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Commentary on
LAW OF EVIDENCE

(Act No. 1 of 1872)

Revised by
GOPAL S. CHATURVEDI

12th EDITION
2002
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(As Amended By)

[The Information Technology Act, 2000 (Act No. 21 of 2000)]

Revised by

Gopal S. Chaturvedi

Senior Advocate
Allahabad High Court

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LAW OF EVIDENCE
[THE INDIAN EVIDENCE ACT, 1872]
(Act No. 1 of 1872)

[Vol. 5]

PART III (contd.)

PRODUCTION AND EFFECT OF EVIDENCE

CHAPTER VIII

ESTOPPEL

115. Estoppel.—When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it.

The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

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1. Meaning of estoppel.[1]—Estoppel as is well known, is a rule of evidence which prevents one party from denying the existence of fact which he represented as existing and upon which representation another person has been induced to act to his detriment.[2]

The rule of estoppel requires that the moment representation is made by a party and the other party acts on that representation and changes his position to his detriment, the first party cannot be allowed to go back on the representation so made.[3]

"An estoppel," says Lord Coke, "is where a man is concluded by his own act or acceptance to say the truth." Mr. Smith, in his note to the *Duchess of Kingston's* case,[4] characterises the definition as a *little startling* but it nevertheless gives a good idea of what it is, by no means easy to include within the limits of a definition. In *Mewa Kumar* v. *Hulas Kuwar*,[5] the Privy Council said that those who rely upon a document as an estoppel—*the nature of an estoppel being to exclude an inquiry by evidence into the truth*—must clearly establish that it does amount to that which they assert.

Privy Council view.

The rule of estoppel must prevail against a pure rule of procedure contained in Sec. 92 of the Evidence Act.[6]

It is well settled that if the truth of the matter is known to both parties, there can be no estoppel.[7]

The party asserting the estoppel must have been induced to act to his detriment. So long as the assumption is adhered to, the party who altered the situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state

Test of detriment.

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1. Ekkari Ghosh *v.* Chittarekha Ghoshani, A.I.R. 1958 Cal. 447 at p. 452 : 62 C.W.N. 209—Estoppel is rule of evidence which prevents a party from alleging and proving the truth.
2. Nirmal Kumar Moulik *v.* Smt. Champabala Roy, A.I.R. 1971 Cal. 407 at p. 409 ; *see* also K.C. Kappor *v.* Smt. Radhika Devi, (1981) 4 S.C.C. 487 : 1981 All. L.J. N 72.
3. Paradise Printers, Chandigarh *v.* Union Territory, Chandigarh, A.I.R. 1981 Punj. 30 at p. 32.
4. 1 Smith L.C. 760 : Howe St. Tr. 538.
5. L.R. 1 I.A. 161 : 13 B.L.R. 312.
6. State Bank of Indore *v.* Messrs. Jasroop Baijnath Joint Hindu Family Firm, Sanawad, A.I.R. 1974 M.P. 193 at p. 196.
7. Rai Sunil Kumar Mitra *v.* Thakur Singh, A.I.R. 1984 Pat. 80 at p. 84.

of affairs, the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment (*vide* Grundts: High Court of Australia).[1]

Rule of estoppel—Applicability of.

The University has pleaded mistakes by the tabulator by the conducting Board and by the Syndicate itself. Even though it is stated that the correction was made on 27th August, 1982 the second provisional certificate was granted to the petitioner on 29th January, 1983 certifying that she had passed the examination. When mistakes abound and the petitioner acting on the declaration/representation made by the University got herself admitted to the Bachelor of Arts course, is it fair that she be now asked to take the Intermediate Examination in Arts ? She did not hope to be a topper. She was of below average attainments. When the results were declared she must have heaved a sigh of relief that she could scrap through. Might be she did not scrutinise the marks secured by her. It could as well be that she thought that she was declared to have passed by the application of the Hard Case Rules. When under a mistake the tabulators applied the Hard Case Rules to her case and the mistake escaped the Conducting Board and the syndicate and the college authorities admitted her to the B.A. course in the face of the marks secured by her, could one blame the petitioner that she did not discover that she had failed at the Intermediate Arts Examination. She has averred that when the college authorities raised the objection later on, she asserted that the Hard Case Rules had been applied to her. There is no material from which one can infer that she was actuated by any *mala fides* or had deliberately suppressed any fact within her knowledge. She prosecuted the certificate and the marks sheet to the college authorities and was admitted. Thus there cannot be a better case for the application of the rule of estoppel.[2]

The cause of justice is paramount and a procedural law cannot be raised to the pedestal of being such a mandatory provision as would take away the Court's right in a given case to exercise its discretion in the interests of justice.[3]

Effect of estoppel.

Though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped.

Where rights are involved estoppel may be described both as a rule of evidence and as a rule creating or defeating rights.[4]

Of course, an estoppel cannot have the effect of conferring upon a person a legal status expressly denied to him by a statute. But where such is not the case a right may be claimed as having come into existence on the basis of estoppel and it is capable of being enforced or defended as against the person precluded from denying it.[5]

The soul of estoppel is equity, not facility for inequity. Nor is estoppel against statute permissible because public policy animating a statutory provision may then become the casuality.[6]

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1. **Tata Iron & Steel Co. Ltd. *v.* Union of India, (2001) 2 S.C.C. 41 at p. 52.**
2. Swapna Rani Das, Miss *v.* Utkal University, (1984) 58 C.L.T. 221 at pp. 224-25.
3. Sri Kasi Biswanath Dev *v.* Parmananda Routray, A.I.R. 1982 Orissa 80 at p. 83.
4. Depuru Veeraraghva Reddi *v.* Depuru Kamalamma, A.I.R. 1951 Mad. 403 at p. 405 : (1950) 2 M.L.J. 575 : 1950 M.W.N. 710 : 63 L.W. 952.
5. Dudh Nath Kori *v.* Smt. Dhamrajia, 1964 A.W.R. 458 at p. 460 ; *see* also C.D. Sharma *v.* Delhi Municipality, 1983 Lab. I.C. 479.
6. Commissioner of Income-tax (Central), Calcutta *v.* B.N. Bhattacharjee, A.I.R. 1979 S.C. 1725 at p. 1738.

The doctrine of estoppel cannot be invoked to render valid a proceeding which the legislature has, on grounds of public policy, subjected to mandatory conditions which are shown to be absent.[1]

The principle of estoppel follows from the provisions contained in Sec. 115, Evidence Act.[2]

2. When estoppel comes into play.—There is no estoppel where some representation is made in a mistaken view of fact. Besides, it is equally well settled that a person knowing the true facts cannot take advantage of the principle of estoppel.[3] The principle of estoppel would be attracted only if there was representation, promise or an assurance on the part of the party litigant and his opponents acted upon the same to their detriment,[4] believing it to be true.

Estoppel against claim for restitution.

The question remains whether the defendant is liable to repay the plaintiffs the sum with which they credited him in error. In Court's opinion, which is based on the statement of the law in Goff and Jones's *The Law of Restitution*,[5] he is liable unless he can show that the plaintiff's are estopped from claiming restitution, and there are three conditions to be satisfied by him if he is to make good this estoppel. *First*, he must show that either the plaintiffs were under a duty to give him accurate information about the state of this account and that in breach of this duty they gave him inaccurate information, or that in some other way there was a misrepresentation made to him about the state of the account for which the plaintiff are responsible. *Secondly*, he must show that this inaccurate information in fact misled him about the state of the account and caused him to believe that the plaintiffs were his debtors for a larger sum than was the case and to make the transfer to Mr. Pirani in that mistaken belief. *Thirdly*, he must show that because of his mistaken belief he changed his position in a way which would make it inequitable to require him now to repay the money.[6]

Wrong statement.

Merely because a person makes a wrong statement before some authority that does not mean that the person is estopped from saying that the statement was an erroneous one. Merely because tenant made a statement before the tenancy authorities stating that he had no objection to the exemption certificate being granted, conditions necessary for invoking the principle of estoppel cannot be said to have been attracted. There can be no estoppel against statute.[7]

The rule of estoppel is based on equity and good conscience and is treated as a rule of evidence and has been given a place in the Evidence Act under Sec. 115. The rule of evidence under this section is a rule of estoppel by conduct as distinguished from an estoppel by record which constitutes *res judicata*. In order to constitute the bar of estoppel the act or omission of the person must be intentional. Estoppel always deal with questions of fact and is a rule of civil action.[8]

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1. S.B. Noronha *v.* Prem Kumari Khanna, A.I.R. 1980 S.C. 193 at p. 197.
2. Jadunandan Puri *v.* President, Board of Secondary Education, Bihar, Patna, A.I.R. 1976 Pat. 58 at p. 59.
3. Jai Prakash Sinha *v.* Chairman, Bihar School Examination Board, A.I.R. 1976 Pat. 301 at p. 304; *see* also Rai Sunil Kumar Mitra *v.* Thakur Singh, A.I.R. 1984 Pat. 80.
4. R.C. Sood & Co. (Pvt.) Ltd. (M/s.) *v.* Union of India, A.I.R. 1971 Delhi 170 at p. 178.
5. (1966) pp. 491, 492.
6. United Overseas Bank *v.* Jiwani, (1977) 1 All E.R. 733 at p. 736.
7. Laxman Siddu Pote *v.* Shri Govindrao Koregaonkar Dharmadaya Sanstha Managing Trustee, A.I.R. 1981 Bom. 33 at pp. 36-37 ; *see* also Remington Rand of India Ltd. *v.* Thiru R. Jambulingam, A.I.R. 1974 S.C. 1915 at p. 1916.
8. Dhanti Devi, Mst. *v.* Kartar Singh, A.I.R. 1980 Pat. 77 at p. 80 ; *see* also Satya Narain Singh *v.* State of Bihar, A.I.R. 1984 Pat. 26.

Where petitioners have accepted compensation without any protest and the protest is raised within three months of payment there is no law whereunder estoppel would arise on such a case.[1]

In the instant case, the appellant had already obtained MPhil and PhD degrees from the respondent University. At the time of his admission to MPhil leading to PhD course in the Department of Philosophy, the question of equivalence in qualification was examined in detail and the Academic Council approved his admission to MPhil or PhD course. In the event his qualification of BA (Hons.) degree from the Council of National Academic Awards is not equivalent to Master's degree, he could not have been admitted to MPhil leading to PhD course. But to say that such acceptance of such equivalence is only for the purpose of admission to MPhil leading to PhD course and not for other purposes will lead to anomalous results. Equivalence of qualification has to be determined before a person is allowed to undergo a course. When the appellant as a result of such admission obtained such high qualifications as MPhil/PhD, it is difficult to imagine that the equivalence of qualification obtained by him earlier was not considered by the University. After having obtained such degrees, to nullify the equivalence declared by the Academic Council and the Vice-Chancellor will be to put the clock back causing grave injustice to the appellant. Had he been denied admission on the ground that his qualification is not equivalent to Master's degree, he might have obtained an equivalent qualification or pursued his studies elsewhere. That opportunity having been deprived to him and his admission to such courses having been ratified based on the recommendations of the Equivalence Committee, it cannot be nullified in the manner it has been done.[2]

3. Estoppel by admission.—An admission by the plaintiff in a will that he had adopted deceased *N* as his son, does not amount to an estoppel because it was not made in the life time of *N* and he could not alter his own position acting on faith of the representation made thereby.[3]

In a will.

Admission loses much of its significance.[4]

An admission in the pleading of a previous suit is binding on the party making that admission and can be used against it in the subsequent suit.[5]

An admission in so far as far as facts are concerned, would bind the maker of the admission provided it operates as estoppel and does not appear to be factually incorrect. If the person to whom it was made was not induced to change his position by acting on it to his detriment, the same cannot be said to have become conclusive by way of estoppel. A gratuitous admission regarding title of a party who does not possess any title in the property in question can be withdrawn and shown to be erroneous and untrue wherever and whenever it is sought to be relied upon against the maker, provided it does not operate as estoppel.[6]

In India estoppels have been treated as rules of evidence and the foundation of the same is representation by a party which has been acted upon by the other party.[7]

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1. Goparajan Dube *v.* Arbitrator, Hirakud Land Organisation, Sambalpur, A.I.R. 1976 Orissa 118 at p. 119.
2. **Tariq Islam *v.* Aligarh Muslim University, (2001) 8 S.C.C. 546 at p. 551.**
3. Jamnadas *v.* Mst. Radhabai, A.I.R. 1963 M.P. 348 at p. 350 : 1963 J.L.J. 817.
4. Syed Mohd. Salie Labhai *v.* Mohd. Hanifa, A.I.R. 1976 S.C. 1569 at p. 1582.
5. Laxmi Narayan Arjundas (M/s.) *v.* State Bank of India, A.I.R. 1969 Pat. 385 at p. 390 ; Basant Singh *v.* Janki Singh, A.I.R. 1967 S.C. 341 : (1967) I S.C.R. 1.
6. Devi Shankar *v.* Dy. Director of Consolidation, 1985 All. L.J. 154 at pp. 157, 158.
7. D.R. Punjab Montogomery Transport Company *v.* Raghuvanshi Pvt. Ltd., A.I.R. 1983 Cal. 343 at p. 352.

Often the plea of equities or promissory estoppel would be put forth for continuance and completion of further course of studies and usually would be found favour with the Courts. The Courts have constitutional duty and responsibility, in exercise of the power of its judicial review, to see that constitutional goals set down in the Preamble, the Fundamental Rights and the Directive Principles of the Constitution, are achieved. A party that seeks equity, must come with clean hands. He who comes to the Court with false claim, cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. There is no estoppel as no promise of the social status is made by the State when a false plea was put forth for the social status recognised and declared by the Presidential Order under the Constitution as amended by the S.C. and S.T. Amendment Act, 1976, which is later found to be false. Therefore, the plea of promissory estoppel or equity have no application.[1]

Title to immoveable property cannot be transferred by mere admission; title can pass only by effecting a transfer in one of the modes permitted by law, and making of an admission is not one of those recognized modes. Therefore, by a person's mere admission that some other person is the owner of a certain property, when in fact that other person has no title at all, he will not denude himself of ownership of the property which really vests in him.[2]

It is now settled law that an admission made by a party in the pleadings is conclusive and no opportunity need be given to explain the same. If there is evidentiary admission, the only presumption is, that there is an admission made, but is a rebuttable presumption. No doubt this is a best piece of evidence so long as it is not rebutted. But if it is sought to be made use of against the person who made the admission, then it must be pointedly brought to the notice of the person who made the admission seeking for an explanation therefor. If he does not give any explanation or gives an explanation therefor then, it is to be considered, whether it should be accepted. The title cannot pass by a mere admission. Alienation deed was found to be true, it cannot be used solely as an admission or estoppel as a basis for declaration of title.[3]

That a gratuitous admission in mutation proceedings cannot confer title has been pointed out by the Judicial Committee in *Mohammad Imam* v. *Ali Husain Khan*.[4]

In *A. Subba Naidu* v. *Rajammal*,[5] one Ayyalu Naidu died on 10th January, 1939. Suit lands were given sometimes after the death of Ayyallu Naidu to his wife Krishnachi Ammal for ejectment during her lifetime towards her maintenance. Krishnachi Ammal died on 19th November, 1969. Thereafter the appellant claimed that the properties should revert back to him and therefore, made a demand on the respondent (Krishnachi Ammal's daughter) to surrender possession. It was held that merely because the appellant had stated in his letter dated 25th October, 1955 to Krishnachi Ammal that the respondent was also entitled to properties alongwith her mother it cannot mean that the limited grant in favour of Krishnachi Ammal became enlarged into one of absolute grant. In any event there was no estoppel against her.

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1. Madhuri Patil *v.* Addl. Commissioner, Tribal Development, A.I.R. 1995 S.C. 94 at p. 105 ; *see* also Darshan Oils Pvt. Ltd. *v.* Union of India, A.I.R. 1995 S.C. 370; and Bajrang Industries *v.* General Manager, D.I.C., A.I.R. 1994 A.P. 10.
2. Ahsan Dar *v.* Mohd. Dar, A.I.R. 1963 J. & K. 15 at p. 17.
3. Anjaneyaswamivari Temple Nidamarusoi *v.* Vedantam Satyavathamma, (1984) 1 A.L.T. 20 at p. 22.
4. I.L.R. 26 Cal. 81 (P.C.).
5. A.I.R. 1977 Mad. 64 at p. 64.

It is the settled position in law that when the facts are fully set out and admitted, a party's opinion about the legal effect of those facts is of no consequence in construing it; no estoppel arises by reason of admission of the party as to such effect; a counsel's admission of a point of law cannot be binding upon a court; and Court is not precluded from deciding the rights of the parties on a true view of the law.[1]

In the under-noted case briefly the facts are that on 24th February, 1956 Madan Lal Bajaj, respondent let out shop No. 4878, Phatak Namak Hauz Qazi, Delhi to M/s Bhajan Lal Harcharan Lal on a monthly rent of Rs. 110/-. The respondent received a sum of Rs. 660/- by cheque issued by the said firm for which a receipt dated 24th February, 1956 (Ex. R. 1) was issued for the period from 1st March, 1956 to 31st August, 1956. On 27th February, 1956 firm Bhajan Lal Harcharan Lal through Bhajan Lal, son of Damodar Dass, as sole proprietor of the firm executed a rent note (Ex. A.1) in favour of the respondent with respect to the said shop premises. On 26th May, 1967 the respondent issued a notice (Ex. A. 3) to the appellant alleging that he was tenant in the said shop on a monthly rent of Rs. 110/- that he was in arrears of rent, that neither he nor any member of his family was residing in the premises, that he had acquired vacant possession of another premises at Greater Kailash, that he had caused damage to the property. The respondent also terminated the tenancy of the appellant. The appellant through his counsel sent a reply dated 27th June, 1967 (Ex. A-4) and stated that the premises were in his occupation and were being used by him that the respondent was refraining from receiving rent from him, that he had sent rent by moneyorder. It is pertinent to note that the appellant in his reply did not deny his relation as a tenant under the respondent.

Held : an admission though not a conclusive proof, raises a presumption that it is true until the contrary is shown. It is well known that in every case of estoppel there is a representation and consequently an admission of the existence of a fact. If such an admission is accepted and acted upon by the person to whom it is made, the maker of the admission subsequently cannot be permitted to show that the admission he made was false. Under Sec. 31 read with Sec. 115 of the Evidence Act the admission made by the appellant in the rent and in his reply to the notice that he was sole proprietor of the firm operates as estoppel and he cannot be permitted to show that it was wrong. Further mere payment of rent by the firm does not mean it was tenant under the respondent.[2]

Admission of newspapers—Effect of.

Ordinarily the question whether a periodical is a newspaper or not is a mixed question of fact and law, the factual position being the nature of the contents of the publication. Once, the position of fact is established or admitted the question whether the publication is a newspaper within the meaning of the relevant statute ceases to be a mixed question of law and fact and reduces to a question of application of law to be decided on the basis of relevant definition of "newspaper". When the facts are fully set out and admitted, a party's opinion about the legal effect of those facts is of no consequence, and no estoppel arises, by reason of the admission of the party as to such effect.[3] In the instant case, it is also not disputed that the petitioner has not derived any special benefit by registering itself as a newspaper under the Press and Registration of Books Act, 1867. The petitioner never obtained any

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1. Shanti Prasad Jain *v.* Kalinga Tubes Ltd., A.I.R. 1962 Orissa 202 at p. 207.
2. Bhajan Lal *v.* Madan Lal Bajaj, A.I.R. 1983 Delhi 555 at pp. 555-56, 557-58.
3. *See* Kalidas *v.* State of Bombay, A.I.R. 1955 S.C., 62.

ews-print quota from the Government nor claimed the exemption available on mport of newspaper machinery. Moreover, the benefit derived by way of oncession in postage by registering the periodicals as newspapers under the ndian Post Office Act enures to the benefit of the subscribers because the price is xclusive of postage which has to be borne by the subscriber. Hence, the admission n the part of the petitioner would not foreclose the plea that the establishment ublishing law reports is not a newspaper within the meaning of the Working ournalists Act. It is, therefore, difficult to accept the submission made on behalf f the respondents that in view of the conduct of the petitioner in voluntarily egistering its publication as newspapers, the petitioner is estopped from, ontending that its publications are not newspapers within the meaning of ec. 2(*b*) of the Working Journalists Act.[1]

The admission made by the appellant in the rent note and in his reply to the otice that he was sole proprietor of the firm operates as estoppel and he cannot e permitted to show that it was wrong.[2]

General rule of estoppel.

The general rule of estoppel is laid down by Bigelow on *Estoppel* in the following words :

> " .. It may... be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of litigation must act consistently with it; one cannot play fast and loose."[3]

It was stated at another place that—

> "....It is laid down that a defendant who obtains judgment upon an allegation that a particular obstacle exists cannot in a subsequent suit based upon such allegation deny its truth."

It is useful to note Justice Mukherjea's observations in *Hemantha Kumari Devi* v. *Parasanna Kumar*,[4] which are to the following effect :

View of the Calcutta High Court.

> "It is well settled that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent; and that this wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit other than the one in which the position was taken up, provided the second suit grows out of the judgment in the first."

View of the Allahabad High Court.

The principle has been applied by the Bench of the Allahabad High Court even to cases where the question involved is one of jurisdiction.[5] In the Nagpur case, *Uttamchand* v. *Saligram*,[6]

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1. All India Reporter Ltd., Nagpur *v.* State of Maharashtra, 1983 Lab. I.C. 789 at p. 799 : A.I.R. 1983 Bom. 201.
2. Bhajan Lal *v.* Madan Lal Bajaj, A.I.R. 1983 Delhi 555 at p. 558.
3. The above principle was applied to cases involving the question of jurisdiction, in the following decisions; Sairabibi *v.* Chandarpal Singh, A.I.R. 1928 Oudh 503 ; Ram Khelawan Singh *v.* Maharaja of Benares, A.I.R. 1930 All. 18 ; Sumitramma *v.* Subbadu, A.I.R. 1943 Mad. 2; Khurshed Ali *v.* Commissioner of Tirhut Division, A.I.R. 1955 Pat. 198 ; Indermall Lonia *v.* Subordinate Judge, Secunderabad, A.I.R. 1958 A.P. 779 ; Champalal *v.* Sampatraj, 1968 R.L.W. 100 at p. 100.
4. A.I.R. 1930 Cal. 32 : I.L.R. 56 Cal. 84 : 120 I.C. 49.
5. Ram Khelawan Singh *v.* Maharaja of Benares, A.I.R. 1930 All. 15 : 1930 A.L.J. 82 ; A.N. Shah *v.* Annapurnamma, (1958) 2 Andh. W.R. 447 : A.I.R. 1959 A.P. 9.
6. A.I.R. 1929 Nag. 79.

it was held that where a person had successfully opposed an application under Sec. 47, C.P.C., on the ground that section did not apply, cannot subsequently raise a plea in a suit consequently brought by the application that the suit was barred by section. This view was based on the doctrine of estoppel.[1]

Doctrine of estoppel applies also where the question of jurisdiction is involved.

It is well settled that an admission in ignorance of the legal rights of a party creates no estoppel.[2] There is no estoppel against illegality or legal unenforceability.[3] Where a mortgage of house by wife as owner is attested by the husband, the attestation would constitute an estoppel.

The rule of estoppel is founded upon the doctrine that it would be most inequitable and unjust if a person who by a representation made or by conduct amounting to representation has induced another to act as he would not otherwise have done, should not be allowed to repudiate the effect of his former statement to the loss and injury of the person who acted on it. In the instant case, the executants of the family arrangement dated 21st April, 1932 did not in any way contract to give up their right or interest to succeed to the share allotted to the other executants. Thus the appellant cannot be said to have been misled by any declaration, act or omission of the executants of the family arrangement to believe a thing to be true and to act upon such belief.[4]

Section 115 of the Evidence Act does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement and there can be no estoppel where the truth of the matter is known to both parties.[5]

4. Principle of estoppel.—The principle upon which the rule of estoppel rests is that it would be most inequitable and unjust if a person, who has by a representation made or by conduct amounting to a representation induced another to act as he would not have otherwise done, is allowed to deny or repudiate the effect of a former representation to the detriment of the other.[6]

The Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Luha*[7] has referred with approval to the statement of law in *Cairncross* v. *Lorimer*[8] and observed that the main question in determining whether estoppel has been occasioned is whether the representation has caused the person to whom it has been made to act on the faith of it. It is not essential that his intention should have been fraudulent, or that he should have been acting with a full knowledge of circumstances and not under mistake or misapprehension. It will be sufficient if he made representation and the other party has acted in faith thereof. Closely allied with this principle embodied in Sec. 115 is also the principle contained in the provision in Sec. 41 of the Transfer of Property Act.

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1. Indermall Loniya *v.* Subordinate Judge, Secunderabad, A.I.R. 1958 A.P. 779 at pp. 781-82 : (1957) 1 Andh. W.R. 196 : 1957 Andh. L.T. 445.
2. Shantilal Shiv Kumar *v.* Transport Appellate Tribunal, Rajasthan, Jaipur, A.I.R. 1967 Raj. 138 at pp. 141-42 ; *see* also A.C. Jose *v.* Sivan Pillai, (1984) 2 I.C.C. 656 ; *see* also Rai Sunil Kumar Mitra *v.* Thakur Singh, 1984 B.L.J. 134.
3. Director, Enforcement Directorate Cabinet Secretariat Department Personnel and A.R. Government of India *v.* Saroj Kumar Bhotika, A.I.R. 1978 Cal. 65 at p. 76.
4. Lalji Maitra *v.* Shyam Behari Mehra, A.I.R. 1979 All. 379 at p. 386.
5. *Vide* the decision of the Privy Council in Mohari Bibee *v.* Dharmodas Ghose, I.L.R. 30 Cal. 539 ; V. Srinivasan *v.* Sundaramurthi, (1972) 1 M.L.J. 141 at p. 148.
6. Harisingh *v.* Ratanlal, 1969 J.L.J. 639 at p. 642 ; *see* also Sales-tax Officer *v.* Kanhaiyalal, A.I.R. 1959 S.C. 135; *see* also Dr. R.K. Deka *v.* Union of India, A.I.R. 1984 Delhi 413.
7. (1893) 20 Cal. 296 (P.C.).
8. (1860) 3 Macq. 827 at p. 829.

This section has been founded on the passage in the judgment in *Ramcoomar* v. *Macqueen.*[1]

All that is required for the application of Sec. 41, Transfer of Property Act is that the transferor must be an ostensible owner and should be so by the consent, express or implied, of the real owner and the transfer is for consideration.[2] It is a principle of natural equity, which must be universally applicable that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is real owner, the man who so allows the other to hold himself out, shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or that there existed circumstances, which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it.[3]

The Supreme Court has explained in *Maddanappa* v. *Chandramma,*[4] the law relating to estoppel in India as follows :

> "As was pointed out by Garth, C.J., in *Ganges Manufacturing Co.* v. *Sourujmull,*[5] the provision of Sec. 115 of the Evidence Act are in one sense a rule of evidence and are founded upon the well-known doctrine laid down in *Piccard* v. *Sears*".[6]
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> "The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. Therefore, where one person makes a misrepresentation to the other about a fact he would not be shut out by the rule of estoppel if that other person knew the true state of facts and must consequently not have been misled by the misrepresentation."

It follows that if the party who is pleading the rule of estoppel as a bar knows the true state of affairs, then, it would not be open to him to plead estoppel because in the ordinary course of things it could not be presumed that he was actually misled by the representation or declaration made by the other party and he altered his position to his prejudice in view of such declaration or representation.[7]

In all the under-noted cases, *Patna City Municipality* v. *Krishnavati Bahoo,*[8] *Satyadeo Narain Lal* v. *Municipal Commissioners, Bhagalpur Municipality,*[9] *Patna Municipal Corporation* v. *Raja Ramachandra Prasad,*[10] and *Commissioners of Darbhanga Municipality* v. *State of Bihar,*[11] it has been laid down that the latrine tax is payable not by the owner but by the person in actual occupation of the holding. But this liability is not absolute. In certain circumstances the liability to pay latrine tax shifts on the owner of the holding. As observed by Kanhaiya Singh, J.,

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1. (1872) 11 Bing. L.R. 46 : 51 I.A. (Sup.) Vol. 40 at p. 43.
2. Ibadat Ali *v.* Baldia Co-operative Bank, Hyderabad, (1968) 2 Andh. W.R. 124 at pp. 131-32.
3. 51 I.A. Sup. Vol. 40 at p. 48. cited in Mohammed Mozuffer Hossein *v.* Kishori Mohun Roy, I.L.R. 22 Cal. 909 at p. 919 ; *see* also Bisheshar *v.* Muirhead, I.L.R. 14 All. 362 at p. 364 : 11 B.L.R. 53 and L.B.R. (1893-1900) 512.
4. A.I.R. 1965 S.C. 1812.
5. I.L.R. 5 Cal. 669.
6. (1837) 6 Ad. El. 469.
7. Shrinivas Krishnarao Kango *v.* Narayan Devji Kango, A.I.R. 1971 Mys. 174 at pp. 175-76 ; *see* also Prabhakar Tularam Vinchurkar *v.* Dev Ashish Co-operative Housing Society Ltd., A.I.R. 1984 Bom. 65.
8. A.I.R. 1938 Pat. 391.
9. A.I.R. 1960 Pat. 84.
10. 1962 B.L.J.R. 801.
11. 1965 B.L.J.R. 602.

in *Patna Municipal Corporation* v. *Raja Ramchandra Prasad*,[1] the occupier cannot be sued for latrine tax unless his name is also mentioned in the assessment register. When the liability to pay the latrine tax is not disputed by the owner when the assessment is made and he allows the assessment list to be prepared in his name is respect of all the liabilities, he cannot subsequently turn round and challenge the demand on the ground of lack of liability, on his part.[2]

The principle on which the rule of estoppel is attracted.

The principle on which the law of estoppel is attracted, is that a person who by his declaration or act or omission caused another person to believe a thing to be true should not be allowed to deny the truth of that thing. This is a cardinal principle which attracts the law of estoppel in any case.[3] Estoppel is a rule of equity. That who wants to estop the other side from changing its position must come to the Court with clean hands. That who himself is changing its position must come to the court with clean hands. That who himself is a party of a transaction of fraud, cannot get any advantage of the same and apply successfully rule of estoppel against him. The soul of estoppel is equity, not facility for inequity. Nor is estoppel against statute permissible because public policy animating a statutory provision may then become the casualty. Where a statute, enacted for the benefit of a section of the public imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers.[4]

The law is clear, that where one by words or conduct wilfully causes another to believe in a certain state of things, and induces him to act on that belief so as to alter his own previous position the former is precluded from averring against the latter a different state of things as existed at the same time. Estoppel is a rule of enquiry which forbids truth being pleaded or represented, on which faith another has acted to his detriment, being retracted.[5]

Examples as to the applicability of the rule of estoppel.

A party cannot both approbate and reprobate.[6] If a party wilfully makes a representation to another meaning it to be acted upon, that gives rise to what is called an estoppel.[7] By the term "wilfully" it must be understood, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon and that it is acted upon accordingly; and if, whatever a man's real intention may be, i.e. in regard to making a representation of fact he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.[8] And conduct by negligible or omission, where there is a duty cast on a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.[9]

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1. 1962 B.L.J.R. 801.
2. Dalbhum Trades and Industries Ltd. *v.* Commissioners of Jugsalai Notified Area Committee, 1969 B.L.J.R. 283 at pp. 287, 288.
3. *In re* Sulekha Works Ltd., A.I.R. 1965 Cal. 98 at p. 137 ; *see* also Sankaran *v.* Chathukutty, (1983) 2 Civil L.J. 536 : Mangal Sen *v.* Kanchhid Mal, 1981 All. L.J. 1028 : A.I.R. 1981 S.C. 1726 ; Jaivir Singh Yadav *v.* Registrar, High Court of Judicature, Allahabad, 1982 Lab. I.C. 179.
4. Sukhpal Singh *v.* Vice-Chancellor, Gorakhpur University, 1982 All. L.J. 1021 at p. 1025-1026 ; *see* also Postal Co-operative House Construction Society Limited *v.* Secretary to the Government of Bihar, Patna, A.I.R. 1984 Pat. 133.
5. Sharma Devi *v.* Registrar, Departmental Examination U.P., 1994 U.P.L.B.E.C. 272 at p. 274.
6. 10 C.W.N. 747 at p. 752; *see* also Pickard *v.* Sears, 6 A. & E. 469 ; 2 M.H.C. 31 at p. 34.
7. Howard *v.* Hudson, 2 El. & Bl. 10; *see* also Qandhara Singh *v.* Union of India, A.I.R. 1984 P. & H. 51.
8. Freeman *v.* Cooke, 2 Exch. 654 ; Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 at p. 314 (P.C.).
9. Freeman *v.* Cooke, 2 Exch. 654 ; *see* W. Spink *v.* W. Moran, 21 W.R. 161 at p. 172.

The rule that one, who knowing his own title, stands by and encourages a purchase of property as another's, will not be allowed to dispute the validity of the sale does not apply to a case where there was nothing more than mere quiescence on the owner's part.[1]

When money is laid out by a tenant in the hope or expectation of an extended term or allowance for expenditure, the tenant has no claim which a court of law or equity can enforce, if such hope or expectation has not been created or encouraged by the landlord.[2] But if a stranger begins to build on my land supposing it to be his own and I, perceiving his mistake, abstain from setting him right and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expanded money on the supposition that the land was his own.[3] Where the owner of property stands by and sees his property sold without raising any objection, he cannot afterwards dispute the sale, and the property passes to the purchaser.[4] It is well settled that if the truth of the matter is known to both parties, there can be no estoppel. In the present case, if the transaction was not real to the knowledge of defendant he cannot plead estoppel nor could the other defendants, because there is an admission by a witness that the oral settlement was initially *farzi*. This admission is wholly contrary to their joint stand that the oral settlement of 1949 was never a *farzi* one. In the instant case, the entire approach of the lower Appellate Court was erroneous. Once it is established that the principle of estoppel was wrongly relied upon by the lower Appellate Court the very basis and foundation of the judgment of the lower Appellate Court is completely shaken.[5]

Principle of estoppel— Wrongly applied— Effect of.

In the instant case, the question of partition of lands of the joint family was found against the appellants in the first round of litigation by the Revenue Authorities. The status of the joint family had come to an end and the shares of the members of the erstwhile joint family had been defined. Further, the High Court upheld the order of the Additional Commissioner that the first respondent was entitled to apply under Sec. 43-1B of the Bombay Tenancy and Agricultural Lands Act, 1948 for possession of the 1/3rd share in Survey No. 99 and it was made clear that the order would be subject to the findings of the Collector on issues 5 and 6. Thus, having confirmed the findings recorded by the Revenue Authorities the case was remanded to the Collector to decide issues 5 and 6 which related to determination of the total land held by the first respondent and the extent of the land he would be entitled to resume. The appellants are now barred from agitating the same point by the principle of "issue estoppel".[6]

Where the payment has been made by the plaintiffs under pain of refusal of permission, it cannot be said that principle of estoppel can operate against them. Even otherwise there cannot be estoppel against statute.[7]

Payment.

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1. Baswantapa Shidapa *v.* Ranu, I.L.R. 9 Bom. 86 and *see* also Shiddheshvar *v.* Ram Chandraray, I.L.R. 6 Bom. 463.
2. Ramsden *v.* Dyson, L.R. 1 H.L. 129 ; *see* Kunhammed *v.* Narayanan, I.L.R. 12 Mad. 320 at p. 322.
3. Ramsden *v.* Dyson, L.R. 1 H.L. 129 ; *see* 1 A.L.J. 673 at p. 677 and Ahmad Yar Khan *v.* Secretary of State for India in Council, I.L.R. 28 Cal. 693 at p. 705 ; *see* also Pilling *v.* Armitage, (1805) 12 Ves. 78; and the like decision in Gregory *v.* Mighell, (1811) 18 Ves 328.
4. 87 P.R. 1875.
5. Rai Sunil Kumar Mitra *v.* Thakur Singh, 1984 B.L.J. 134 at pp. 138, 139, 140.
6. **Tatoba Bhau Savagave *v.* Vasantrao Dhindiraj Deshpande, (2001) 8 S.C.C. 501 at p. 506.**
7. Sunil Vasudeva *v.* Delhi Development Authority, A.I.R. 1988 Delhi 184 at p. 188.

The principle of estoppel cannot operate against a person who was non-existent at the date when the transaction took place.[1]

Rule of estoppel cannot apply in respect of fundamental rights as held in *Behram Khurshid Pesikaka* v. *State of Bombay*.[2]

Estoppel is a rule of evidence by which a person is not allowed to allege and prove a thing under certain circumstances.[3] Where the widow had consented to the transfers, she is estopped from laying claims to the property.[4]

No difference in the rule of estoppel between India and England.

The law of India and England is the same as regards estoppel.[5] In the case of *Stronghill* v. *Buck*,[6] Pateson, J., stated as under :

> "When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument."

How questions on estoppel be decided.

A question of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities.[7]

The rule of estoppel affects substantive rights.

The rule of estoppel affects substantive rights.[8] Estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist or be taken away. To invoke the doctrine of estoppel by representation it is necessary that in acting upon it,

Estoppel : rule of evidence and rule of law both.

the party to whom it was made, should have altered his position to his prejudice.[9] It may be that when prejudice or damage is made out and the other circumstances are such as to create an estoppel, it is unnecessary to measure the quantum or extent of the prejudice or damage or arrive at the result that it is irreparable.[10]

Scope of the rule.

When one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of

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1. Shri Ramji Mandir Narsinghji *v.* Narsingh Nagar Co-operative Housing Society Ltd., Navasari, A.I.R. 1979 Guj. 134 at p. 139.
2. A.I.R. 1955 S.C. 128; Sakharkheda Education Society, Sakharkheda *v.* State of Maharashtra, A.I.R. 1968 Bom. 91 at p. 97.
3. Kisto Chandra Mandal *v.* Mst. Anila Bala Dasi, A.I.R. 1968 Pat. 487 at p. 494.
4. Jagaribai, Mst. *v.* Rakhilawan, A.I.R. 1976 M.P. 106 at p. 109.
5. Lachman Lal *v.* Munshi Mahton, A.I.R. 1939 Pat. 708 (2) at p. 711.
6. (1855) 14 Q.B.D. 781 : 19 L.J.Q.B. 209 : 14 Jur. 741.
7. Canada and Dominion Sugar Co. *v.* Canadian National Steamships, A.I.R. 1947 P.C. 40 at p. 43 : 228 I.C. 614.
8. Mst. Wahidan *v.* Nasir Khan, A.I.R. 1930 All. 434 (2) at p. 436 : 1930 A.L.J. 1012.
9. Halsbury's *Laws of England*, 2nd Ed., Vol. 13, para 547.
10. Depuru Veeraraghava Reddi *v.* Depuru Kamalamma, A.I.R. 1951 Mad. 403 at p. 405 : (1950) 2 M.L.7. 575 ; (1950) M.W.N. 710 : 63 L.W. 952 ; Kalidas Dhanjibhai *v.* State of Bombay, A.I.R. 1955 S.C. 62 : 1955 S.C.A. 340 : 1955 S.C.J. 150 : (1955) 1 S.C.R. 887 : 57 Bom. L.R. 702 : 56 Cr. L.J. 193.

that thing. This is the rule of estoppel by conduct as distinguished from an estoppel by record which constitutes the bar of *res judicata*.[1]

Estoppel is both a rule of pleading and evidence because it is clear from *Forbes* v. *Ralli*[2]—that it extends to things which are matter of pleading and not proof.[3]

Elements of estoppel.

Estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted upon, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence. But the whole concept is more correctly viewed as a substantive rule of law.[4] A man is not estopped from asserting a right which he had said that he will not assert. It is also a well-known principle that there can be no estoppel against a statute. To bring the case within the scope of estoppel as defined in Sec. 115 of the Evidence Act : (1) there must be a representation by a person or his authorized agent to another in any form—a declaration, act or omission : (2) the representation must have been of the existence of a fact and not of promises *de futuro* or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (6) the mis-representation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel; (8) only the person to whom representation was made or for whom, it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee.[5]

The basic principle underlying the rule of issue of estoppel is that the same issue of fact and law must have been determined in the previous litigation.[6] The crux of the principle of issue-estoppel may be stated in the words of Dixon, J. in the *King* v. *Wilkes*,[7] as follows :

> "Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. There must be a prior proceeding determined agaisnt the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner."

In order to invoke the rule of issue-estoppel not only the parties in the two trials must be the same but also the fact-in-issue, proved or not, the earlier trial must be identical with what is sought to be reagitated in the subsequent trial.[8]

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1. Sunderbai *v.* Devaji, A.I.R. 1954 S.C. 80 at p. 84 ; *see* also Smt. Kamala Devi *v.* Special Land Acquisition Officer, Nagar Mahapalika, Kanpur, 1985 All. L.J. 293.
2. A.I.R. 1925 P.C. 146 : 87 I.C. 318 : I.L.R. 4 Pat. 707 : 52 I.A. 178 (P.C.).
3. Darbari Lal *v.* Raneeganj Coal Association Ltd., A.I.R. 1944 Pat. 30 at p. 32.
4. Canada and Dominion Sugar Co. *v.* Canadian National Steamships, A.I.R. 1947 P.C. 40 at p. 48.
5. Chhaganlal Keshavlal Mehta *v.* Patel Narandas Haribhai, A.I.R. 1982 S.C. 121 at pp. 125-26.
6. Gopal Prasad Sinha *v.* State of Bihar, A.I.R. 1971 S.C. 458 at p. 459 : 1970 S.C.D. 1116.
7. 77 C.L.R. 511 at p. 518.
8. Ravinder Singh *v.* State of Haryana, A.I.R. 1975 S.C. 856 at p. 892.

Estoppel by conduct.

An estoppel by conduct can only come into operation if by the conduct of one party the other party had to change his position to his prejudice.[1]

Estoppel deals with question of facts only.

Estoppel deals with questions of fact and not questions of right, or in other words there is no general rule of law that a man is estopped from asserting a right which he has said that he will not assert.[2] Before an estoppel can arise, there must be, *first*, a representation of an existing fact as distinct from a mere promise *de futuro* made by one party to the other; *second*, that the other party, believing it, must have been induced to act on the faith of it, and *third*, that he must have so acted to his detriment.[3]

Estoppel upon a representation.

No estoppel can ensue upon representation, not of a fact, but of a mere opinion or of a point of law. Where there has been a representation as to the existence of a fact to a certain person and the latter believes it and acts upon it and his position is altered, so that he cannot be put back to his original position at all, or, at any rate, without great loss and inconvenience, estoppel will undoubtedly ensue.[4] There can be no estoppel where truth is accessible. Again, there can be no estoppel in the absence of representation or conduct amounting to such. Further there can be no estoppel where a party is not misled and has not been induced to do something detrimental to his interest owing to the action of the other party.[5]

No estoppel : if truth is accessible.

Typographical mistake—No estoppel.

It is an established principle of law that there cannot be an estoppel against the statute. The statute requires that the students shall secure minimum percentage of marks. If there is any clerical or typographical mistake, such a mistake comes in the way of such statutory requirement. There may be a case in which a person might have been declared as failed wrongly due to certain typographical mistakes and in such a case it is always open for the University to correct its results *suo motu* or when such a mistake is brought to its notice and declare the student as passed. The instant case is a reverse case in which the results of the petitioner was declared as passed but on the basis of the results found in the record, the petitioner in fact has failed and the same was due to the typographical mistake. In these circumstances, *held* that the petitioner is not entitled to the benefit of the doctrine of estoppel.[6]

The plea of estoppel sought to be pressed into service by the appellant as well as the College Management against the Department is not only misconceived but has no merit of acceptance when the very order of the Deputy Director choosing to accept the judgment to the detriment of the rights of the first respondent, came to be set aside in the writ proceedings instituted by the first respondent. Such a plea also fails to take into account the vital fact that the authorities of the Education Department, the Deputy Director, could not have legitimately chosen to accept a judgment to which he was not a party when such acceptance has the impact of directly and seriously prejudicing the rights of the first respondent, who was also not made a party to the suit before the Civil Court.[7]

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1. Munyaraj *v.* Venkatapati, A.I.R. 1955 Hyd. 172 at p. 173; *see* also Rameshwar Prasad Sinha *v.* State of Bihar, A.I.R. 1984 Pat. 61.
2. Nathoo *v.* Hori Lal A.I.R. 1945 All. 196 at p. 197 : I.L.R. (1945) All. 294 : 1945 A.L.J. 129 : 1945 A.W.R. (H.C.) 76.
3. Dhiyan Singh *v.* Jugal Kishore, A.I.R. 1952 S.C. 145 at pp. 46-47 : 1952 S.C.A. 417 : 1952 S.C.J. 142 : 1952 S.C.R. 478 : 1952 A.L.J. 324 90 C.L.J. 206 : 1952 M.W.N. 528.
4. Dharam Prakash *v.* Mst. Kalawati Devi, A.I.R. 1928 All. 459 at p. 464 : 26 A.L.J. 1106 : I.L.R. 50 All. 885 ; Ram Singh *v.* Baldeo Prasad, A.I.R. 1932 All. 643 : 1932 A.L.J. 605.
5. Ram Singh *v.* Baldeo Prasad, A.I.R. 1932 All. 643 at p. 647 : 1932 A.L.J. 605.
6. **N. Vanajakshi *v.* Principal, University College for Women, Hyderabad, A.I.R. 1999 A.P. 323 at pp. 326-27.**
7. **Shiv Kumar Tiwari *v.* Jagat Narain Rai, A.I.R. 2002 S.C. 211 at pp. 214-15.**

Where there was copying on a large scale, and the whole examination is scrapped there is no violation of any principle of natural justice. In such a case it is neither desirable nor practicable to issue notice to all the candidates to show cause why the test should not be cancelled. It is for the University to decide that effective action should be taken in the interest of the maintenance and purity of its academic standards. To insist a notice to all candidates in such a situation is to parody the principles of natural justice and take an unnatural form. When the whole examination is scrapped it is not possible to see how any one can say that it is an aspersion against him. The mere announcement of the results of the test on the notice board of the University creates no vested rights in the candidates. Nor is there any question of estoppel since it is not shown that any of the candidate is demnified in anyway.[1]

Examination vitiated by adoption of unfair means on a mass scale.

It is true that the doctrine of estoppel precludes a party from taking up a position which is inconsistent with an admission which he has previously made, but this doctrine comes into play only when the admission was designed actually or apparently to influence the conduct of the party claiming the estoppel and when the said party has changed his position in reliance on the admission. It does not apply to an erroneous admission on a point of law[2] or when the admission is gratuitous;[3] and a party making such an admission is entitled to retract the same[4] and to prove the admission was mistaken or untrue.[5] Estoppel can only arise when one person has by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. For before the doctrine of estoppel can be invoked there must be (*i*) representation by a person to another, (*ii*) the other should have acted upon the said representation, and (*iii*) such action should have been detrimental to the interest of the person to whom representation is made. These conditions must co-exist.[6]

When estoppel comes into play.

The power of the Government under Art. 309 of the Constitution to make rules regulating the conditions of service of Government employees or of teachers in aided schools under Sec. 12 of the Kerala Education Act, 1959 (6 of 1959), could in no way be fettered by any agreement even if such an agreement was proved. The rule of estoppel can hardly be invoked in such a circumstance.[7]

In *Raj Kumar* v. *Vijaya Kumar*,[8] the defendant did not raise any objection in the Court below to the admissibility of the certified copy of the application filed under the Guardians and Wards Act and to the certificate of guardianship. *Held* he could not in revision question the admissibility of those documents in evidence.

In *Messrs. Kasturbhai Ramchand Panchal and Brothers* v. *Firm of Mohanlal Nathubhai*,[9] where the Lower Appellate Court admitted additional evidence, no objection was raised by the defendants. *Held* that it would not be open to the defendants to raise any such point in the revision.

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1. Radhakrishan, R *v.* Osmania University, A.I.R. 1974 A.P. 283 at p. 283.
2. Gulab Chand *v.* Bhaiyalal, A.I.R. 1929 Nag. 343 ; Ram Bharose *v.* Ram Bahadur Singh, A.I.R. 1948 Oudh 125.
3. Mohammad Imam Ali Khan *v.* Husain Khan, I.L.R. 26 Cal. 81 (P.C.) ; Budh Ram *v.* Uttam Chand, A.I.R. 1928 Lah. 726 at p. 728.
4. Sita Ram *v.* Pir Baksh, A.I.R. 1931 Lah. 6.
5. Abdul Kareem *v.* Rashiduddin, A.I.R. 1931 Oudh 246 : 131 I.C. 903 ; Mst. Chinto *v.* Narinjan Singh, A.I.R. 1957 Punj. 317 at p. 320 : 59 Punj. L.R. 475 : I.L.R. (1957) Punj. 1719.
6. Babu Ram *v.* Basdeo, A.I.R. 1982 All. 414 at p. 418.
7. C. Sankaranarayan *v.* State of Kerala, A.I.R. 1971 S.C. 1997 at p. 2000 ; contra *see* Union of India *v.* Lieutenant T.C.R. Peduval, 1982 Lab I.C. 1668.
8. A.I.R. 1969 All. 162 at pp. 164, 165.
9. A.I.R. 1969 Guj. 110 at p. 120.

In *Tirathalal* v. *State of West Bengal*,[1] it was held that a petitioner could not be permitted to challenge the acquisition itself and at the same time claim increased compensation.[2]

Where a coparcener executed a *tamluknama* alleging that he was the sole owner of the property and that he was entitled to execute the said document it should not be open to him to resile from the said document on the basis that he was not entitled to execute the same.[3]

The scheme of Gujarat Municipalities Act shows clearly that a voter has an independent right to challenge any order passed by the Returning Officer relating to the rejection of the nomination paper of the person admitting objection at the time of scrutiny with regard to his eligibility for standing as a candidate at the election. The admission made by the candidate therefore would not bind him and he cannot be so estopped from challenging the same.[4]

The Government of Assam by a notification, dated 12th March, 1968, carved out about 239 *bighas* of the Bahari Grazing Reserve, since de-reserved for the purpose of a *bazar*, from the existing territorial jurisdiction of the Bahari Gaon Sabha and reconstituted a new Gaon Sabha for this area. *Held* that the petitioner having himself approached the State Government for reconstituting the Gaon Sabha was estopped from questioning the validity of the impugned notifications.[5]

In *Smt. Hubaraji* v. *Authorised Chief Settlement Commissioner, U.P., Bihar*,[6] sale of property under Displaced Persons Compensation and (Rehabilitation) after its earlier sale was confirmed. The order of confirmation, passed in exercise of the power conferred under Sec. 40 of the Administration of Evacuee Property Act. It was held that the transferee under the earlier sale could approve the forum of revision prescribed under the Displaced Persons Compensation and Rehabilitation Act to challenge the second sale in view of the finality given of the orders passed under the Displaced Persons Act. Approach made by the transferees was justified and the approach did not operate as estoppel. They were not estopped from saying that the property in dispute was not pool property.

5. Principle of issue—Estoppel is different from principle of double jeopardy.—The principle of issue estoppel is simply this : that where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused such a finding would constitute an estoppel on *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the receipt of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law.[7]

The rule of issue estoppel is not the same as the plea of double jeopardy of *autrefois acquit*. It does not introduce any variation in the Code of Criminal Procedure either in investigation, enquiry or trial. It relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent Court at a previous trial. The principle of issue estoppel applies to criminal cases also. The rule of issue estoppel in a criminal trial is that where an

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1. 66 C.W.N. 115 at p. 121.
2. Mohammad Habibullah Sahib *v.* Special Deputy Collector for Land Acquisition, Madras, A.I.R. 1967 Mad. 118 at p. 121.
3. Lakshmi Devi, Smt. *v.* Smt. Kala Devi, A.I.R. 1977 All. 509 at p. 515.
4. Indravadan Parshotamdas Desai *v.* Indravadan Ambalal Mehta, A.I.R. 1969 Guj. 251 at p. 255.
5. Premnath Das *v.* State of Assam, A.I.R. 1969 Assam 61 at pp. 62, 65.
6. A.I.R. 1980 All. 231 at pp. 235, 240.
7. Masud Khan *v.* State of Uttar Pradesh, A.I.R. 1974 S.C. 28 at p. 30.

issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution. But this principle would equally apply to an issue of law also. The principle of issue estoppel has been invoked in criminal cases in order to cover cases where the plea of *autrefois acquit* will not be available because the crime with which the accused is charged in the later proceedings may not be the same crime of which he was acquitted earlier. Yet it may be that the verdict of acquittal in the earlier proceedings might have been based on a finding, the consequence of which is that he must be acquitted of the charge in the later proceedings also. That is not *autrefois acquit* as the accused is not able to show that the crime charged is substantially the same crime on which a finding was given in the first verdict. Such a situation is covered by principle of issue estoppel is only a convenient label or *res judicata*.[1] It should be stated that the principle of issue-estoppel is different from the principle of double jeopardy or *autrefois acquit* as embodied in Sec. 403 (Sec. 300 new) of the Criminal Procedure Code. The principle of issue-estoppel is a different principle, *viz.* where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of Sec. 403 (2), (Sec. 300 new) Cr. P.C.[2]. Speaking on the principle of estoppel, Dixon; J., said in *King* v. *Wilkes*[3] :

> "....There is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in view on a second criminal trial of the same prisoner. That seems to be implied in the language used by Wright, J., in *R.* v. *Ollis*,[4] which in effect I have adopted in the foregoing statement..."

In a subsequent case *Marz* v. *Queen*,[5] Dixon, C.J., stated as follows :

> "The law which gives effect to issue-estoppel is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel still less with the processes of reasoning by which the finding was reached in fact. It is enough that an issue or issues have been directly raised and found."

Again in *Brown* v. *Robinson*,[6] Herron and Maguire, JJ., said—

> "Before issue-estoppel can succeed in a case such as this there must be prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner...."

The principle of issue-estoppel has received the approval of the Supreme Court in *Pritam Singh* v. *State of Punjab*[7] and *Manipur Administration* v. *Thokchom Bira Singh*.[8]

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1. Sarma, T.V. *v.* R. Meeriah, A.I.R. 1980 A.P. 219 at pp. 228, 229.
2. Piara Singh *v.* State of Punjab, A.I.R. 1969 S.C. 951 at p. 964.
3. 77 C.L.C. 511 at pp. 518, 519.
4. (1960) 2 Q.B. 758.
5. (1956) 96 C.L.R. 62.
6. (1960) S.R. (N.S.W.) 297 at p. 301.
7. A.I.R. 1956 S.C. 415 : 1956 Cr. L.J. 805.
8. A.I.R. 1965 S.C. 87 : (1964) 7 S.C.R. 123.

For issue-estoppel to arise, there must have been distinctly raised and inevitably decided the same issue in the earlier proceedings between the same parties.[1]

"Rule of issue estoppel" explained.

The rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused such a finding would constitute estoppel or *res judicata* against the prosecution not as bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of the evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which may be permitted by the terms of Sec. 300 (2), Cr. P.C. The rule only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and specific finding recorded at an earlier criminal trial before a Court of competent jurisdiction.[2]

6. Things necessary to bring a case within the section.—The law on the subject is laid down very clearly by their Lordships of the Privy Council in *Beni Ram* v. *Kundan Lal*[3] and *Mohori Bibi* v. *Dharmodas Ghose*.[4] The principle enunciated by their Lordships in those cases is that unless a person is found guilty of either an overt act or of an omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of, there can be no question of estoppel. In *Mustafa Hussain* v. *Saidul Nisann*,[5] it was held that a plea of estoppel in such cases can only be maintained if the conduct of the person against whom the estoppel is alleged, is found to be fraudulent.[6]

It is well settled that for any plea of estoppel to arise there must be either a promise or an assurance intended to be acted upon and only when the same is in fact acted upon that the question of the binding nature thereof or of an estoppel as against the person making the promise or giving the assurance arises. In order to support a plea of estoppel the representation must also be of an existing fact.[7] The question of estoppel arises only when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. The plaintiff is not estopped from asserting her title to the land left by her father merely because she did not claim the property in the former title suit by the defendants and deposed merely as a witness in favour of her sons in support of a gift executed by her mother.[8]

7. Elements of estoppel.— Its main elements are that the plaintiff must have made a declaration intentionally so that another may believe it to be true and to act on the footing that it is true.[9]

In the case reported in *Union of India* v. *Messrs. Rishi Raj and Company, Delhi*,[10] a letter was written by the Regional Director (Food), Ministry of Food and Agriculture, Government of India, to the contractor terminating the contract. This

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1. Piara Singh *v.* State of Punjab, A.I.R. 1969 S.C. 961 at p. 965 ; Baidyanath Basak *v.* Union of India, 1983 Cr. L.J. 1542 at p. 1557 (Cal.).
2. State of Uttar Pradesh *v.* Kali Ram, 1985 All. L.J. 345 at p. 347.
3. I.L.R. (1906) 21 All. 469 : 26 I.A. 58 : 7 Sar. 523 (P.C.).
4. 7 C.W.N. 441 : 8 Sar. 374 (P.C.).
5. A.I.R. 1927 Oudh 66.
6. Ram Dat *v.* Chhotak, A.I.R. 1923 Oudh 23 at p. 24.
7. *Vide* the observations of Mitter, J., speaking for the Supreme Court in Sat Narain *v.* Union of India, C.A. 646 of 1954, dated 27th September, 1971 (S.C.), Messrs. Byford Private Ltd. *v.* Union of India, A.I.R. 1972 Delhi 59 at p. 70.
8. Langa Manjhi *v.* Jaba Majhnian, A.I.R. 1971 Pat. 185 at p. 187.
9. Kanhu Charan Tripathi *v.* Laxmidhar Tripathy, A.I.R. 1970 Orissa 87 at p. 88.
10. A.I.R. 1973 Delhi 15 at p. 21.

was followed by a demand notice and by the notice the contractor was informed that by reason of getting the work done by other contractors the Government had incurred extra expenditure. Within two days of the receipt of the notice the contractor admitted his liability and also agreed to the recovery of the amount from the security deposit. The question arose whether by reason of this letter the contractor was precluded from disputing the Government's claims and for asking the Court to refer the dispute to arbitration. *Held* that the mere fact that the contractor had admitted its liability to the Government's claim in his letter will not operate as an estoppel against the contractor and will not prevent him for challenging the claim of the Government. Therefore, the contractor was entitled to seek arbitration with regard to the claim raised by the Government against him.

In the instant case, the plaintiff-respondent did not get the mutation sanctioned in his favour after its alltoment to him right from 1964. The conduct of the plaintiff-respondent was responsible for the defendants-appellants in believing that Surjit Singh was the owner of the suit property. Therefore, the plaintiff-respondent was held to be estopped from filing the suit.[1]

In the case of *Ram Kumar* v. *Bastu Singh*,[2] the plaintiff's suit was for recovery of money by sale of mortgaged property.

So far as the question of burden of proof was concerned it is important to note that no such objection was taken in any of the two Lower Courts. The plaintiff accepted the burden of proving the execution of the mortgage-deed by the defendants.

Held it was not open to him now to complain that the burden of proof pertaining to the execution of mortgage-deed was wrongly placed on him.

In *Venkatesh Damodar* v. *Mallappa Bhimappa*,[3] a Division Bench of the Bombay High Court observed as follows :

> "The result is that Damodar has agreed to sell the property to the first defendant who was then in possession and had all along been in possession since the time of the decree, and the defendant paid the purchase price. It is quite true that the defendant has not got a sale-deed, and the time has passed within which he could have sued Damodar to get a sale-deed. But the equitable principles which should be applied to these facts are, in my opinion, perfectly clear."
>
> "The decision was based on the fiduciary aspect of the vendor's position and the impropriety of permitting him to succeed against his vendee in a suit for possession. That argument must also apply where the vendee in possession has allowed the time for filing a suit for specific performance to expire."

Their Lordships relied on an earlier Full Bench decision of the same Court in *Bapu Apaji* v. *Kashinath*,[4] where C.J. Scott speaking for the Full Bench observed as follows :

> "Once it is recognized that the plaintiff is violating his fiduciary obligation, it is clear that the Court cannot grant him the relief which he seeks, for if will not aid him in committing a breach of trust and his suit

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1. Gurdev Singh *v.* Jagroop Singh, 1993 (1) P.L.R. 86 at pp. 90, 91 (P. & H.).
2. A.I.R. 1971 Raj. 124 at p. 124 ; *see* also Smt. Pushpa Devi Agarwal *v.* Collector and District Magistrate, Mirzapur, 1985 All. L.J. 23.
3. I.L.R. 46 Bom. 722 at pp. 724, 726 : A.I.R. 1922 Bom. 9.
4. I.L.R. 41 Bom. 438 at pp. 441, 452 : A.I.R. 1916 Bom. 1 (F.B.).

must fail, the defendant is no trespasser, but is in possession under the contract which the plaintiff has bound himself to carry out.

Upon a legitimate application of those principles not only is the purchaser who has obtained possession entitled to enforce specific performance of the contract for sale, but if an attempt be made by the seller to evict him by an action in ejectment he would have a valid answer to the action on the ground of fraud. The same ground would be available to him to entitle him to recover possession in the event of his being ousted by the seller."

To the same effect is another decision of the Allahabad High Court in *Begum* v. *Mohd. Yaqub*.[1]

It is manifestly clear that where the plaintiff voluntarily executes a contract of sale, puts the proposed vendee in possession of the property and receives the entire consideration money, there is no special equity in his favour to allow him to turn round and claim the property after a long time merely beacuse the price of the property has increased. He cannot be allowed to repudiate the fiduciary obligation arising out of the contract nor can the Court aid him to commit fraud by dispossessing a prospective vendee who has done all that was required of him to do for purchasing the property.

Even though the possession of the vendee may be permissive, since the vendee has received the entire consideration money and allowed the position to be changed to the prejudice of the vendee he will be estopped from repudiating the sale transaction and recovering possession from the vendee. On this ground alone, the defendant is entitled to succeed.[2]

Estoppel consists of misrepresentation and an act induced by that misrepresentation.[3] The materials, which would furnish an estoppel to prevent the real owner of property from averring the truth with regard to the non- transfer of his property, may be classed under three heads, *viz.* "Actual Representation" by him contrary to that truth : "Concealment" by him of what he ought to have represented with regard to it ; and "Negligence" in the matter so gross as to amount to evidence of fraud, and, if the intention is fraudulent in any respect, though not pointed exactly to the object accomplished, yet, he will be bound.[4] To invoke the doctrine of estoppel embodied in Sec. 115 of the Evidence Act, three conditions must be satisfied : (1) representation by the person to another, (2) the other shall have acted upon the said representation, and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made. Where the first two conditions are satisfied, but the third is not, there is no scope to invoke the doctrine of estoppel.[5]

Estoppel to be pleaded.

In order to raise the plea of estoppel, the facts on which it is based must be pleaded. It has been said that estoppel is eminently a matter of pleadings. If not set up in the pleadings or issues, it cannot be availed of. It would not be appropriate to permit the plea of estoppel to be raised for the first time in second appeal.[6]

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1. I.L.R. (1894) 16 All. 344 (F.B.).
2. Ghulam Qadir *v.* Ghulam Hussain, A.I.R. 1973 J. & K. 11 at p. 12.
3. 8 C.W.N. ccxxvii (ccxxviii).
4. Evans *v.* Bicknell, 6 Ves. 174 ; *see* W. Spink *v.* W. Moran, 21 W.R. 161 at p. 172.
5. Marketing and Advertising Associates Pvt. Ltd. *v.* Telerad Private Ltd., A.I.R. 1969 Bom. 323 at p. 328 ; Gyarsi Bai *v.* Dhansukh Lal, 1966 S.C. D. 222 : A.I.R. 1965 S.C. 1055 ; cited in State of Orissa *v.* Indupalli Babaji, 25 Cut. L.T. 60 at p. 78.
6. Inderjit Singh *v.* Randhir Singh, A.I.R. 1978 Punj. 260 at p. 263 ; *see* also T.P. Palaniswami *v.* Deivanaiammal, A.I.R. 1984 Mad. 19.

It admits of no doubt that a plea of estoppel cannot be entertained unless it has been raised in the pleadings and an issue has been struck on the same. The Trial Court has travelled beyond the pleadings and its approach to the case on the principle of estoppel is entirely erroneous.[1]

Plea of estoppel : points requiring proof.

A person who puts forward the plea of estoppel must prove every one of the legal requirements necessary to be established before he could avail of such a plea.[2]

8. Requirements.—In order to found a plea of estoppel, there must be proof that the firm or the petitioner suffered detriment by acting upon the representation.[3]

Before an estoppel can arise, there must be *first* a representation of an existing fact distinct from a mere promise made by one party to the other, *secondly* that the other party believing it must have been induced to act on the faith of it, and *thirdly*, that he must have so acted to his detriment.[4]

Five partners carried on the business of the unregistered firm till 21st July, 1952. Long after the firm discontinued its business, the Income-tax Officer made an assessment on the dissolved firm in the status of an unregistered firm. Five separate appeals were filed by the five ex-partners against the order of assessment on the dissolved firm before the Appellate Assistant Commissioner. *Held* that separate appeals filed by the ex-partners were maintainable and that such appeals were not barred by the principles of *res judicata* and estoppel.[5]

In *Kesoram Industries and Cotton Mills Ltd.* v. *Union of India*,[6] the company was granted a licence to import capital goods namely plant and machinery for manufacturing spun pipes. One of the conditions of licence was to export spun pipes as would be manufactured by that plant and machinery imported to the extent of 15 per cent. of its production and for due performance of the obligation, the company executed a written undertaking. By a circular dated 17th August, 1966 the Government of India informed the Secretary, Export Promotion Council that it was decided to grant cash assistance against exports effected from 6th June, 1966 the date of devaluation of the Indian rupee, on specified engineering products. On 4th June, 1969, the Joint Chief Controller of Imports and Exports of the Government informed the company that according to the then policy, no cash assistance was admissible against exports in discharge of export obligation in C.C. cases, i.e. capital goods licences issued with prospective export obligation. It was held that there was no such representation of an existing fact which raised an estoppel or a representation of a future act which could be enforced at law or in equity. There was no question of any estoppel or any right in the company enforceable against the Government at law or in equity.

9. Burden of proving ingredients of the section.—The burden of proving the ingredients of Sec. 115 of the Evidence Act lies on the party claiming estoppel. The representation which is basis for the rule must be clear and unambiguous and not indefinite, upon which the party relying on it is said to have, in good faith and in belief of it, acted.[7]

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1. Modi Sugar Mills Ltd. *v.* Union of India, 1978 Tax L.R. 673 at p. 676.
2. N.R. Revanna *v.* T.V. Mallappa, A.I.R. 1965 Mys. 258 at p. 259; *see* also University of Delhi *v.* Ashok Kumar Chopra, A.I.R. 1968 Delhi 131 at pp. 140-41.
3. George A. Leslie *v.* State of Kerala, A.I.R. 1970 Ker. 21 at p. 27.
4. Union of India *v.* Wing Commander, R.R. Hingorani, A.I.R. 1987 S.C. 808 at p. 812.
5. Commissioner of Income-tax *v.* Sri S.K. Bose, A.I.R. 1969 Cal. 4 at p. 9.
6. A.I.R. 1977 Cal. 459 at pp. 460, 462.
7. Bennett Coleman & Co. Pvt. Ltd. *v.* Punya Priya Das Gupta, A.I.R. 1970 S.C. 426 at p. 434.

10. Doctrine of equitable estoppel.—A rule of evidence such as equitable estoppel may not be invoked against the people and the State if it is shown to be against the general interest of the people and the State or against the advancement of their known social policy or if it affects the public revenues. Precise definition of the limits is difficult as this branch of the law is yet evolving. Boundaries will have to be determined in individual cases with reference to the facts of cases.[1] There is a long line of authority of the Madras High Court, taking the view that a lessee is not entitled to the benefits of Sec. 51 of the Transfer of Property Act.

Doctrine of estoppel and Sec. 51, Transfer of Property Act; rule is not excluded.

But the doctrine of equitable estoppel, or the rule in *Ramsden* v. *Dyson*[2] as it may be called goes far beyond the principle embodied in Sec. 51 of the Transfer of Property Act. That rule is not excluded by Sec. 51 of that Act. It would be helpful to refer to the rule in *Ramsden* v. *Dyson*.[3]

The Judicial Committee in *Beniram* v. *Kundanlal*,[4] stated the principle thus at page 502—

Privy Council view.

> "In order to raise the equitable estoppel which was enforced against the appellants by both the appellate courts below it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention was sufficient to justify the legal inference that they had by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation."

It was held that whether or not the letting was a permanent one, the statement in the letter that it was so was a representation of fact, and that the appellant was estopped under Sec. 115 from denying that the letting was of that character.

Seniority and equitable estoppel.

Equitable estoppel means the effect of voluntary conduct of a party whereby he is precluded from asserting right against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. In the instant case, the seniority was not at any time given to the petitioner from any back date though his past services were allowed to be counted for all other purposes. How has the petitioner changed his position for worse on the basis of any such understanding. If any, what is the right that the respondents seek to assert ? To determine seniority according to the resolution of takeover the various other conditions attached to it. Tentative or draft seniority lists cannot be construed as an estoppel. Final seniority has been fixed for the first time in 1974 and the petitioner has had enough chances to put up his representations which he did and that satisfies the requirements of natural justice, if any.[5]

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1. State *v.* Amrit Banaspati Ltd., A.I.R. 1977 P. & H. 268 ; Venkateshwar Stainless Steel Wire Industries, Hyderabad *v.* Messrs, Chief Controller of Imports and Exports, New Delhi, A.I.R. 1979 A.P. 280 at p. 289.
2. (1865-66) 1 H.L. 129.
3. *Ibid. Contra* : *see* Achutha Menon *v.* Jagannatha Menon, A.I.R. 1984 Ker. 51.
4. I.L.R. 21 All. 496, referred to in Ramsden *v.* Dyson, (1865-66) 1 H.L. 129 ; *see* also Forbes *v.* Ralli, 52 I.A. 178 : A.I.R. 1925 P.C. 146.
5. *See* Gulab Chand *v.* State of Rajasthan, (1979) 1 Serv. L.R. 802 : 1978 Lab. I.C. 1529 (Raj.) ; C.D. Sharma *v.* Municipal Corporation of Delhi, 1983 Lab. I.C. 479 at p. 482.

In *Plummer* v. *Wellington Corporation*,[1] the Judicial Committtee had occasion to consider the rule in *Ramsden* v. *Dyson*[2] in great detail. In that case the lessor who demised the property to the appellant had in 1848 created a wharf on the land with the permission of the Government, and had also put up a jetty in 1855.

In 1856 at the request and for the benefit of the Government he incurred large expenditure for the extension of the jetty and for the erection of a warehouse. It was held that the lessor must be deemed to have occupied the ground from 1848 under a revocable licence to use it for the purpose of a wharfinger, that by virtue of some transaction in 1850 such licence ceased to be revocable at the will of the Government whereby the lessor acquired an indefinite, that is practically a perpetual, right to the jetty.

The legal conception underlying the term "equitable estoppel" was explained thus by the Judicial Committee in the *Canadian Pacific Rly. Co.* v. *King*[3] :

Foundation of "equitable estoppel" ?

> "It is a doctrine which is sometimes alluded to under the name of the 'equitable estoppel'. The foundation upon which reposes the right of equity to intervene is either contract, or the existence of some facts which the legal owner is estopped from denying."

After having taken some advantage by taking possession of the acquired land under Sec. 17 (1) on the ground that the land was either arable or waste land, the State cannot turn round and say that the land is forest land. By its action the State is estopped equitably from challenging the character of the land acquired and also from saying that it is a forest land.[4]

Doctrine of equitable estoppel—When applicable.

The doctrine of equitable estoppel applies to a case where a person is given an unequivocal assurance and on the faith therof, he acted detrimental to his interest and he suffered an irretrievable injury in that pursuit. In such an event, having made such a promise, the maker thereof is precluded to resile therefrom and pass an order detrimental to the interest of the person who believed the promise; placed reliance thereof acted on that basis to his detriment and he cannot adequately be compensated.[5]

In the instant case, the appellant's letter dated 7th August, 1971, shows that only one specimen of felt had been forwarded by the appellants to the Commissioner of Sales Tax alongwith their letter, dated 25th March, 1971, and it was only in relation to that single specimen of felt that the Commissioner had expressed the view that it was exempt under Entry of Sch. I. From the samples produced in this case it is found that the appellants are manufacturing as many as 26 different varieties of compressed woollen felt of varying hardness density and thickness. There is absolutely no material on the record to show which out of these 26 varieties was sent as specimen to the Commissioner in 1971. In these circumstances the principle of equitable estoppel is not attracted.[6]

Doctrine of equitable estoppel—Applicability in the case of a person not qualified to hold the post.

The only short question is whether at this stage after the petitioner has put in about 21 years of service he should be told that he is not qualified to hold the post to which he was appointed and is also not qualified to be considered for promotion to higher post, though he was found to be qualified for promotion, and,

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1. (1884) 9 A.C. 699.
2. (1865-66) 1 H.L. 129.
3. A.I.R. 1932 P.C. 108 at p. 115 : 61 M.L.J. 958.
4. Messrs. Burn and Company Ltd. *v.* State of West Bengal, A.I.R. 1976 Cal. 389 at p. 392.
5. N. Bhuvaneshwar Rao *v.* Principal, Osmania Medical College, Hyderabad, A.I.R. 1986 A.P. 196 at p. 202.
6. Filterco, Messrs *v.* Commissioner of Sales Tax, M.P., A.I.R. 1986 S.C. 626 at p. 631 : 1986 Tax L.R. 2275.

as a matter of fact, was promoted. If the terms of a statute are absolute and do not admit of any relaxation or exemption, then anything done contrary to the terms of such a statute would be *ultra vires* and would be void and no person could be estopped from putting forward the contention that what he did was illegal or void. But, if, on the other hand, a statute having prescribed certain conditions or qualifications for the doing of a certain thing itself provides for exemption therefrom under certain circumstances or authorises somebody to exercise the power of exemption, then, anything done not in terms of those conditions or qualifications would not be said to be *ultra vires*. It may amount only to an irregularity and to such an act the proposition that there can be no estoppel against a statute will have no application. It would be most inequitable and unjust to hold that the petitioner cannot hold the post at this late stage of his life and also to treat him as a candidate without any right to hold the post. Though the authorities concerned cannot be charged with having done anything positively to the detriment of the petitioner, they by reason of their inaction or silence for a long number of years after the petitioner's entry into service have induced the petitioner to believe that he was qualified to continue in service. In these circumstances, this is eminently a fit case for the application of the doctrine of equitable estoppel.[1]

In a decision of the Madras High Court in *Thavasi Ammal* v. *Arumuga Nattar*,[2] this question of a claim for compensation by a tenant against a landlord based upon the doctrine of equitable estoppel come in for consideration. At page 190 Seshagiri Aiyar, J., observed as follows :

> "In the well-known case of *Ramsden* v. *Dyson*,[3] it was distinctly laid down that mere standing by would not compel the landlord to pay compensation at the time of eviction. What is actually required is that there should be encouragement by the landlord to build and an implied promise that, in case the tenant was ejected, he would be compensated. Estoppel of this kind must be based upon something more substantial than failure to object.....[4]

A rule was issued on 26th June, 1961, which reads as follows :

> "Candidates applying for admission to P.P.C. in Medicine and to the first year of M.B.B.S. course, must have passed the qualifying examination in one attempt."

A few days thereafter, i.e., on 3rd July, 1961, this rule was amended by omitting the clause which disabled candidates who did not pass the qualifying examination in one attempt from applying for admission to the Pre-Professional Course.

When equitable estoppel not applicable.

The argument on behalf of the petitioner was that she believed that the candidates who passed different subjects at different times would be excluded from consideration and, therefore, she did not apply to the other Medical Colleges in the Andhra area whose last date for submitting applications expired with 30th June, 1961. Consequently, the concerned authorities were estopped and precluded from amending the rules and enlarging the field of eligibility. The principle of equitable estoppel could not have any application in the instant case.[5]

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1. V.P. Thirunavukkaraso *v.* State of Tamil Nadu, 86 L.W. 483 : at p. 487 : (1973) 2 Mad. L.J. 181.
2. 7 M.L.W. 178 : A.I.R. 1918 Mad. 419.
3. (1865-66) 1 H.L. 129.
4. Alagarswami Kone *v.* T.J. Andhoni, A.I.R. 1961 Mad. 293 at pp. 295-96.
5. Gullapalli Nageswara Rao *v.* Principal, Medical College, Guntur, A.I.R. 1962 A.P. 212 at pp. 217-18.

The principle of equitable estoppel presupposes that the person claiming the benefit has been put into some disadvantageous position by the act of other side. In this case, there is no such plea taken in the petition. The petitioner enjoyed the benefit of the admission only for a short duration of three days. He was admittedly lower in merit. He was wrongly given admission. He has nowhere stated in the petition that on account of this admission, he has lost his chance to join some other institution. He has not indicated in what manner he has been prejudiced. Thus, the doctrine of equitable estoppel would not apply to this case.[1]

In the instant case, since, petitioner's eligibility for selection/admission was subject to fresh scrutiny by the Competent Authority, it was for him to satisfy the requirements and if he failed he could fall back to invoke the doctrine of equitable estoppel or acquiescence to make up his shortfall. Because the doctrines of Estoppel or Acquiescence do not operate against a statutory bar nor can higher merit of a candidate be pleaded to cure his ineligibility under the statute of the rules.[2]

In *State of Orissa* v. *Narain Prasad*,[3] it is held that a person, who enters into certain contractual obligations with his eyes wide open and works the entire contract, cannot be allowed to turn round and question the validity of those obligations or the validity of the rules which constitute the terms of the contract. The extraordinary jurisdiction of the High Court under Art. 226 which is of a discretionary nature and is exercised only to advance the interest of justice cannot certainly be employed in aid of such persons. Neither justice nor equity is in thier favour.[4]

In the instant case, the petitioner in his application has not stated the foundational facts for invoking the doctrine of promissory estoppel, nor the said principle is attracted in this case. It is not, therefore, possible to accept the contentions of the petitioner that the members of the Oil Selection Board had promised that the dealership would be given to him. Keeping in view of the fact that a large number of persons obtained higher marks than the petitioner, it is not possible to accept the contention of the petitioner.[5]

Moreover, the petitioner took part in the interview with full knowledge and thus the petitioner is estopped from questioning the efficacy and/or mode thereof.[6]

The doctrine of equitable estoppel in so far as it affects the executive has to a considerable extent been excluded.[7]

The doctrine of promissory or equitable estoppel does not apply to representations and assurances by the Government or by officers acting on its behalf.[8]

Application of doctrine of equitable estoppel to Government activity.

The kaleidoscope of precedents, Indian, American and English, shows that in the final analysis the doctrine of equitable estoppel is but a rule of fair play founded on the principle of justice, equity and good conscience. Good administration demands that rule of

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1. Brajendra Singh Chouhan *v.* State, A.I.R. 1995 M.P. 23 at p. 26.
2. Vinod Kumar Razdan *v.* State, A.I.R. 1995 J. & K. 68 at p. 72.
3. (1996) 5 S.C.C. 740 : A.I.R. 1997 S.C. 1493.
4. Navayuga Exports Ltd. *v.* A.P. Mineral Development Corporation, A.I.R. 1998 A.P. 391 at p. 393 : 1998 (4) A.L.T. 505 : 1998 (4) A.L.D. 571.
5. Siben Kumar Mondal *v.* Hindustan Petroleum Corporation Ltd., A.I.R. 1995 Cal. 327 at p. 331, 335.
6. *Ibid.*
7. Madras Steelware Industry, Madras *v.* Joint Chief Controller of Imports and Exports, Madras, A.I.R. 1977 Mad. 377 at p. 378.
8. *Ibid.*, at p. 381.

fairplay should be observed by all Governmental and Public Authorities. Good administration requires that the Government and other public authorities should be bound by promises made by them, upon which others have acted as much as parties are bound by similar promises. But, there is a difference. The Government acts for the people. It acts in the public interest. The people, for whom the Government acts, require to be protected against the unauthorised, prejudicial or mischievous acts of the persons who act for the Government. The people cannot be bound by promises which are unauthorised, or, which are prejudicial to the public interest or which are productive of public mischief. Therefore, the need to restrict the application of the doctrine of equitable estoppel to Governmental activity. Therefore, the unwisdom and inexpediency of applying the doctrine too widely. There are, of course, certain obvious limitations. When the Government acts in a sovereign capacity there can never be any question of estoppel. Nor can there ever be an estoppel to prevent Parliament from making a law. Nor can the government, while functioning as a delegate of Parliament, be estopped from legislating contrary to the promises earlier held out by it in an executive capacity. Nor can there be an estoppel to prevent the Government from carrying out the mandates of Parliament. Parliament is supreme and the executive Government cannot estop itself from discharging the obligations imposed upon it by Act of Parliament. Nor can the Government do something or be compelled to do something which is prohibited by statute or which is opposed to obvious legislative policy. And, the Government cannot be bound by an estoppel to do indirectly that which it cannot do directly, it cannot bind itself to circumvent a statute. Again, a Government cannot bind itself or a succeeding Government by an estoppel, to a fixed policy. The politic dynamism of the State requires review and revision of policy and a Government must have the right at all times to change its policy. Accrued rights have to be honoured no doubt. But, no rights based on promissory estoppel can ever be considered to accrue which are against the public interest and opposed to the public policy or which affect the public revenues. No one can be permitted to take undue advantage of a representation made by a servant of the people and claim rights as against the people themselves and to their proven detriment, if such rights are not consistent with the public good. A rule of evidence such as equitable estoppel may not be invoked against the people and the State if it is shown to be against the general interest of the people and the State or against the advancement of their known social policy or if it affects the public revenues. Precise definition on the limits is difficult as this branch of the law is yet evolving boundaries will have to be determined in individual cases with reference to the facts of the cases.[1]

Principles of equitable estoppel cannot be invoked against Government.

The principle of equitable estoppel cannot operate so as to prevent the Government from discharging the obligations imposed upon it by an Act of Parliament or to compel the Government to do something which was prohibited by statute or which was opposed to obvious legislative policy. The Government is not barred by the principle of equitable estoppel from enforcing the Haryana Ceiling on Land Holdings Act against the vendees from a big land-owner. It is true that Sec. 12 of the Haryana Ceiling on Land Holdings Act may work great hardship on persons who have purchased land from a big land-owner and invested large sums of money in developing the land as orchard in the belief that the land would not be treated as surplus area of the big land-owner. But that is a matter which the aggrieved persons have to take up with the Government for proper action to relieve them from the hardship.[2]

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1. State of Punjab *v.* Amrit Banaspati Co. Ltd., A.I.R. 1977 Punj. 268 at p. 284.
2. Jaswant Kaur, Smt. *v.* State of Haryana, A.I.R. 1977 Punj. 221 at p. 232.

Legal or equitable estoppel

The question of estoppel would arise where the party to whom the representation is made acts on such representation in such a manner as to change his position, and the question of permitting the party making the representation to resile from such representation is likely to subject the other party to irreparable loss or injury.[1]

In the instant case the petitioner, alongwith the application, had submitted his community certificate. The declaration with regard to the place of birth and the place of domicile were given by the petitioner in the application itself as admitted by the respondent bank. When initially the authorities have accepted the community certificate and provided employment to the petitioner, it is not open to them at this stage to raise such an objection with regard to the jurisdiction of the authorities to issue the community certificate. Moreover, the petitioner had not been given an opportunity to explain the same, since this was not mentioned in the show cause notice. Hence, this cannot be a ground to terminate the service of the petitioner.[2]

In *Registrar, University of Madras* v. *Sundara Shetty*,[3] the Secondary School Leaving Certificate Examination Board had issued a certificate to the petitioner that he had passed the public examination. Thereafter, the petitioner was admitted to the college in due course and passed the first year course in the Intermediate Examination. On 7th April, 1953, he was promoted to the senior Intermediate Class. He was served with a letter from the Principal of the college, on or about 22nd December, 1953, that his name was not to be found in the list of S.S.L.C. holders of Madras 1952 declared eligible for University course of study and that he should show cause against the same. In dealing with the question of estoppel, Rajamannar, C.J., who delivered the judgment of the Bench, referred to the facts of that case and came to the conclusion that that was a case of legal or equitable estoppel which practically satisfied all the conditions embodied in Sec. 115.[4]

11. Reservation in medical college by misusing "Reservation Quota".—Where a student has secured admission in the medical college by hook or by crook and by misusing "Reservation Quota" it would be national waste, in addition to the loss of career if the student is deprived of his enrolement in the medical college after 3-4 long years. The authorities shall be estopped from unseating him on principle of estoppel.[5]

In *Sangeeta Srivastava, Miss* v. *Prof. U.N. Singh*,[6] the silence and inaction on the part of the University resulted in admission to the petitioner who was strictly speaking not eligible for admission as per regulations of the University. She did not have 45% marks. The petitioner continued to attend the classes, paid her fee, continued as a student of the college and participated in other activities as student and it was only in April, 1979 when the examination was to take place that she was denied admission to sit in the examination. It was held that the petitioner could invoke the rule of equitable estoppel to urge that after such a long time the

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1. S.A. Manjunath Annayyappa *v.* University of Bangalore, A.I.R. 1967 Mys. 119 at p. 122.
2. **R. Krishnadevan *v.* The Asst. General Manager, I.O.B. Industrial Relations Dept., Madras, 2001 (3) C.T.C. 385 at p. 390 (Mad.).**
3. A.I.R. 1956 Mad. 309.
4. S.A. Manjunath Annayyappa *v.* University of Bangalore, A.I.R. 1967 Mys. 119 at p. 122.
5. Harphool Singh *v.* State of Rajasthan, A.I.R. 1981 Raj. 8 at p. 11.
6. A.I.R. 1980 Delhi 27 at p. 29.

university is barred from denying her the right to continue her studies on the ground that as per regulations she could not have got admission.

On 5th December, 1975, the petitioner was admitted into the First Year M.B.B.S. course by the Principal, Medical College. Although it is not so stated either in the petition or in the counter- affidavit, learned counsel for all the parties including the State have admitted that in the year 1977 the petitioner passed Part I of his M.B.B.S. course. Thereafter he was prosecuting his studies for the final completion of the M.B.B.S. course and in the year 1979 the petitioner was in the final year of the M.B.B.S. class. At this stage by the impunged order of the Principal, dated 7th May, 1979 his (petitioner's) admission to the First Year M.B.B.S. course was cancelled. It was held that although in strict terms the principle of Sec. 115 of the Evidence Act may not be said to have been attracted, the principle of *quasi* estoppel or equitable estoppel would apply to such a case. Cancellation of the admission to the college was barred by principle of estoppel.[1]

Result of the petitioner of B.Sc. Part I was withheld because he was suspected of adopting unfair means. Petitioner managed to join B.Sc. final and attended his classes normally and his form and fees for B.Sc. final examination was also accepted and he was permitted to appear in B.Sc. final examination held in September, 1979. He failed in the paper of chemistry. Petitioner was not permitted by the University to appear in the supplementary examination of B.Sc. Part II. It was held that the equitable principle of promissory estoppel was not available to the petitioner.[2]

On account of inordinate delay of about four years, during which the petitioner continued his studies in Medical College, the authorities would be disentitled to revoke the admission of the petitioner, whatever may have been the nature of the petitioner's representation and whether or not the petitioner did or did not belong to the Scheduled Caste.[3]

Cases where occasion arises for refusal to permit a candidate to appear in an examination or cancel his examination may broadly be categorised thus :

(*i*) where the candidate practised fraud on the authorities, or was guilty of mis-statement or suppression of facts in his application form on the basis of which admission to examination was granted ;

(*ii*) where there is some technical defect in the filling of the form or where there was any deficiency, such as shortage in attendence, which defect or deficiency could be condoned by the authorities in exercise of discretion vested in them under the staute, Rules or Regulations ;

(*iii*) where the candidate was patently ineligible on the particulars supplied by him ; and

(*iv*) where the question of eligibility depends upon interpretation of any provision of law, or rules or regulations having the force of law, and two interpretations are reasonably possible.

(*i*) In the first category of cases no question of estoppel arises. The authorities will be within their rights to cancel the admission card or the examination on the discovery of fraud. This is because a person, who practices fraud or makes a mis-statement or suppresses material facts cannot claim estoppel. Fraud vitiates

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1. Amresh Kumar *v.* Principal, Bhagalpur Medical College, Bhagalpur, A.I.R. 1982 Pat. 122 at pp. 123, 124, 125-126.
2. Israr Ahmad *v.* Gorakhpur University, 1982 All. L.J. 1089 at pp. 1090, 1094.
3. Inder Prakash *v.* Deputy Commissioner, Delhi, A.I.R. 1979 Delhi 87 at p. 91.

everything. (*ii*) In the second case, if admission card has been issued to the candidate and he has appeared even in one paper of the examination, estoppel will operate against the authorities. The reason is that the authorities will be deemed to have represented to the candidate that the defect has been cured or the deficiency has been condoned. Where the examination has not yet begun, whether the authorities will be estopped from cancelling the admission card will depend upon the facts of each case. (*iii*) In the third category of cases, there will be no estoppel, the principle being that there can be no estoppel against the statute. For instance, if a candidate has not passed the B.A. examination and has applied for appearing in L.L.B. Examination, even if an admission card has been issued and even if the candidate had stated the facts truthfully, the authorities will be entitled to cancel the admission card and the examination. (*iv*) It will depend upon the peculiar facts of each case falling under the fourth category whether or not estoppel, will operate against the authorities to cancel the examination once a candidate has appeared in a single paper. In such a case, the authorities may be deemed to have accepted the other possible interpretation, which is in favour of the candidate.[1]

After having taken some advantage by taking possession of the acquired land under Sec. 17(1), Land Acquisition Act, on the ground that the land was either arable or waste land, the State cannot turn round and say that the land is forest land. Forest land is a quite different type of land which the State could not have taken possession of under Sec. 17(1) of the Land Acquisition Act. By its action the State is estopped equitably from challenging the character of the land acquired and also from saying that it is a forest land.[2]

12. Promissory estoppel.—Estoppel is a rule of equity. That rule has gained new dimensions in recent years. A new class of estoppel, i.e., promissory estoppel has come to be recognized by the courts in this country as well as in England. A representation made by one party for the purpose of influencing the conduct of the other party and acted upon by him, will, in general, be sufficient to entitle him to the assistance of the Court of Equity for the purpose of realizing such representation was the dictum of Lord Cottenham cited with approval in *Maunsell v. Hedges.*[3]

Origin.

Though the origin of the doctrine of promissory estoppel may be found in *Hughes* v. *Metropolitan Rly. Co.*[4] and *Birmingham and District Land Co.* v. *London and North Western Rly. Co.*,[5] authorities of old standing decided about a century ago by the House of Lords, it was only recently in 1947 that it was rediscovered by Mr. Justice Denning, as he then was, in his celebrated judgment in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[6] This doctrine has been variously called "Promissory estoppel", "equitable estoppel", "quasi estoppel", and "new estoppel". It is a principle evolved by equity to avoid injustice and though commonly named "promissory estoppel," it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctine is the interposition of equity. Equity has always, true to form, stepped in to mitigate the rigours of strict law. Since estoppel has always been traditionally a principle invoked by way of defence, the doctrine of promissory estoppel has also come to be identified as a

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1. Bal Krishna Tewari *v.* Registrar of Awadhesh Pratap Singh, University Rewa, A.I.R. 1978 M.P. 86 at p. 91.
2. Burn and Company Ltd. Messrs *v.* State of West Bengal, A.I.R. 1976 Cal. 389 at p. 392.
3. (1854) 4 H.L.C. 1039.
4. (1877) 2 A.C. 439.
5. (1888) 40 Ch. D. 268.
6. (1956) 1 All E.R. 256 : 1947 K.B. 130.

measure of defence. The ghost of traditional estoppel continues to haunt this new doctrine; formulating and applying this new equity in the *High Trees'* case.[1] Lord Denning added a qualification that though in the circumstances set out, the promise would undoubtedly be held by the courts to be binding on the party making it, not understanding that under the old common law it might be difficult to find any consideration for it, "the courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it". Lord Denning also pointed out in *Combe* v. *Combe*,[2] that "Much as I am inclined to favour the principle stated in the *High Trees'* case,[3] it is important that it should not be stretched too for, lest it should be endangered. That principle does not create new cause of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties...." So also said Buckley, J., in the more recent case of *Breesly* v. *Hallwood Estates Ltd.*[4] :

> "The doctrine may afford a defence against the enforcement or otherwise of enforceable rights, it cannot create a cause of action."

It is, however, necessary to make it clear that though this doctrine has been called in various judgments and text books as promissory estoppel and it has been variously described as "equitable estoppel," "quasi-estoppel" and "new estoppel," it is not really based on the principle of estoppel, but it is a doctrine evolved by equity in order to prevent injustice where a promise is made by a person knowing that it would be acted on by the person to whom it is made and in fact it is so acted on and it is inequitable to allow the party making the promise to go back upon it. Lord Denning himself observed in the *High Trees* case,[5] expressly making a distinction between ordinary estoppel and promissory estoppel that cases like the one before him were "....not cases of estoppel in the strict sense. They are really promises, promises intended to be binding, intended to be acted upon in fact acted upon". Jenkins, C.J., also pointed out in *Municipal Corporation of Bomby* v. *Secretary of State*[6] that the "doctrine is often treated as one of estoppel, but I doubt whether this is correct, though it may be a convenient name to apply". The doctrine of promissory estoppel need not be inhibited by the same limitation as estoppel in the strict sense of the term. It is an equitable principle evolved by the Courts for doing justice and there is no reason why it should be given only a limited application by way of defence.[7]

History.

Promissory estoppel is an expanding doctrine. The development of this branch of law in India is *sui generis*. It has a long history of over hundred years. In *Ganges Manufacturing Company* v. *Souruj Mull*,[8] the doctrine of estoppel by representation was first applied by the Calcutta High Court in the area of private law. M/s. Cohen and Bros. had contracted with the defendants to buy 1,80,000 gunny bags for cash on delivery. Subsequently, the plaintiffs agreed with M/s. Cohen to advance Rs. 15,000 against 87,500 bags. The defendants gave delivery orders to M/s. Cohen although the goods remained unpaid for. M/s. Cohen then endorsed certain of

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1. (1956) 1 All E.R. 256.
2. (1951) 2 K.B. 215.
3. (1956) 1 All E.R. 256.
4. (1960) 2 All E.R. 314.
5. (1956) 1 All E.R. 256.
6. (1905) I.L.R. 29 Bom. 580 at p. 607.
7. Motilal Padampat Sugar Mills Co. Ltd., Messrs. *v.* State of Uttar Pradesh, A.I.R. 1979 S.C. 621 at pp. 629, 631-32. *see* also M/s R.B. Jodhamal Bishen Lal *v.* State of Jammu & Kashmir, A.I.R. 1984 J. & K. 10.
8. (1880) I.L.R. 5 Cal. 669.

the delivery orders over to the plaintiffs. On these orders the agents of the defendants at request of M/s. Cohen wrote the following words :

"the bearer of this will personally take delivery of each lot as required."

The plaintiffs took delivery of 50,000 bags but defendants refused to deliver to him the remainder on the ground that M/s. Cohen had not paid him according to the terms of the contract. On these facts, the Trial Court decreed the suit. On appeal by the defendants, the Ganges Manufacturing Co., the High Court held that by their conduct, the defendants induced the plaintiffs to advance Rs. 15,000 to M/s. Cohen and it was not open to the defendants, to repudiate the transfer. The Court observed "Estoppels in the sense in which that term is used in English legal phraseology are matters of infinite variety, and are by no means confined to subjects which are dealt with in Chapter VIII of the Evidence Act. A man may be estopped not only from giving particular evidence, but from doing acts, or relying upon any particular arguments or contentions which the rules of equity and good conscience prevent him from using as against his opponents".

This case is an important landmark in the development of doctrine of estoppel by representation in India. Three principles were established by this case : (1) the equity by way of representation is a separate variety from one which is incorporated in Secs. 115 and 117 of the Evidence Act and that Court has always a power to invoke this principle in equity and good conscience, to prevent a defendant from resiling from his promise: (2) that a promise or representation can furnish a cause of action and is not merely a defence; (3) it is not necessary that for that application of this rule of equity consideration should pass between the promisor and promisee. Twenty years thereafter the principle was made applicable to a promise/representation made by Government in *Ahmed Yar Khan* v. *Secretary of State for India*.[1] In that case the predecessor of plaintiff Ahmed Yar Khan privately constructed what is known as Hajiwah Canal on Sutlej river spending more than Rs. 9 lacs. The canal was to pass through private lands and Government lands. Government permitted the canal to pass through the Government lands on satisfying itself that considerable area of land would be rendered fit for cultivation in the District of Multan and that there was every hope of increase in the Government revenue. Thereafter a large tract of land including the lands under the canal were given by way of *inam* to the predecessors of the plaintiff in recognition of their loyalty and good service to the Government and particularly for digging the Hajiwah Canal. One of the terms in the grant was that the Government could take over the management of the canal for a temporary period for better management in the interest of public. Thereafter the Government passed an order permanently taking over the management of the canal and seriously contesting the proprietary right of the plaintiff of the canal land. The plaintiff failed in the Court of Divisional Judge of Lahore and the Chief Court at Lahore. The Privy Council allowed the appeal and decreed the suit. The Privy Council held that the Government must have intended the Khans to understand and in fact, must have led them to accept that all Government land required for the canal would be made over to them in proprietary right. The Privy Council applied the rule enunciated in *Ramsden* v. *Dyson*.[2] Thus it was established by this case that doctrine of promissory estoppel can be invoked against the Government. The case also illustrates that the rule of equity can be used as a cause of action and absence of consideration is no bar for invoking the principle.[3]

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1. (1901) 28 I.A. 212.
2. L.R. (1866) 1 H.L. 129.
3. Jasjeet Films (Pvt.) Ltd., Messrs. *v.* Delhi Development Authority, A.I.R. 1980 Delhi 82 at pp. 86-87.

The term "promissory estoppel" or an "equitable estoppel" is the development of the recent times and this new type of estoppel appears to be something belong the ordinary rule of estoppel as envisaged under Sec. 115 of the Evidence Act.[1]

The doctrine of promissory or equitable estoppel has no application to the State when the State is acting in its public, Governmental or sovereign capacity expect when it is necessary to apply the doctrine to prevent fraud or manifest injustice.[2]

The modern doctrine of promissory estoppel has become the most powerful and flexible instrument in the realm of our administrative law. The Government cannot claim immorality from the operation of that doctrine. That doctrine is available both against the Government as against their delegates or agents. Whereas the common law doctrine of estoppel is founded on a representation as to an existing fact, the doctrine of promissory estoppel is found on a representation with regard to an assurance as to future conduct. The latter enlarges the scope of the former and subsumes within its ambit not merely statements of fact but also promises as well. Unlike its common law counterpart viewed merely as a rule of evidence, the doctrine of promissory estoppel, will have the effect of creating substantive rights against the representee and thus it can be viewed as a rule of substantive law. A representation of fact or intention on which the doctrine is founded if intened to be acted upon becomes actionable. The claim for the relief depends upon that representation, which constitutes the cause of action. The representation, be it of promise or intention or future conduct on which this doctrine of promissory estoppel is founded is susceptible of generating enforceable promises and binding contractual obligations even where there is no consideration, such as at common law would have supported the promises and obligations. In any event, that doctrine, clothes the representee with the needed interest to maintain an application under Art. 226 of the Constitution of India.[3]

Promissory estoppel is recent development. It is something beyond the ordinary rule of estoppel which is contained in Sec. 115, Evidence Act. It is a new estoppel which affects legal relations. The new estoppel applies to representation as to future. The assurances given may not amount to contract binding in law but these are assurances as to future and are intended to be acted on and when the same are acted on by one of the parties, it must be held binding on the other party especially when the said other party is the Government who had made the same. In this view, the Court is guided by the *Union of India* v. *Messrs. Anglo Afghan Agencies*,[4] *Century Spinning and Manufacturing Company Limited* v. *Ulhasnagar Municipal Council*,[5] *Turner Morrison and Company Limited* v. *Hungerford Investment Trust Limited*[6] and *Union of India* v. *K.P. Joseph*.[7] In the instant case the Court is of the opinion that the assurances made by respondent No. 1, (State of Punjab) regarding the refund of the sales tax besides other concessions may not amount to contract in the strict sense but it was an assurance as to the future and it was intended to be binding on respondent No. 1 who gave it. It is a case where the parties acted and adopted a definite course. It was planned, deliberate and well

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1. Malhotra & Sons *v.* Union of India, A.I.R. 1976 J. & K. 41 at p. 44.
2. Malhotra & Sons *v.* Union of India, A.I.R. 1976 J. & K. 41 at p. 48; *see* also Dasarathi, Dr. *v.* State of Andhra Pradesh, A.I.R. 1985 A.P. 136.
3. Boda Subrahmanyam and Co. *v.* State of Andhra Pradesh, A.I.R. 1975 A.P. 126 at p. 134.
4. A.I.R. 1968 S.C. 718.
5. A.I.R. 1971 S.C. 1021.
6. A.I.R. 1972 S.C. 1311.
7. A.I.R. 1973 S.C. 303.

thought of course of action on the part of respondent No. 1 to attract the petitioner and to prompt it to set up the Vanaspati plant at Rajpura after investing money. Therefore, the conclusion is inescapble that the principle of promissory estoppel which may be described as quasi-estoppel is attracted and must govern the present case.[1]

Doctrine of promissory estoppel—When displaced

It is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise equity in favour of the promisee to enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case, because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts which has transpired since the making of the promise, public interest would be prejudiced, if the Government were required to carry out the promise, the Court would have to balance the public interest with the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest is likely to suffer if the promises were required to be carried out by the Government and determine which way the equity lies.[2]

It is well settled that doctrine of promissory estoppel can be applied against the Government or the Governmental agency where the interests of justice and fairness dictate such a course to be adopted. Doctrine of estoppel is an equitable doctrine and it must yield when equity so requires. At the same time it is to be remembered that if by enforcing a promise, public interest is likely to be prejudiced, the Courts generally strike the balance between public interest and promissory estoppel and pronounce its verdict accordingly. But while claiming exception from liability to carry its promise, the State has to place definite ground of necessity or expedience. State ought to bring out complete details before the Court as to why it is not possible to enforce the promise made by it.[3]

In the instant case the argument of the appellants that the ingredients of promissory estoppel were not met and therefore, no reliance could be placed on the said principle was held to be totally misconceived and untenable. The Government held out the promise to provide cash credit assistance on exports to be made during the particular period. On the basis of the said promise, the petitioners made exports or entered into firm commitments to make exports at prices which would not have been viable to them in the absence of the cash credit assistance. Why was the Government giving the assistance ? Because it was aware that otherwise Indian exports will not be able to stand in the international market because of lower international price. The Government wanted to encourage exports and, therefore, provided the cash assistance. The promise of the Government to provide the assistance led the petitioners to enter into firm commitments which otherwise they would not have made. Based on the promise the petitioners have altered their position. Thus, it was held that Government cannot be allowed to go back on its promise.[4]

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1. Amrit Vanaspati Company Limited *v.* State of Punjab, (1975) 77 Punj. L.R. 557 at pp, 561, 565.
2. Ghulam Ahmed *v.* State of Jammu and Kashmir, 1986 Kashmir L.J. 48 at p. 52.
3. Davinder Singh *v.* State of J.& K, 1988 Kash. L.J. 127 at pp. 132, 133.
4. Union of India *v.* Cosmique International, 1994 (54) D.L.T. 71 at p. 74; *see* also State of Rajasthan *v.* Shyam Lal Joshi, 1994 (1) S.C.C. 593.

The doctrine of promissory estoppel has been evolved by equity to avoid injustice. The principle is that one who demands equity must do equity and must come with clean hands. Suppressions of facts and recourse to falsehood would disentitle a person to claim this equitable relief.[1]

In *Mohd. Yida Karim* v. *State of Bihar*,[2] it was held that Government can change its policy and such a change is neither hit by Art. 14 of the Constitution nor by the provisions of Sec. 115 of the Evidence Act nor by Secs. 42 and 43 of Bihar Excise Act.

In the instant case the respondents were estopped from charging the amount raised by them in the revised demand on the principle of promissory estoppel. Petitioners had applied for allotment of the shops under Scheduled Castes quota in response to advertisement and in terms of the advertisement they were required to deposit 25% of of the reserve price as indicated in the allotment letter. On the representation of the respondents that the petitioners were required to pay 25% of reserve price as mentioned in the demand letters, the petitioners acting on such representation deposited the requisite amount and after taking possession of shops from respondent-DDA have also started business. Had the petitioners known at that time of deposit of the 25% of the Reserve price, as they were required to pay originally, that revised demand of balance of 25% of reserve price would be raised by the DDA, they would have perhaps not purchased such shops. Thus it was held that DDA is estopped from raising further demand of balance of 25% of the reserve price *vide* their impugned letters under the doctrine of promissory estoppel.[3]

The essence of doctrine of promissory estoppel is that where one party by its words or conduct made to the other a clear and unequivocal promise which is intended to created legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.[4]

The doctrine of promissory estoppel applies when, *inter alia*, there is a clear and unequivocal promise relying on which the other side has acted to his prejudice the way he has done.[5]

Before any promissory estoppel can be raised, there must be a promise or representation to act in a certain way.[6]

The doctrine of promissory estoppel does not apply when a false certificate has been obtained and fraud has been played on the authorities.[7]

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1. Reeta *v.* Berhampur University, A.I.R. 1993 Orissa 27 at p. 33.
2. 1992 (2) S.C.J. 235 at p. 238.
3. Devender Kumar *v.* D.D.A., 1994 (54) D.L.T. 68 at pp. 70, 71.
4. Brij Bihari Singh *v.* State of M.P., 1988 M.P.L.J. 311 at pp. 325, 326 ; Forward Construction Co. *v.* Prabhat Mondal, A.I.R. 1986 S.C. 391 (relied on).
5. Anchar Ali *v.* State of Assam, A.I.R. 1989 Gau. 12 at p. 15.
6. Moti Ram *v.* New Delhi Municipal Committee, A.I.R. 1988 Delhi 57 at p. 58.
7. B. Venkata Rao *v.* Principal, Andhra Medical College, Visakhapatnam, A.I.R. 1989 A.P. 159 at p. 166.

Courts will not grant any redress where the person to whom representation has been made, is cognizance of its falsity.[1]

The principle of promissory estoppel is also not applicable where an order on the basis of which estoppel is claimed is *ultra vires*. The principle is further not applicable to compel a party to do an act prohibited by law or to prevent it from discharging its legal duty. The principle is likewise not applicable to the Legislature in exercise of its legislative function. It also cannot be invoked if it is found to be inequitable or unjust. These are the broad outlines.[2]

The principle of promissory estoppel pertains to the realm of equity. If a public authority has made a promise it is bound by that when the same was acted upon by the person to whom it was made. The Supreme Court of India reiterated the applicability of the doctrine of promissory estoppel in public law in *Union of India* v. *Godfrey Philips India Ltd.*,[3] and while observing that the Indian Law has gone far ahead of the narrow position adopted in England, stated the rule; "It is now well settled that the doctrine of promissory estoppel is not limited in its application only to defence but it can also find a cause of action". This doctrine has no application in respect of legislature functions nor can a public authority be debarred from enforcing a statutory provision. Nothing which is contrary to law falls within the domain of the doctrine. Being an equitable doctrine it must yield to equity.[4]

This doctrine of promissory estoppel has been formulated with characteristic lucidity in Halsbury's *Laws of England*, 3rd Ed., Vol. 15, p. 175, para 344, in the following terms :

> "'Promissory estoppel", when one party has, by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.....
>
> "The doctrine may have been too widely stated in recent cases and its limits are not yet finally settled. The doctrine cannot create any new cause of action where none existed before...."

"Estoppel" is a rule of equity. That rule has gained new dimensions in recent years. A new class of estoppel, i.e., promissory estoppel has come to be recognized by the Courts in this country as well as in England. The full implication of promissory estoppel is yet to be spelled out. The doctrine of promissory estoppel has assumed importance in recent years though it was dimly noticed in some of the earlier cases. The leading case on the subject is *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[5] The facts of that case are as follows :

> "Central London Property Trust Ltd. let to the High Trees House Ltd. a subsidiary of the former, a block of flats for a term of 99 years from 29th September, 1937, at a ground rent of $ 2,500 a year. In the early part of 1940, owing to war conditions then prevailing only a few of the flats in the block

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1. B. Venkata Rao *v.* Principal, Andhra Medical College, Visakhapatnam, A.I.R. 1989 A.P. 159 at p. 165.
2. S.R. Dass Shri *v.* State of Haryana, 1988-1 (93) P.L.R. 430 at pp. 448, 449.
3. A.I.R. 1986 S.C. 806.
4. Andhra Pradesh Rayons Ltd., *v.* Government of A.P., A.I.R. 1997 A.P. 23 at p. 26 : 1997 (1) A.L.T. 69 : *see* also, Y. Konda Reddi *v.* State of A.P., A.I.R. 1997 A.P. 121.
5. (1947) 1 K.B. 130.

were let to tenants and it became apparent that the High Trees House Ltd. would be unable to pay the rent reserved by the lease out of the rent of the flats. Discussions took place between the directors of the two companies and as a result on 3rd January, 1940, a letter was sent by the lessor to the lessee confirming that the ground rent of the premises would be reduced from $ 2, 500 to $ 1,250 from the beginning of the term. The lessee thereafter paid the reduced rent. By the beginning of 1945, all flats were let but the lessee continued to pay only the reduced rent. In September, 1945, the lessor wrote to the lessee demanding rent at the rate of $ 2,500 per year. It also claimed at that rate for the quarters ending 29th September and 25th December, 1945. The lessee repudiated that claim. The question for decision was whether the lessor was bound by the concession that it had agreed to show as the same was not supported by any consideration. Answering that question Denning, J. (as he then was) held that where parties enter into an agreement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the Court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense. Therein the Court divided the claim made in the suit into two categories one for the period prior to the end of 1945 and the other for the period thereafter. It disallowed the claim of the lessor in respect of the former and allowed the claim relating to the latter period."

The rule laid down in *Central London Property Trust Ltd.*, v. *High Trees House Ltd.*[1] again came up for consideration before the King's Bench in *Combe* v. *Combe.*[2] Therein the Court ruled that the principle stated in *High Trees* case,[3] is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word. But that principle does not create any cause of action which did not exist before so that, where a promise is made which is not supported by any consideration, the promisee cannot bring an action on the basis of that promise. This principle enunciated in the *High Trees* case[4] was also recognized by the House of Lords in *Tool Metal Manufacturing Co. Ltd.*, v. *Tungsten Electric Co. Ltd.*[5]

Reference may be made to a decision of the Supreme Court in which that principle has been recognized in our country, and that is, in the case of *Union of India* v. *Anglo-Afghan Agencies.*[6] The facts of that case were that the Textile Commissioner published in 10th October, 1962, a scheme called the Export Promotion Scheme providing incentives to exporters of woollen goods. By that Scheme as extended to exports to Afghanistan, exporters were invited to get themselves registered with the Textile Commissioner for exporting woollen goods,

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1. (1947) 1 K.B. 130.
2. (1951) 2 K.B. 215.
3. (1947) 1 K.B. 130.
4. *Ibid.*
5. (1955) 2 All E.R. 657.
6. A.I.R. 1968 S.C. 718.

and it was represented that the exporters would be entitled to import raw materials of the total amounts equal to 100 per cent. of the f.o.b. value of the exports. Under that Scheme the respondents who were a firm dealing in woollen goods exported to Afghanistan in September, 1963 woollen goods of the f.o.b. value of over Rs. 5,00,000. The Deputy Director in the office of the Textile Commissioner, Bombay, however, issued to the respondents an Import Entitlement Certificate for Rs. 1,99,459 only. Representations made by the respondents of the Union Government having failed, a writ petition under Art. 226 of the Constitution was filed before the High Court of Punjab by the respondent for a writ or order directing the Union of India and the Textile Commissioner as well as the Joint Chief Controller of Imports and Exports, Bombay, to issue a licence for the entire balance of the value of the goods exported by the respondents. The High Court granted the writ sought by the respondents on that petition, and the Union of India and its officers appealed from that decision to the Supreme Court. It was held that the claim of the respondent was properly founded upon the equity which arose in their favour as a result of the representation made on behalf of the Union of India in the Export Promotion Scheme and the action taken by the respondents acting upon that representation to their prejudice under the belief that the Government would carry out the representation made by it. It was further observed by the Supreme Court that equity did not fall within the terms of Sec. 115 of the Evidence Act. The equity which was recognized and enforced by the Supreme Court in the *Anglo-Afghan Agencies* case,[1] was none other than "promissory estoppel". On a proper analysis, before the doctrine of promissory estoppel, can be invoked it must be proved (1) that there was a representation or promise in regard to something to be done in the future, (2) that, that representation or promise was intended to affect, the legal relations of the parties and to be acted upon accordingly, and (3) that it is one on which the other side has, in fact, acted to its prejudice.[2] In order to create estoppel the party asserting it has to show that it has been induced to act to its detriment or misled to its injury. A change of one's position for the worse because of reliance on anothers' act is an element of estoppel.

Estoppel how created.

As said by Lord Coke the name "estoppel" was given because a man's own act stoppeth or closeth up his mouth to allege or plead the truth.

The name "estoppel"; how it came into existence.

Estoppel is a preclusion in law preventing a man from alleging or denying a fact in consequence of his own previous allegation or denial. It is, however, a shield for defence but not a weapon of attack and does not furnish a basis for action.

Under the common law the doctrine of estoppel by representation was confined to representation as to facts either past or present but not to representations or promises concerning the future. A "promissory estoppel" which is a recent development of an equitable estoppel operates to preclude perpetration of fraud or causing of injury, in a case, where the representation or promise has been made to induce an action on the part of the party setting up the estoppel.

Estoppel by representation, under common law.

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1. A.I.R. 1968 S.C. 718.
2. Air Corporation Employees Union *v.* C.B. Bhirade, A.I.R. 1971 Bom. 268 at pp. 291-92 ; *see* also Tamil Oil Industries *v.* State of Maharashtra, 1984 Mah. L.J. 321.

In such a case the party making the promise is precluded from asserting want of consideration therefor.[1]

Modern doctrine of promissory estoppel.

The modern doctrine of promissory estoppel is a recent advance in public law. The common law doctrine of estoppel contained in the Evidence Act, 1872 is but a shadow of its modern self. Orthodox concepts have been discarded. Consideration is no longer necessary. One can found an independent cause of action on promissory estoppel now. Not only as a shield it can also be used as a sword. Detriment is no longer required to be proved. It is enough if the promisee has altered the position on the faith of the representation. The desire to do justice through equitable possibilities is so strong that the old traditional concepts of private law are crumbling and giving rise to a new estoppel and a "new equity" in public law.[2]

The scope of estoppel has been indicated by the Supreme Court in the case of *Union of India* v. *Anglo-Afghan Agencies*.[3] In *T. Morrison and Company* v. *Hungerford Investment Trust Ltd.*[4], the Court indicated :

> "Estoppel is a rule of equity. That rule has gained new dimensions in recent years. A new class of estoppel i.e., promissory estoppel has come to be recognized by the courts in this country as well as in England."

A representation made by one party for the purpose of influencing the conduct of the other party and acted upon by him, will, in general, be sufficient to entitle him to the assistance of the Court of Equity for the purpose of realizing such representaton was the dictum of Lord Cottenham cited with approval in *Maunsell* v. *Hedges*.[5]

The maxim that a person cannot approbate and reprobate is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury's *Law of England*, Vol. XIII, p. 454, para 512 :

> "On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g., payment of costs) be heard to say that it is invalid and ask to set aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded, nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it."

In the case of an estoppel, the representee should have altered his position to his detriment for the rule of approbate and reprobate to apply the representator must have obtained an advantage by the representation made or the stand taken by him.[6]

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1. *Vide* Ames *Lectures on Legal History*, p. 143.
2. Bansal Exports (P) Ltd. *v.* Union of India, A.I.R. 1983 Delhi 445 at p. 452.
3. A.I.R. 1968 S.C. 718.
4. A.I.R. 1972 S.C. 1311.
5. (1854) 4 H.L.C. 1039 ; Kamalendu Prasad Padhi *v.* Samalpur University, A.I.R. 1976 Orissa 134 at p. 138.
6. Jiwan Das *v.* Smt. Sarla Devi, A.I.R. 1976 All. 261 at pp. 219, 220 ; *see* also Hans Raj Bansal *v.* Hardev Singh, A.I.R. 1984 P. & H. 229.

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American Jurisprudence, Vol. 19, para. 53, pp. 657-658, contains the following statement of law :

> "The doctrine of 'promissory estoppel' is by no means new, although the name has been adopted only in comparatively recent years. According to that doctrine, an estoppel may arise from the making of a promise, even though without consideration, if it was intended that promise should be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice...."

Doctrine of "promissory estoppel", American law.

The principle of "promissory" estoppel, which is also known as "equitable" or "quasi" estoppel is expressed in the following words in Halsbury's *Laws of England*, 3rd Ed., Vol. 15, p. 175 :

> "When one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

Promissory estoppel under English law.

The trial in which the appellants were tried for the murders, was registered as Sessions Trial No. 55 of 1971, while the one under Sec. 27, Arms Act was numbered as Sessions Case No. 56 of 1971. The main case was decided first, and that under the Arms Act subsequently. At both the trials, in his examination under Sec. 342, Cr. P.C., Ajit Singh, appellant had admitted that the gun in question, was recovered from his possession at the Rajendra Hospital, Patiala. In the case under the Arms Act, the Trial Judge did not record any finding that Ajit Singh appellant was not in possession of the gun. He acquitted him on the sole ground that the intention to use the gun or allow its use for any unlawful purpose had not been proved, which is an essential ingredient of an offence under Sec. 27, Arms Act. It was held that the doctrine of issue estoppel was not applicable to the facts of the instant case.[1]

In the recent years this doctrine has been considerably developed as will appear from *Lyle Mellor* v. *A. Lewis & Co. (Westminister) Ltd.*[2] Denning, L.J., said—

> "I am clearly of opinion that his assurance was binding, no matter whether it is regarded as a representation of law or of fact or a mixture of both, and no matter whether it concerns the present or the future. It may not be such as to give rise to an estoppel at common law, strictly so called, for that was confined to representations of existing fact; but we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations.

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1. Bhoor Singh *v.* State of Punjab, A.I.R. 1974 S.C. 1256 at p. 1261.
2. (1956) 1 All E.R. 247 ; *see* also Nihal Singh *v.* Director of Education, 1983 Lab. I.C. 1662.

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"This new estoppel applies to representations as to the future. Take the kind of assurance which was neld binding in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[1] and in *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*,[2] *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[3] in the Court of Appeal *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[4] and in the House of Lords *Tool Metal Manufacturing Co. Ltd.* v. *Tungston Electric Co. Ltd.*[5] In each of those cases a creditor during the war gave a promise or assurance to the other party that he would for the time being forego sums which were thereafter to become due to him...The assurance was not a contract binding in law, but it was an assurance as to the future, it was intended to be acted on, it was acted on, and it was held binding on the party who gave it. This appears distinctly from the speech of Lord Cohen in (1955) 2 All E. R. 657 at pp. 685, 686."

There could be no estoppel in respect of a fact which did not exist, for the law of estoppel must relate to an existing fact. If that fact is not there, mere future promise or promise to do something in some subsequent date will not create any estoppel in favour of the party claiming it.[6]

The authorities cannot give assurance contrary to the statutory rules. The sites are required to be disposed of by auction, allotment or sale as per the procedure prescribed. The authorities who are bound by the rules of procedure cannot make any representation or promise to allot particular sites to the applicants. Even if they make such promise or assurance, the doctrine of promissory estoppel cannot be invoked to compel them to carry out the promise or assurance which is contrary to law.[7]

The promissory estoppel would be available against subordinate or delegated legislations, when such subordinate legislations are used or made by ignoring the resolutions passed by the Municipal Corporation.[8]

It is well settled in law that the principle of promissory estoppel applies with full force even to administrative actions of the State which strictly speaking do not give rise to contractual obligations between the parties and that if a citizen has acted upon an administrative assurance to his disadvantage the State can be pinned down to its promise.[9]

The plea of promissory estoppel is a mixed question of fact and law. For obtaining relief under such a plea, foundation is required to be laid down in the pleadings.[10]

Promissory estoppel—Mixed question of law and fact.

13. Promissory estoppel against Government—Maintainability.—The principle of promissory estoppel can hardly be applied to a case where Government is free to modify its policies from year to year depending on a variety of factors.[11]

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1. (1956) 1 All E.R. 256.
2. (1953) 69 R.P.C. 108.
3. (1954) 2 All E.R. 28.
4. (1953) 69 R.P.C. 108.
5. (1955) 2 All E.R. 657.
6. Nirmal Kumar Moulik *v.* Smt. Champabala Roy, A.I.R. 1971 Cal. 407 at p. 410 ; *see* also Jullundur Improvement Trust *v.* Kuldip Singh, A.I.R. 1984 P. & H. 186.
7. Paradise Printers *v.* Union Territory of Chandigarh, (1988) 1 S.C.C. 440 at p. 449 : (1988-1) 93 P.L.R. 400 at p. 405.
8. O.P. Bhalotra *v.* Municipal Corporation of Delhi, 1988 Lab. I.C. 634 at p. 644 (Delhi).
9. Ashutosh Biswas, Dr. *v.* State of Orissa, A.I.R. 1989 Orissa 120 at p. 122.
10. Associated Cement Companies Ltd. *v.* State of Rajasthan, A.I.R. 1981 Raj. 133 at p. 138.
11. Preethi Srinath, Miss *v.* Selection Committee for Govt. and Pvt. Medical Colleges, A.I.R. 1981 Kant. 58 at p. 61 ; *see* also Vithalrao Mahale *v.* State of Madhya Pradesh, A.I.R. 1984 M.P. 70.

There can no promissory estoppel against the exercise of legislative power of the State. So also the doctrine cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent of the Government must be held to have notice of the limitations of his authority.[1]

It is urged that the State Government was bound by the rule of promissory estoppel and hence could not retire such teachers at the age of 55 years notwithstanding the fact that the age of superannuation has been reduced to 55 years from 58 years. The petitioners relied upon the decisions in *Union of India* v. *Anglo-Afgan Agencies*[2] and *Century Spinning and Mfg. Co. Ltd.* v. *Ulhasnagar Municipal Council*.[3] In support of the above contention. It is seen that both the above cases are distinguishable from the present case. The Government did not tell the concerned teachers that the age of superannuation would not be altered by a subsequent amendment. No Government can bind a law making authority by its representation. It is a basic principle of constitutional law that no contract or grant can cutrail the Legislative power granted by the Constituton. Dealing with a similar question the Federal Court observed in *Thakur Jagannath Baksh Singh* v. *United Provinces*[4] as follows :

> "If once it be found that the subject-matter of a Crown grant is within the competence of a provincial Legislature nothing can prevent that Legislature from legislating about it, unless the Constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally."

The above view, of the Federal Court was approved by the Privy Council in *Thakur Jagannath Baksh Singh* v. *U.P.*[5] and followed by the Supreme Court in *Maharaj Umeg Singh* v. *State of Bombay*.[6] Hence, even granting that there had been a representation on the State Government both the State Government and the officials concerned are bound by the impugned amendment which is the result of a legislative action.[7]

The power of the State Government to make reservation in conformity with Art. 15(4) of the Constitution can neither be affected nor negatived by the mere fact that a statutory regulation made by it for admission into the Medical Colleges do not provide for reservation. The power to make reservation is derived under Art. 15(4) of the Constitution. The exericse of that power cannot be prevented merely because some statutory instruments had not earlier provided for reservation.[8]

In the abovenoted case the original prospectus that was issued for admission to the Post-Graduate Medical Course in the Medical College did not contain any provision for reservation for scheduled caste or scheduled tribe candidates. After the publication of the result the State created reservation for the members of the scheduled caste and scheduled tribes. It was held that the State was not prevented

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1. Dr. S.K. Juwarkar *v.* Dr. Ku, Maria, D.P. De Rege, A.I.R. 1982 Goa, Daman and Diu, 1 at p. 6.
2. A.I.R. 1968 S.C. 718.
3. A.I.R. 1971 S.C. 1021.
4. A.I.R. 1943 F.C. 29.
5. 73 I.A. 123.
6. A.I.R. 1955 S.C. 540.
7. Laxman *v.* State of Karnataka, (1974) 2 Knt. L.J. 275 at p. 295-296.
8. Deepak *v.* State of Bihar, A.I.R. 1982 Pat. 126 at p. 130.

on principle of provision of estoppel for creating reservation for the members of the scheduled castes and scheduled tribes.

Promissory estoppel—When Government can be allowed to resile.

It is well settled that if the Government wants to resile from a promise or an assurance given by it on the ground that undue advantage was being taken or misuse was being made of the concessions granted the Court may permit the Government to do so but before allowing the Government to resile from the promise or go back on the assurance the Court would have to be satisfied that allegations by the Government about misuse being made or undue advantage being taken of the concessions given by it were reasonably well established.[1]

There can be no doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel.[2]

Whenever the promissory estoppel is invoked what the Court ought to ask is : Whether the communication coming from the Government is legislative or executive in character. If the communication is legislative, the doctrine of promissory estoppel cannot be invoked. In the exercise of its statutory powers the Government cannot fetter itself or its successors. It cannot divest itself of the freedom of action. A public authority created to exercise statutory powers vested in it in the public interest under the authority if the Legislature cannot act inconsistently or incompatibly with the purposes for which the statutory powers have been granted estoppel would create contractual fetters. It would fetter the exercise of statutory powers. If the communication is executive in character, on the authorities it appears that the doctrine of promissory estoppel can be properly pressed against public authorities.[3]

Supreme Court considered the decisions of *Motilal Padampat Sugar Mills* v. *State of Uttar Pradesh*[4] and *Jeet Ram* v. *State of Haryana*,[5] and held :

> "What has been laid down in *Motilal Padampat Sugar Mills* v. *State of Uttar Pradesh*[6] represents the correct law in regard to the doctrine of promissory estoppel and their Lordships expressed disagreement with the observation in *Jeet Ram* v. *State of Haryana*[7] "to the extent that they conflict with the statement of law in *Motilal Padampat Sugar Mills* v. *State of Uttar Pradesh* and introduce reservations cutting down the full width and amplitude of the propositions of law laid down in that case."

In *P. Raman* v. *Commissioner, Madurai City Municipal Corporation, Madurai*,[8] it was clear from the auction-notice and also the tender notice that the right to cancel or to refuse to accept the highest bid in the auction and the tender was reserved with the corporation itself. The appellant had not only deposited the fee alongwith the tender but had also made the deposit for bidding at the auction. Corporation stopped the auction. It was held that the Corporation could not be directed to hold the auction.

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1. Assistant Commissioner of Commercial Taxes (Asstt.), Dharwar *v.* Dharmendra Trading Company, 1988 (3) S.C.C. 570 at p. 573.
2. Union of India *v.* Godfrey Philips India, Ltd., A.I.R. 1986 S.C. 806 at pp. 815, 816.
3. Bansal Exports (P) Ltd. *v.* Union of India, A.I.R. 1983 Delhi 445 at pp. 452-53.
4. A.I.R. 1979 S.C. 621.
5. A.I.R. 1980 S.C. 1285, referred in Godfrey Phillips India Ltd., A.I.R. 1986 S.C. 806 at p. 815.
6. A.I.R. 1979 S.C. 62.
7. A.I.R. 1980 S.C. 1285, referred in Godfrey Phillips India Ltd., A.I.R. 1986 S.C. 806 at p. 815.
8. A.I.R. 1982 Mad. 56.

The Government policies framed under the Imports and Exports (Control) Act, 1947 (the Act) are liable to be changed in the public interest according to the needs of the country. By the Export Control Order of 30th March, 1979 the Government did not impose a ban on export of the goods in question. The Order only restricted the export to cases to be decided "on merits". To precontrol cases para 316 was made inapplicable and in place of that paragraph new guidelines were laid down on 12th September, 1979. Para 316 of the Hand Book does not constitute a statutory promise against which the doctrine of promissory estoppel can be properly pressed. If they are "statutory promises" they can be changed by the statutory authority. They are not statutory promises because sub-para (6) of Para 316 itself says that these guidelines "shall not confer any right on the persons concerned to the grant of any export licence or permission to export". Whenever promissory estoppel is invoked what the Court ought to ask is: Whether the communication coming from the Government is legislative or executive in character. If the communication is legislative the doctrine of promissory estoppel cannot be invoked. In the exercise of its statutory powers the Government cannot fetter itself or its successors. It cannot divest itself of the freedom of action. A public authority created to exercise statutory powers vested in it in the public interest under the authority of the legislature cannot act inconsistently or incompatibly with the purposes for whcih the statutory powers have been granted. Estoppel would create contractual fetters. It would fetter the exercise of statutory powers. This raises the question of relationship between this doctrine and the doctrine concerning the fettering of public powers. Would the doctrine of estoppel be excluded whenever its operation would fetter the powers of a public body in a way that could not be done by a contract ? It seems logiclal that it should be so.[1] The application of estoppel in such a case would infringe the rule concerning statutory duties. The basic powers of Government cannot be subject of bargain. Earl of Birkenhead in a case decided by the House of Lords in 1926 formulated the principle concerning public authorities in these words :

> ".....if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties."[2]

An estoppel cannot be raised to prevent the exercise of a statutory discretion or to prevent or excuse the performance of statutory duty.[3] A further extension of the doctrine of promissory estoppel would erode the general principle as set out in a long line of cases of which the decision of the Privy Council in *Maritime Electric Co.* v. *General Dairies Ltd.*[4] and the judgment of the English Divisional Court in *Southend-on-Sea Corporation* v. *Hodgson (Wickford) Ltd.*[5] are notable examples.[6] Therefore, there is a rule, that a public authority cannot by contract (its own action) disable itself from exercising a statutory power. *Jit Ram Shiv Kumar* v. *State of Haryana*[7] emphasises this aspect of the doctrine of promissory estoppel.

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1. *Government and Law*, Hartley and Grifith, pp. 294-295.
2. Birkdale District Electric Supply Company Ltd. *v.* Southport Corporation, (1926) A.C. 355 at p. 364.
3. *See* Spencer Bower and Turner on *Estoppel by Representation*, 3rd Ed., 1977 p. 141 and Western Fish Products *v.* Penwith, DC (1981) 2 All E.R. 204 at p. 219, *per* Megaw, L.J.
4. (1937) A.C. 610.
5. (1962) 1 K.B. 416.
6. *Western Fish* at p. 221.
7. A.I.R. 1980 S.C. 1285.

It is not possible to accept the view that the doctrine does not apply against the executive power, and the executive is free to do what it likes. If the communication is executive in character, on the authorities it appears that the doctrine of promissory estoppel can be properly pressed against public authorities, as was done in *Union of India* v. *Anglo-Afghan Agencies*,[1] against the Textile Commissioner, and against the Chief Secretary in *M.P. Sugar Mills* v. *State of Uttar Pradesh*.[2] The doctrine of promissory estoppel is not attracted where the Government exercises its legislative or statutory powers. The doctrine may be attracted where the Government has acted in exercise of its administrative or executive power. The Government and its officers are not entitled at their mere whim to ignore the promises made by the Government and the Government is bound to honour its solemn promises and assurances, if on the basis of representations a person has acted to his detriment or, as said in *M.P. Sugar Mills* v. *State of Uttar Pradesh*,[3] even altered his position. The Government would be bound even though the promise made is not recorded in the form of a formal contract as required by the Constitution.

The imports of palm oil having been made at huge cost on a clear representation by Government that imported oil could be used for the manufacture of refined palm oil, the Government would be estopped from bringing the case of such importers within the revised policy on the basis of the doctrine of the promissory estoppel. It is true that the doctrine applied by the Supreme Court in the case of *Anglo-Afghan Agencies*[4] has since been considerably watered down in the country of its origin on account of the judicial controversy following the decision in the case of *Robertson* v. *Minister of Pensions*[5] and it has been recognised in England that the doctrine was not available, "as a sword" of attack though it may still be "used as a shield" of defence and there is a considerable judicial thinking which concedes to the sovereign authority the power to change the policy or modify the administrative action even if on the basis of any representation made earlier a citizen may have acted to his prejudice, a view which is shared by juristic opinion in India. The doctrine would nevertheless be still available in India because in spite of the controversy, the decision of the Supreme Court in the case of *Anglo-Afghan Agencies* still holds the field.[6]

On the other hand there are certain decisions which support the contrary view. It is said that if the Government or any authority on behalf of the Government has made a representation and acting on that representation a party has altered its situation, then, it is not open to the Government to resile from that position and at the instance of the party who has altered its situation to its disadvantage, the Court is entitled to direct the Government or the authority to carry out its promises or its scheme.[7]

Where the lessee surrenders his legal right created in his favour under the earlier lease on representation of the State that the lessee will be provided with alternate sites and will enjoy the property for 90 years and thus changes his position to his prejudice the lessee is entitled to claim alternate site from the State on the basis of promissory estoppel.[8]

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1. A.I.R. 1968 S.C. 718.
2. A.I.R. 1979 S.C. 621.
3. A.I.R. 1979 S.C. 621.
4. A.I.R. 1968 S.C. 718.
5. (1949) 1 K.B. 227.
6. Jain Shudh Vanaspati Ltd., Messrs. *v.* Union of India, A.I.R. 1979 Delhi 122 at p. 128.
7. Messrs. Kothari Oil Products Company, Rajkot *v.* Government of Gujarat, A.I.R. 1982 Guj. 107 at p. 111.
8. Rout, K.C. *v.* State of Orissa, A.I.R. 1979 Orissa 120 at p. 125.

There is divergence of opinion in various decisions of the Supreme Court regarding the law of promissory estoppel against the State Government. In one set of cases it has been held that promissory estoppel can be the basis of a cause of action against the State. The first in the series of cases supporting this view in *Collector of Bombay* v. *Municipal Corporation of the City of Bombay*.[1] In all these cases, it was held that the public bodies or the State Government were as much bound as individuals were to carry out obligations incurred by them, because parties seeking to bind the authorities have altered their position to their disadvantage or have acted to their detriment on the strength of the representations made by these authorities. A contrary view explaining the *Anglo-Afghan Agencies* case,[2] was taken by a constitutional Bench of the Supreme Court, in *N. Ramanatha Pillai* v. *State of Kerala*,[3] wherein their Lordships held :

> "As a general rule the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity. An exception however, arises where it is necessary to prevent fraud or manifest injustice."

In *Excise Commissioner, U.P., Allahabad* v. *Ram Kumar*,[4] it was held:

> "There can be no question of estoppel against the Government in exercise of its legislative, sovereign or executive powers."

In spite of the above divergent opinion, there is unanimity in all the decisions delivered by the Supreme Court and other courts on the point that where the Government owes a duty to the public to act differently, promissory estoppel cannot be invoked to prevent the Government from doing so. The doctrine of promissory estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The doctrine of promissory estoppel cannot be applied in teeth of an obligation or liability imposed by law. It may also be noted here that promissory estoppel cannot be invoked to compel the Government or even a private party to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative powers. The Legislature can never be precluded from exercising its legislative functions by resort to the doctrine of promissory estoppel. It is one of the obligatory duties of the State Government to provide an opportunity to its citizens to be governed by the local self-government. As such, it cannot be said that the State Government was or is precluded from extending the limits of Lakheri Municipality.[5]

Promissory estoppel—Service matter—Whether a selected candidate has a right of appointment.

Where neither the statement in the advertisement that the appoinments will be made in accordance with the select list nor the relevant communication in which the petitioners were informed of their selection and were told that they would be called for training and appointed as per the training schedule can be regarded as a promise to make appointment for it is well settled position in law that mere selection confers no right to appointment and secondly there can

1. A.I.R. 1951 S.C. 469 ; followed by the Union of India *v.* Anglo-Afghan Agencies, A.I.R. 1968 S.C. 718; Century Spinning and Manufacturing Co. Ltd. *v.* Ulhasnagar Municipal Council, A.I.R. 1971 S.C. 1021 ; Turner Morrison and Co. Ltd. *v.* Hungerford Investment Trust Ltd., A.I.R. 1972 S.C. 1311 and Radhakrishna Agarwal *v.* State of Bihar, A.I.R. 1977 S.C. 1496.
2. A.I.R. 1968 S.C. 718.
3. A.I.R. 1973 S.C. 2641.
4. A.I.R. 1976 S.C. 2237.
5. Associated Cement Companies Ltd. *v.* State of Rajasthan, A.I.R. 1981 Raj. 133 at p. 138.

be no appointment without a post. The statement in the advertisement only meant that candidates who are included in the select list, when appointed will be required to be on probation and they would be entitled to the pay scale as specified in the advertisement. On the facts and circumstances of the case the principle of promissory estoppel can be invoked and enforced.[1]

Where Government makes a promise knowing or intending that it would be acted on by the promisee and in fact, the promisee acting in reliance on it, alters his position, the Government would be held bound by the promisee and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not in the form of a formal contract as required under Art. 299 of the Constitution. The Government cannot claim to be exempt from the liability to carry out the promise on some indefinite and undisclosed ground of necessity or expediency, nor can the Government claim to be the sole judge of its liability and repudiate it on an *ex parte* appraisement of the circumstances. It is only if the Court is satisfied on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The doctrine of promissory estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The doctrine of promissory estoppel cannot be applied in teeth of an obligation or liability imposed by law. If the subordinate agency of State does an act against the directions of the superior authority, there can be no promissory estoppel in law.[2]

Where it has not been shown or even averred that the petitioners who had appeared for the P.M.T. and P.E.T. would not have appeared if there had been a rule empowering relaxation in the percentage of qualifying marks prescribed in the case of S.C./S.T. candidates, and as a result of any representation made by the State Government in that behalf, the petitioners have altered their position to their detriment, the question of promissory estoppel does not arise.[3]

In *Dasarathi, Dr.* v. *State of Andhra Pradesh*,[4] the petitioners suffered no detriment by being appointed as a Poet Laureate. But in any case, the doctrine of promissory estoppel will have no application to the abolition of a Governmental post. For this reason it was held that the theory of promissory estoppel will not help the petitioner.

In *Hasmukh Balubhai Shah* v. *State of Maharashtra*,[5] reliance was placed on the provisions of Sec. 115 of the Evidence Act, particularly the doctrine of promissory estoppel and in that behalf it is submitted that the investigating officer Shri Karnik, who was in charge of the relevant investigation has promised the petitioner that even though he was recording his statement still the witness would not be called to give any evidence in a Court of law. Unfortunately Shri Karnik is no more. However, the concerned investigating officer, who took over and ultimately filed

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1. Muralidhar N. Inamdas *v.* Chairman, Bijapur Grameena Bank, Bijapur, 1988 Lab. I.C. 887 at p. 895 (Knt.).
2. Chhatisgarh Hydrade Lime Industries, Bilaspur *v.* Special Area Development Authority, Bilaspur, A.I.R. 1989 M.P. 82 at p. 88.
3. Awadeesh Nema *v.* State of Madhya Pradesh, A.I.R. 1989 M.P. 61 at p. 70.
4. A.I.R. 1985 A.P. 136 at p. 144.
5. 1986 (1) Cr. L.C. 70 at p. 77 (Bom.) : *see* also, Wellworth Plastics and Chemicals, Quilon *v.* State of Kerala, 1986 Tax. L.R. 2203 at p. 2205.

charge sheet obviously felt that there is no question of any promise that could be legitimately given to the petitioner by the said investigating officer. It is also rightly submitted by the Public Prosecutor that the concerned officer should basically have jurisdiction and authority to give such a promise. It also cannot be overlooked that this plea has come forth for the first time nearly 10 years after the statement was recorded. It is impossible to accept that any such promise would ever has been given or in fact was given by the investigating officer.

14. Estoppel and *res judicata*.—The principle of *res judicata* is based upon the maxim that no one shall be vexed twice over the same matter. In *Mst. Lachmi* v. *Mst. Bhulli*,[1] it was held that "*res judicata* is either estoppel by verdict or estopped by judgment (or record), and, there is no such thing as estoppel by 'decree'.....". The determining factor is not the decree but the decision of the matter in controversy.

In *Narhari* v. *Shankar*,[2] the decision in *Mst. Lachmi* v. *Mst. Bhulli*[3] was approved.[4]

If an issue does not arise out of the pleading, the matter covered by it cannot be said to be a matter directly and substantially in issue in the suit and when a finding on the issue is given and it is claimed by a party that it operates as *res judicata*, the claim can be met by the other party by showing that the issue did not arise directly and substantially in the previous suit. The other party, however, may be estopped by his own conduct from pleading so, in which case the only obstacle in the way of the decision operating as *res judicata* would disappear.

Estoppel and *res judicata*.

The decision will operate as *res judicata* only when the other party is estopped from pleading that the issue did not arise directly and substantially in the previous suit; so long as he is not estopped, it cannot operate as *res judicata*.[5]

It is now well settled principle of law that where a Court or Judicial Tribunal of competent jurisdiction has finally adjudicated subject matter in litigation, any party or privy to such a litigation, against any other party or privy thereto, and in all cases of judgment *in rem*, the petitioners therein or any other person thereto, would in subsequent proceedings before the Courts be estopped from disputing or questioning the previous decision of merits. Having regard to the provisions of Secs. 40 to 44 of the Indian Evidence Act, unless and until any fraud or coercion or want of jurisdiction is alleged, the said judgments would be relevant apart from operating as *res judicata*.[6]

In the case of *Dina Dinshaw Merchant* v. *Dinshaw Ardeshir Merchant*,[7] there was no dispute between the parties that the previous suit was only for judicial separation. There was no dispute as regards the fact that the acts of cruelty alleged in that suit were relied upon for the relied of divorce in the present suit.

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1. A.I.R. 1927 Lah. 289 (F.B.).
2. A.I.R. 1953 S.C. 419.
3. A.I.R. 1927 Lah 289 (F.B.).
4. Jai Narain Har Narain *v.* L. Bulaqi Das, A.I.R. 1969 All. 504 at p. 508.
5. L. Nem Kumar Agarwal *v.* Nem Kumar, A.I.R. 1958 All. 207 at p. 209 : 1957 A.W.R. 728 (2) : 1957 A.L.J. 734.
6. **Bharat Heavy Electricals Limited Higher Secondary School Staff Association, BHEL, Ramachandrapuram, Medak District *v.* Bharat Heavy Electricals Limited, New Delhi, 2001 (3) A.L.D. 125 at p. 138 (D.B.).**
7. A.I.R. 1970 Bom. 341.

Held that to apply the principles continued in Sec. 11 of the Civil Procedure Code it would be absolutely essential that "the Subject-matter" of the two litigations in question must be the same. As relief of divorce was not claimed in the previous suit, it is difficult to hold that the present suit was in respect of the subject-matter for which the previous suit had been instituted.

It has been held under Order XXIII, rule 1 that when a suit for a different relief is filed, it cannot be held to be a suit for the same subject-matter.[1]

Distinction between estoppel and *res judicata*.

Estoppel and *res judicata* are entirely distinct; *res judicata* prevents a man averring the same thing twice over in successive litigations while estoppel prevents him from saying one thing at one time and the opposite at another.[2] In *Low* v. *Bouverie*,[3] Bowen, L.J., said : "Estoppel is only a rule of evidence : you cannot find an action on estoppel." "The rule is not a rule of substantive law in the sense that it does not declare any immediate right or claim. It is a rule of evidence but capable of having the gravest effect on the substantive rights of the parties."[4]

A question of estoppel is not a question of fact but an inference of law from facts proved and is, therefore, open to examination by the High Court in second appeal.[5]

Even an erroneous decision on a question of law operates as *res judicata* as the correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *res judicata*.[6]

The principle of *res judicata* is attracted even when the earlier *lis* is on a writ under Art. 226 of the Constitution and the later on a suit.[7] An earlier writ raises an estoppel in the same way as a judgment entered, after a *lis* is fought out to the bitter end does.[8]

15. Compromise decree creates estoppel by judgment.—A compromise stands in the eye of law independently of any order of the Court passed thereon. Although a compromise decree has no greater validity than the compromise on which it is founded, yet, even though the decree may be a nullity for want of jurisdiction the compromise may nonetheless survive.[9]

It must be taken to be settled law that a compromise decree is not a decision of the Court and as such Sec. 11, C.P.C., is not applicable in its term to such a decision. In this connexion, reference may be made to the observation of their Lordships of the Supreme Court in *Venkata Subba Rao* v. *V. Jagannadha Rao*.[10]

In *Sailendra Narayan* v. *State of Orissa*,[11] the Supreme Court made the following observations :

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1. Dina Dinshaw *v.* Dinshaw Ardeshir, A.I.R. 1970 Bom. 341 at pp. 347-48 : I.L.R. (1969) Bom. 1043 : 72 Bom. L.R. 41 : 1970 Mah. L.J. 286.
2. Cassamally *v.* Curreembhoy, I.L.R. 36 Bom. 214.
3. (1891) 3 Ch. 105.
4. Pollock on *Contract*, 6th Ed., pp. 505, 506.
5. Ujagar Singh *v.* Sham Singh, A.I.R. 1979 Punj. 12 at p. 14.
6. Mohamed Sali *v.* Siluvai Arikkanjir Fernandes, 1969 M.L.J. 415 at p. 416.
7. Gulabchand Chotolal Parikh *v.* State of Gujarat, A.I.R. 1965 S.C. 1153.
8. *In re* South American and Mexican Company, *Ex parte* Bank of England, (1895) 1 Ch. 37 and Margaret Gomes *v.* Kanupada Bhowmik, (1966) 70 C.W.N. 944 ; Managing Committee of Victoria Girls High School *v.* Board of Secondary Education, West Bengal, 73 C.W.N. 328 at p. 337.
9. Sri Ram *v.* Girdhar Lal, 1982 All. L.J. 1419 at p. 1422.
10. A.I.R. 1967 S.C. 591.
11. A.I.R. 1956 S.C. 346.

> "The plea of estoppel is sought to be founded on the compromise decree, passed by the Patna High Court. The compromise decree is utilised in the first place as creating an estoppel by judgment. *In re, South American and Mexican Co., Ex parte, Bank of England,*[1] it has been held that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case."

To the like effect are the following observations of the Judicial Committee in *Kinch* v. *Walcott*[2]—

> "First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal."

The same principle has been followed by the High Courts in India in a number of reported decisions. Reference need only be made to the cases of *Secretary of State* v. *Attendranath Das,*[3] *Bhaishankar* v. *Morarji,*[4] and *Kumara Venkata Perumal* v. *T. Ramaswamy Chetty.*[5]

In this case, the question of *lis pendens* could have been of importance if the concession was not made by the counsel on behalf of the appellant on 30-4-1999. Having made the concession, it is a statement amounting to compromise as it is apparent that the applicant has, in view of the statement, not pressed for the Review application. There is no concession on any point of law but is a concession regarding giving up a particular right, which cannot be said to be not legal. An agreement regarding raising objection to the validity of Will or otherwise cannot be said to have the effect of estoppel against the Statute. Therefore, even if, the appellant could have challenged any action of the applicant by virtue of the provisions of Sec. 52 of the Transfer of Property Act, the concession of the right or giving upon of the right by virtue of the statement made before the Court has resulted in debarring the appellant to raise such a point in future.[6]

There is no allegation against the counsel and the counsel has not come for to show that he had made a mistaken statement before the Court. Again, though the compromise decree is alleged to be a conclusive decree by the appellant, by making the concession, the counsel give up the right to challenge the authority of Will, though kept the right to raise the objection regarding suit, if filed, being time barred open. There is no concession on the point of law. Will was held to be valid by the trial Court and the lower appellate Court.[7]

Where several grounds have been put forward by a plaintiff in the alternative for claiming a particular relief and the defendant admits that the relief claimed by the plaintiff may be granted without saying anything more, it becomes difficult to come to the firm conclusion as to which finding the defendant intended to accept while giving consent that the relief prayed for be granted.[8]

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1. (1895) 1 Ch. 37.
2. (1929) A.C. 482 at p. 493.
3. I.L.R. (1936) 63 Cal. 550 at p. 558.
4. I.L.R. (1912) 36 Bom. 283.
5. I.L.R. (1912) 35 Mad. 75.
6. **Pritam Kaur** *v.* **Harpal Singh, A.I.R. 2001 P. & H. 306 at p. 308.**
7. ***Ibid.*, at p. 309.**
8. Bhanwarlal *v.* Raja Babu, A.I.R. 1970 Raj. 104 at pp. 106-07.

In *Sunderbai* v. *Devaji*,[1] the Supreme Court has observed that the bar of *res judicata* may not be applicable in the case of a compromise decree as the matter in issue has not been heard and finally decided as required under Sec. 11 of the Code of Civil Procedure. But the Supreme Court has in the same decision observed that the party would be estopped from raising the same contention in a subsequent suit.

The observations of the Supreme Court in *Sailendra Narayan Bhanja Deo* v. *State of Orissa*,[2] make the position clear. It has been explained in that decision that the compromise decree creates an estoppel by judgment and a judgment by consent is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case.[3]

The Judicial Committee in *Kinch* v. *Walcott*,[4] has also taken the same view.

16. Estoppel and fraud.—It is too well-known that fraud vitiates all actions and no Court can uphold a right based on fraud. Even for considering a claim of estoppel, the law is not different.[5] The law of estoppel which is embedded in Sec. 115 was epitomised by Lord Denman in *Pickard* v. *Sears*,[6] in the following words :

> "The law is clear, that where one by word or conduct wilfully causes another to believe in a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existed at the same time."

The law of estoppel explained.

Lord Blackhurn in *Burkinshaw* v. *Nicolas*,[7] said—

> "When one says to another, 'I take upon myself to say such and such things exist you may act upon the basis that they do exist and the other man does really act upon that basis, it is of the very essence of justice that between these two parties their rights should be regulated not by the real state of facts, but by that conventional state of facts which the two parties agree to make the basis of their action, and that is what is meant by estoppel."

Essentials of doctrine of estoppel.

One essential feature of the doctrine of estoppel is that the person relying on the estoppel must have acted on the representation made to him to his detriment. He cannot be deemed to rely on the statement where he knew it to be false. He must have reasonably believed the statement to be true and, therefore, acted on it.

When estoppel fails.

The case of estoppel would fail where the statement is not sufficiently clear and unqualified.[8] In cases of estoppel, it has to be shown that a person ignorant of the real truths and believing the representation made to him to be true, acted upon it and to his detriment. In other words, he was aggrieved by the fraudulent or false statement.[9]

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1. A.I.R. 1954 S.C. 82.
2. A.I.R. 1956 S.C. 346 ; *see* also Smt. Sharda Debi *v.* Board of Revenue, U.P., Allahabad, 1985 All. L.J. 135.
3. *In re* South American and Mexican Co., *Ex parte* Bank of England, (1895) 1 Ch. 37.
4. (1929) A C. 482 at p. 493.
5. Krupasindhu Mallik *v.* Orissa Board of Secondary Education, A.I.R. 1981 Orissa 91 at p. 92.
6. (1837) 6 A. & E. 69, at p. 74.
7. (1878) 3 A.C. 1004 at p. 1026.
8. *Vide* Canadian and Dominion Sugar Co. Ltd. *v.* Canadian National (West Indies) Steamships Ltd., (1947) A.C. 46, at p. 56.
9. *See* Bell *v.* Marsh, (1903) 1 Ch. 526.

Estoppel and fraud, Common feature in. When doctrine of estoppel is not attracted.

Both in the cases of estoppel and of fraud, the common feature is the damage to the party deceived. There must co-exist a false representation and consequential damage. Proof of fraud, without damage, or of damage without fraud, will not suffice. The doctrine of estoppel is not of unlimited application, and it is invokable within a narrow and restricted ambit. There can be no estoppel where the parties have equal means of knowledge. The doctrine of estoppel is not attracted where the party invoking it has not changed its position to its disadvantage.

The indispensable elements of estoppel.

The indispensable elements of estoppel are ignorance of the parties who invoke the estoppel, a representation by the party sought to be estopped which misleads and an innocent and deleterious change of position in consequence of reliance upon the representation made. Another concomitant of estoppel is loss, injury damage or prejudice to the party claiming it following an act on the inducement of it. Estoppel is a preclusion in law, the resultant prejudice being the basis. Fraud and estoppel have a number of features in common though the doctrine of estoppel is more broad-based.

Essential elements of actionable fraud.

The essential elements of actionable fraud are : (1) that the person alleged to have committed fraud has made a material representation to his victim ; (2) that representation made is false to the knowledge of the maker or was made recklessly without knowledge of its truth and as a positive assertion ; (3) the representation had been made with intention that it be acted upon by the party to be defrauded ; (4) that party acted in reliance upon such a representation ; and (5) that he thereby suffered injury. The absence of any one of these elements is fatal to an action based on fraud.

Estoppel and frauds; its common features.

The common feature of both estoppel and fraud is that law will not come to the rescue of a person who has not suffered deception, as, where he has not been led to believe in the truth of the representation. Courts will not grant any redress where the person to whom representation has been made, is cognizant of its falsity. Similarly, omission to disclose facts which are known to exist, cannot furnish a ground for an action on the basis of fraud. No. redress is available to a person who with full knowledge of the falsity of the representation, acts to his detriment as the injury in such a case will be of one's own inviting.[1]

Fraud on statute.

What is of relevance is not whether the appellant had committed any fraud upon the respondents but whether the appellant had fraudulently suppressed relevant materials from the notice of the Rent Controller and had thereby obtained an order of sanction from the Rent Controller to lease out the property for a period of two years from 1st March, 1976. The fact that the respondents had also appeared before the Rent Controller and agreed to take the property on lease for a limited period of two years without demur cannot obliterate or nullify the fraud committed on the statute.[2]

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1. People's Insurance Co. Ltd. *v.* Sardar Sardul Singh Caveeshar, A.I.R. 1962 Punj. 543 at pp. 546-47.
2. Subhash Kumar Lata *v.* R.C. Chhiba, (1988) 4 S.C.C. 709 at p. 717.

17. Collusion and pre-emption.—Collusion in judicial proceedings is normally associated with secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceeding the claim put forward is fictitious, the contest feigned or unreal and this is generally done with the object of confounding third parties. In the case of pre-emption it is open to the plaintiff to find financial aid and from any source he likes. It is true that the vendor cannot in the garb of a *benamidar* pre-emtp his own sale. But merely because the vendors who are the fathers of the plaintiff-pre-emptors are helping their sons to exercise the statutory right conferred on the sons cannot, without more, deprive them of the right to be substituted for the vendees in exercise of their right of pre-emption. Even in the wider sense of the word "Collusion" which suggests a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper, purpose, would not apply to the present case so as to operate as estoppel against the plaintiff.[1]

In *Nava Bharat Ferro Alloys Limited* v. *Andhra Pradesh State Electricity Board, Hyderabad,*[2] it was observed that these are not instances where the principles of promissory estoppel could at all be invoked against the Board. The State Government would have held out some concessions in the tariff rates to persuade them to agree to locate their industries.

The appellants merely declined to purchase the shares offered to them before purchase of the suit property. Expression of such disinclination cannot be said to constitute their giving up of the right of pre-emption under Sec. 4 of the Partition Act, which arose upon filing of the suit by the respondent in 1980. The facts and circumstances of this case do not show that the appellants, particularly, the female appellants made any promise not to exercise their right of pre-emption arising under Sec. 4(1) of the Partition Act, upon filing of the suit by respondent a stranger-purchaser on the basis of which the respondent purchased the share in the said property. In the facts and circumstances of the instant case of respondent is not entitled to the benefit of promissory estoppel.[3]

18. Fraudulent intention, if essential for estoppel.—The doctrine of estoppel is based on a fraudulent purpose and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel. There must be deception and change of conduct in consequence.[4] In order to create estoppel, the representations founded on must have been made with an intention to deceive. The term "intentionally" was adopted advisedly. By the substitution of it for the term "wilfully" in the rule stated in *Pickard* v. *Sears,*[5] and explained in *Freeman* v. *Cooke*[6] and *Cornish* v. *Abington,*[7] it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it has stated by the English Courts.[8]

"Intentionally" and "wilfully".

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1. Sukhnadan Singh *v.* Jamiat Singh, A.I.R. 1971 S.C. 1158 at p. 1161.
2. A.I.R. 1985 A.P. 299 at p. 320.
3. Nirupoma Basak, Smt. *v.* Baidyanath, A.I.R. 1985 Cal. 406 at p. 419.
4. Gana Sahai *v.* Hira Singh, I.L.R. 2 All. 809 (F.B.).
5. 6 A. & E. 469.
6. 2 Exch. 654.
7. 4 H. & N. 549.
8. Eranjoli Illath Vishnu Nambudri *v.* Eranjoli Illath Krishnan Nambudri, I.L.R. 7 Mad. 3 at p. 8.

Scope and applicability of that section.

Section 115 does not make it a condition of estoppel resulting, that the person, who by his declaration or act has induced the belief on which another has acted, was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances and under no mistake or misapprehension.[1]

The position of the person who was induced to act.

The English law gives no countenance to the doctrine that, in order to create estoppel, the person whose acts or declarations induced another to act in a particular way, must have been under no mistake of himself or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position, of the person, who was induced to act.[2]

If the person who made the statement did so without full knowledge, on under error, *sibi imputent* ; it may in the result be unfortunate for him but it would be unjust even though he acted under error, to throw the consequences on the person who believed his statement and acted on it, as it was intended he should do.[3] The principle of equitable estoppel can have no application when the party in whose favour it is invoked is found guilty of fraud.

In the above noted case the petitioner got his admission in the Polytechnic on the basis of a declaration that he belonged to a Scheduled Caste and he procured a certificate from the Naib Tahsildar in support of his admission. The petitioner was by no stretch of imagination a member of a Scheduled Caste, which he claimed for his admission and for which he procured a certificate from a Naib Tahsildar.[4] It was clear from the certificate on the basis of which the petitioner got admission that he practised fraud and fraudulently obtained a certificate on the basis that he was Harijan and got admission in the Polytechnic on that basis. It was held that there was no equity in his favour to debar State from cancelling his admission.

Legality of the act sanctioned even by conduct cannot be questioned subsequently.

If a man, either by words or by conduct, has intimated that he consents to an act which has been done he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have given faith to his words or to the fair inference to be drawn from his conduct.[5]

Fraudulent intention.

There is no ground in the English authorities for the suggestion that the person making the representation, which induces another to act must be influenced by a fraudulent intention.[6] No doubt in certain cases where estoppel is successfully pleaded against a party the original statement may have been made fraudulently but a fraudulent intention is by no means necessary to create an estoppel.[7] In determining whether an estoppel has been created, the main question is, whether the representation has caused the person, to whom it

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1. Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 at p. 310 (P.C.); Gana Sahai *v.* Hira Singh, I.L.R. 52 All. 809 (F.B.) and Eranjoli Illath Vishnu Nambudri *v.* Eranjoli Illath Krishnana Nambudri, I.L.R. 7 Mad. 3 (diss.).
2. Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 at p. 310 (P.C.).
3. *Ibid.*
4. Israr Ahmad Mansuri *v.* State of Madhya Pradesh, A.I.R. 1982 M.P. 205 at p. 206.
5. Cairncross *v.* Lorimer, 3 H.L.C. 829, cited in Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 at p. 311 (P.C.).
6. Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 at p. 312. (P.C.).
7. Carr *v.* London & N.W. Ry. Co., L.R. 10 C.P. 316.

has been made, to act on the faith of it.[1] The existence of estoppel does not depend on the motive or knowledge of the matter on the part of the person making the representation.[2] It is not essential that the intention of the person, whose declaration, act or omission has induced another to act or to abstain from acting, should have been fraudulent or that he should not have been under a mistake or misapprehension.[3] Estoppel does not depend on the motive or on the knowledge of the matter, on the part of the person making the representation. It is not essential that the intention of the person should have been fraudulent or that he should have been acting with the full knowledge of circumstances and not under a mistake or misapprehension. It is not necessary that there should be a design to mislead. A representation, even when made innocently or mistakenly, may operate as an estoppel.[4] It must, therefore, be held that plaintiff having consented to these transfers, disentitled herself to claim the property.[5]

If the mortgagor enters in the mortgage-deed a small piece of land situated in another district in order to work a fraud and then turned round and said that the Registration Officer had no jurisdiction because courts find in fact the item in question did not belong to him or the item in question was wrongly described or that it was never intended by him to mortgage the item, the mortgagor would be stopped from taking up any such position. This is not estoppel against statute. The estoppel is against giving evidence that he did not intend that document to relate to the plot.[6]

Estoppel against statute or against giving evidence against a document.

It was held in *Kamoyya* v. *Mamayya*,[7] that a person who has conveyed property *benami* to another for the purpose of effecting a fraud on his creditors cannot, where the fraud has been effected, set up the *benami* character of the transaction by way of defence in a suit by the transferee for possession under the conveyance.[8]

Benami transaction when no defence in a suit.

As it is one of the principal functions of a court of law to detect and punish fraud, it only right that it should do nothing that would even indirectly encourage or promote fraud. So, from the earliest cases the Courts refused to relieve the grantor of a fraudulent deed of its consequences. In the earlier cases, the rule was applied with such stringency that the grantor of a fraudulent deed was refused relief from the effects thereof, whether or not the fraudulent purpose had been carried into effect.[9] In later years, a more lenient view has prevailed and the Courts have restricted such refusal only to cases where the fraudulent purpose of the deed has been fulfilled.[10]

Courts to detect and punish fraud.

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1. 4 C.L.J. 323.
2. *Ibid*.
3. *Ibid*.
4. *See* the leading case, Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 (P.C.).
5. Jagaribai Ramlal Kanojia *v.* Ramkhilawan Govind Prasad, 1975 M.P. L.J. 875 at p. 861.
6. Jageshwar Prasad Onkar Prasad *v.* Mulchand, A.I.R. 1939 Nag. 57 at p. 61 : 1939 N.L.J. 44.
7. 43 I.C. 352.
8. *See* also (Koppula) Kottayya Naidu *v.* Chitrapu Mahalakshmamma, A.I.R. 1933 Mad. 457 at p. 458 : 37 M.L.W. 645 : 64 M.L.J. 719 : 1933 M.W.N. 652 ; Subbaraya Naicker *v.* Venkatesa Naicker, A.I.R. 1934 Mad. 252 : 39 M.L.W. 357 ; but *see* Qadir Bakshi *v.* Hakam, A.I.R. 1932 Lah. 503 : I.L.R. 13 Lah. 713 : 33 P.L.R. 730.
9. Ram Indar *v.* Rup Narayan, (1814) 2 Mac. S.R. 149 ; Ram Narain *v.* Jungnath, (1851) Bengal S.D.A., p. 774.
10. Jadu Nath Poddar *v.* Ram Lal Poddar, 10 C.W.N. 650 ; I.L.R. 33 Cal. 967 ; Petherpermal Chetty *v.* Muniandy Chetty, I.L.R. 35 Cal. 551 : 35 I.A. 98 (P.C.) ; Kalipada Mondal *v.* Kali Charan Mondal, A.I.R. 1949 Cal. 204 at p. 206.

In unilateral or bilateral fraud; repudiation of such transaction.

In all cases of unilateral or bilateral fraud which has not been successfully effected, either party can repudiate the fraudulent transaction and can recover or maintain his possession by proving his real title.

Where fraud is accomplished.

In cases where fraud is accomplished (1) where only one party acts fraudulently, he cannot be allowed, either as plaintiff or as defendant, to plead his fraud, on the principle that no man shall be heard to plead his own fraud, (2) where both parties are equally fraudulent, the Courts will refuse to enforce the fraudulent transaction on the principle that where each party is equal in fault the law favours him who is actually in possession with the result that—(*a*) where the plaintiff seeks relief on the allegation and on the basis of joint fraud, his suit will be dismissed, and (*b*) where he seeks relief by suppressing the fraud, the defendant can plead and prove the common fraud to defeat the plaintiff's claim.[1]

19. Section not exhaustive.— Sections 115 to 117 are not exhaustive and the principle of estoppel contained in these sections may be applied by analogy to parties not mentioned therein. It can be applied to the case of a licensee or an agent let into possession.[2]

Section 115, whether exhaustive.

Estoppels are not confined to the subjects, which are dealt within Chapter VIII of the Evidence Act, but a man may be estopped from doing acts or relying upon any particular argument or contention.[3] When the principles of the law of estoppel are found in Sec. 115, there is no need to fall back on the analogies of the Mohammedan law in a case of pre-emption arising between the Hindus.[4]

20. Section follows English law.—The terms of the Indian Evidence Act do not enact as law in India anything different from the law of England on the subject of estoppel.[5]

When truth once admitted it cannot be denied subsequently.

21. Scope of the section.—Under Sec. 115 when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.[6]

The doctrine of estoppel embodied in Sec. 115 has been explained by the Judicial Committee in *C. & D. Sugar Co.* v. *C.N. Steamship Ltd.*,[7] in the following terms :

Privy Council on estoppel.

> "Estoppel is a complex legal notion, involving a combination of several essential elements the statement to be acted upon, acting on the faith of it, resulting detriment to the actor."

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1. Guddappa Chikkappa Kurbar *v.* Balaji Ramji Dange, A.I.R. 1941 Bom. 274 at p. 278 : I.L.R. (1941) Bom. 575 : 43 Bom. L.R. 681.
2. Fattu Bhila *v.* Bhawaniram Dashrath, A.I.R. 1961 M.P. 27 at p. 29 : Ajitullah *v.* Bilati Bibi, A.I.R. 1932 Cal. 383(2) ; Asaram *v.* Ludeshwar, A.I.R. 1938 Nag. 335 ; Savitribai *v.* Sidu Arjun, A.I.R. 1946 Nag. 108.
3. 4 O.C. 408 at p. 416.
4. 4 A.L.J. 210 : (1907) A.W.N. 88.
5. Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 at p. 310 (P.C.) ; *see* also Gana Sahai *v.* Hira Singh, I.L.R. 2 All 89 (F.B.).
6. Shivadhar Sukla *v.* Corporation of Calcutta, 64 C.W.N. 60 at p. 72.
7. A.I.R. 1947 P.C. 40.

Essential conditions for invoking the doctrine of estoppel.

To invoke the doctrine of estoppel three conditions must be satisfied : (1) representation by a person to another, (2) the other shall have acted upon the said representations, and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made.[1]

Act done under misapprehension of legal right.

Any act done under a misapprehension of legal rights does not create an estoppel.[2] Where the method adopted for payment of compensation for acquisition of land is *ultra vires* and without jurisdiction no question of estoppel arises.[3]

When the parties know the correct position, there is no question of estoppel.[4]

The entire question of estoppel was considered by the Judicial Committee in the *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.*[5] Lord Wright refers to the broad rule stated by Ashhurst, J., in *Lickbarrow* v. *Mason.*[6]

Lord Wright then observes that this dictum was too wide, and has been dissented from in several decisions subsequently.

When rule of estoppel could arise.

The Judicial Committee state that the rule of estoppel can only arise where there is some duty which has not been fulfilled, or some omission of that which the party was bound to do, against whom the estoppel is claimed to operate.[7]

The question as to whether estoppel has occasioned or not; how to be decided.

As was pointed out by the Privy Council, in *Sarat Chander Dey* v. *Gopal Chunder Laha*,[8] the law enacted in Sec. 115 of the Evidence Act relating to estoppel does not differ from the English law on that subject. The main question, in determining whether estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of estoppel does not depend on the motive or on the knowledge of the matter, on the part of the person making the representation. It is not essential that his intention should have been fraudulent, or that he should not have been under a mistake, or misapprehension. The word "representation" covers declaration, act or omissions, which may be express or implied and may be made in any form.[9]

The Privy Council ruling in *G.H.C. Ariff* v. *Jadunath Majumdar*,[10] the facts in that case were as follows : In 1913, Ariff (the appellant), having verbally agreed with Majumbar (the respondent) to grant him a permanent lease of a plot of land at Rs. 80 per month, let him into possession. Shortly afterwards, the respondent, with the knowledge and approval of the appellant, erected structures on the land. In December, 1918, the appellant definitely refused to grant the respondent the

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1. Gyarsi Bai *v.* Dhansukh Lal, A.I.R. 1965 S.C. 1055 at p. 1061 : (1965) 2 S.C.J. 788.
2. *See* G.H.C. Ariff *v.* Jadunath Majumdar Bahadur, A.I.R. 1931 P.C. 79; Man Mohan Das *v.* Janki Prasad, A.I.R. 1945 P.C. 23 ; Kartar Singh Bedi *v.* Dayal Das, A.I.R. 1939 P.C. 201 and Mool Chand Moti Lal *v.* Ramkishan, A.I.R. 1933 All. 249.
3. State of Jammu and Kashmir *v.* Sanahullah Mir, A.I.R. 1980 S.C. 1349 at p. 1354.
4. *See* Mohori Bibee *v.* Dharmodas Ghosh, (1903) 30 Ind. App. 114 (P.C.) ; Shanker Lal *v.* Narendra Bahadur Tandon, A.I.R. 1967 All. 405 at pp. 410-11.
5. I.L.R. (1938) Mad. 360 : A.I.R. 1938 P.C. 52.
6. (1787) 100 E.R. 35.
7. Nadar Bank Ltd., Madurai *v.* Canara Bank Ltd., A.I.R. 1961 Mad. 326 at p. 330.
8. I.L.R. 20 Cal. 296 (P.C.).
9. Srirangam Venkataratnam *v.* Perambadur Bullemma, A.I.R. 1965 A.P. 163 at p. 166 : (1964) 2 Andh. L.T. 299 : (1960) 1 Andh. W.R. 112.
10. I.L.R. 58 Cal. 1235 : A.I.R. 1931 P.C. 79.

agreed lease, and, in 1923 sued to eject him. The respondent's right to sue for specific performance of the verbal agreement was barred in December, 1921.

On those facts, their Lordships held that the English doctrine of equitable estoppel did not arise in the case because the only contract to which the erection of the structures could be referred, had since ceased to be enforceable and there was no representation of fact giving rise to estoppel by Sec. 115 of the Evidence Act.

At page 1243 of the report, (of I.L.R. Cal.) : (at p. 81 of A.I.R.) their Lordships observed :

> "This is no case of money being expended by the respondent in any mistaken belief as to his legal rights, or of the appellant knowing of the existence of any such mistaken belief, or encouraging the respondent by abstaining from asserting a right inconsistent with the acts of the respondent."

At p. 1246 (of I.L.R. Cal.) : (at pp. 82-83 of A.I.R.) their Lordships referred to the well-known dictum of Lord Kingsdown in *Ramsden* v. *Dyon*[1] :

> "If a man, under a verbal agreement with a landlord for a certain interest in land....takes possession of such land, with the consent of the landlord, and upon the faith of such promise....with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court equity will compel the landlord, to give effect to such promise...."

Their Lordship proceeded to observe with reference to the above passage, thus—

> "Even if Lord Kingsdown's language was intended to cover something beyond the equitable doctrine of part performance in relation to the Statute of Frauds, and was intended to refer to the circumstances in which a court of equity will enforce a title of land against the person who at law is the owner thereof, the title must nevertheless, in their Lordships' view, be based either upon contract express or implied or upon some statement of fact grounding an estoppel."

Then the judgment proceeds to apply the above principles to the facts of that case—

> "Their Lordships have already indicated thier opinion that no act was done by the respondent otherwise than under the verbal contract which was then enforceable at his suit. No circumstances exist from which any other contract by the appellant can be implied; and as to estoppel there is no trace of any statement by him upon which any estoppel can be grounded."

Where the site belonged to Rao, the husband of the 1st plaintiff, and that he had, by encouragement and abstention, induced the defendant to construct the house it was held that the conduct which would have estopped her husband from claiming the site, would equally occasion estoppel against the plaintiff, as she is a representative-in-estate of her deceased husband.[2]

Extent of the term "estoppel."

It is well settled that "estoppels" are by no means confined to the subjects which are dealt within Chapter VIII of the Evidence Act. According to Garth, C.J., in *Ganges Manufacturing Co.* v. *Sourujumull*[3] "a man may be estopped, not only from giving

1. (1866) 1 H.L. 129 at pp. 170-71.
2. Srirangam Venkataratnam *v.* Perambadur Bullemma, A.I.R. 1965 A.P. 163 at pp. 166-67.
3. I.L.R. 5 Cal. 669 at p. 678.

particular evidence, but from doing acts, or relying upon any particular arguments or contention, which the rules of equity and good conscience prevent his using as against his opponent.

Applicability of the principles of "estoppel."

Reference is made to a large number of cases collected in a notes to *Deo* v. *Oliver*.[1] Mr. Justice Wallis (as then was) took the same view in *Krishnaswamy Chetty* v. *Sitaram Chetty*[2] and followed the passages from Bigelow on *Estoppel*, pages 783, 789. A similar view was taken by a Bench of the Madras High Court in *Aiyathuri Pillai* v. *Gnanaprakasa Odayar*.[3]

When the suit was instituted on the small cause side of the Munsiff's Court, the defendant successfully pleaded want of jurisdiction and the plaint was returned for presentation on the original side. When he sought to raise an objection that the appeal against the decision of the District Munsif on the original side was not maintainable on the ground that the suit was of a small cause nature, the learned Judges held that he was estopped from objecting to the jurisdiction. In *Annapurnammagaru* v. *Rajah of Vizianagaram*,[4] a Single Judge of the Madras High Court (Venkata Subba Rao, J.) took the same view.

Question of jurisdiction.

The observations of the Privy Council in *Ambu Nair* v. *Kelu Nair*,[5] "it is a well-accepted principle that a party cannot both approbate and reprobate" as also the words of Honyman, J., in *Smith* v. *Baker*,[6] that he cannot "at the same time blow hot and cold" were followed.[7]

A party cannot both approbate and reprobate.

Estoppel can only arise when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief.[8] It is well settled that any admission made in ignorance of rights or under duress cannot bind the maker of the admission.[9]

When estoppel could arise.

In order to bring a case within the purview of estoppel, there must be a representation by one party, the representation must be a representation of fact, the representation must have been made with the intention that the other party should act upon the faith of the statement, and the other party must believe the representation to be true and act upon it.[10]

Representation made must be acted upon by the other side.

If a party adopts an order of a court and takes a benefit thereunder, he cannot be allowed to challenge the correctness of that order.[11]

Party adopting Court's order and taking benefit cannot challenge the said order.

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1. (1829) 2 Smith's *Leading Cases*, 8th Ed., 775.
2. 23 M.L.J. 335.
3. 52 I.C. 829 : A.I.R. 1919 Mad. 1172.
4. A.I.R. 1935 Mad. 367.
5. I.L.R. 56 Mad. 737 : A.I.R. 1933 P.C. 167.
6. (1873) L.R. 8 C.P. 350 at p. 357.
7. Amritial N. Shah *v.* Alla Annapurnamma, A.I.R. 1959 A.P. 9 at pp. 14-15 : I.L.R. (1958) A.P. 569 : 1958 Andh. L.T. 684 : (1958) 2 Andh. W.R. 447.
8. Hem Nolini Judah *v.* Isolyne Sarojbasini Bose, A.I.R. 1962 S.C. 1471 at p. 1476 : I.L.R. (1962) 2 All. 683.
9. Shri Krishan *v.* Kurukshetra University, Kurukshetra, A.I.R. 1976 S.C. 376 at p. 382.
10. State of Bihar *v.* Dukhlal Das, A.I.R. 1962 Pat. 140 at pp. 144-45.
11. Dhrubendra Deb Roy *v.* Kumarendra Deb Roy, A.I.R. 1959 Cal. 19 at p. 20 : I.L.R. (1959) 1 Cal. 77.

Where a party has proceeded on the footing that rule 12 of the Fishery Rules (Assam) is perfectly valid, there is no justification at all for him to question the vires of the rule.[1]

Estoppel and industrial adjudication.

It may generally not be useful or wise to take recourse to strict legalistic principles like estoppel in deciding all material questions in industrial adjudication.[2]

Auction bids.

The very persons whose auction bids had been accepted, should not turn round and say that the sale to them is invalid.[3]

No estoppel on concession made by a counsel on pure question of law.

The concession made by a counsel on a pure question of law, will not estop him or his client from withdrawing from such concession at a later stage.[4]

Estoppel cannot confer on the Board of Commissioners for Hindu Religious Endowments a power which it did not possess, otherwise under the Madras Hindu Religious Endowment Act, 1926 (Madras Act II of 1927).[5]

It cannot be said that any question of estoppel arises when it is expressly stated that no plea will be entertained that the student was ignorant of ordinances, regulations, rules or other provisions.[6]

Figures in bill of entry constitute an estoppel.

It is wrong to say that the figures in the bill of entry constitute an estoppel against the plaintiffs for there is no question of the defendant's altering his position on the faith of the representations contained in the bill of entry.[7]

Arbitration proceedings and when principle of estoppel applies.

The general principle that where a court has inherent lack of jurisdiction, mere consent of parties cannot confer jurisdiction, has no application to arbitration proceedings. The principle of estoppel will generally apply where a party having consented to arbitration by a person and participated in the proceedings before him subsequently attempted to challenge the jurisdiction of the arbitrator.[8]

Keeping in perspective the existence of the second Agreement, there is every reason to hold that the parties had agreed to refer all their disputes, pertaining to the proprietorship concern and/or the Company, to arbitration. In any event, the disputes are identical and were referred as such by the Municipal Corporation of Delhi, which is now estopped from raising this controversy, only because the Award is against it.[9]

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1. Adarsha Fishery Co-operative Society *v.* State of Assam, A.I.R. 1968 Assam 48 at p. 50.
2. Associated Cement Companies Ltd., Dwarka *v.* The Workmen, A.I.R. 1959 S.C. 967 at pp. 981-82 : (1959) 2 S.C.A. 280 : (1959) S.C.R. 925 : (1959) 1 Lab. L.J. 644.
3. Coffee Board, Bangalore *v.* Famous Coffee and Tea Works, Coimbatore, A.I.R. 1965 Mad. 14 at p. 19 : (1964) 2 M.L.J. 403.
4. State *v.* B. Chikkavenkatappa, A.I.R. 1965 Mys. 253 at p. 255 : (1965) 2 Cr. L.J. 379.
5. State of Madras *v.* Kunnakudi Melamatam, A.I.R. 1965 S.C. 1570 at p. 1574.
6. Parma Nand Bhutani *v.* University of Delhi, A.I.R. 1960 Punj. 150 at p. 151 : 62 Punj. L.R. 79.
7. Firm S.P.A. and A.R. Chockalingam Chettiar *v.* National Steamship Co., Bombay, A.I.R. 1958 Ker. 47 at p. 50 : 1957 K.L.T. 1106.
8. Union of India *v.* Ch. Radhanath Nanda, A.I.R. 1961 Orissa 143 at p. 147.
9. **International Security & Intelligence Agency Ltd. *v.* Municipal Corporation of Delhi, A.I.R. 2001 Delhi 283 at p. 295**

The mere execution of a promissory note by a purchaser does not extinguish the statutory vendor's lien available to a seller, and does not estop him from an action on such lien.[1]

When the Administrator, Committee of the Wakf Board could not call for applications for appointment to various posts, the presentation of an application by an employee of the Board not for the post which he was holding but for a higher post pursuant to the notification advertised in exercise of such a non-existent power cannot and will not amount to an estoppel.[2]

Mere participation on the part of the petitioner in the meetings in which the members of the Managing Committee of the School were present and participated as active members cannot create any estoppel in the way of petitioner to vindicate the grievance before the Court.[3]

The fact that the petitioner actually participated in the meeting and took chance of succeeding at the voting by show of hands without raising any objection to such a procedure being followed would not stop him from challenging a legality of the meeting convened for considering a proposal for no-confidence.[4]

A plaintiff is not debarred from urging his claim against defendant auction purchaser *pendente lite* because of inaction on the part of the plaintiff and not informing the executing Court that judgment-debtor's title in the property in question was subjudice.[5]

22. Mixed question of law and fact.—A question of estoppel is a mixed question of fact and law, and without definite allegations in the pleading a party should not be permitted to resort to the plea of estoppel.[6]

It is well established that the plea of estoppel involves questions of facts.[7]

Mixed question of fact and law—No estoppel in such matter.

The question whether the 30,000 fully paid-up shares were issued by the company as price of the goodwill of the agency or as price of the assets of the agency or in lieu of grant of monopoly rights by the State to the company depends upon the interpretation of the various documents which passed between the company and the State and is a mixed question of fact and law, and therefore, there cannot be an estoppel in such a matter.[8]

Their Lordships of the Judicial Committee of the Privy Council have stated that Sec. 115, Evidence Act, represents, or is that same as the law of estoppel in England.[9]

23. Evidence made formerly to do duty for estoppel.—The Courts formerly, through the phraseology and under the garb of "evidence", accomplished results, which they now attain through a cautious reaching out of the principle of estoppel.[10]

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1. C. Sundaraja Pillai *v.* Sakthi Talkies (Dindigul) Ltd., A.I.R. 1967 Mad. 127 at p. 129.
2. Mohd. Dilawar Ali *v.* Andhra Pradesh Muslim Wakf Board, A.I.R. 1967 A.P. 291 at p. 293.
3. Ram Autar Prasad *v.* Chairman, Board of Secondary Education, Bihar, A.I.R. 1976 Pat. 116 at p. 117.
4. Mangal Singh *v.* State of Rajasthan, A.I.R. 1976 Raj. 123 at p. 125.
5. Bhai Ishar Das *v.* Smt. Govindi, A.I.R. 1975 Raj. 45 at p. 46.
6. Associated Publisher (Madras), Ltd. *v.* K. Bashyam *alias* Arya, A.I.R. 1961 Mad. 114 at pp. 120-21.
7. *In re* New Monkhooshi Tea Co. Ltd., A.I.R. 1967 Cal. 196 at p. 199.
8. State of Rajasthan *v.* Messrs. Bundi Electric Supply Co. Ltd., Bundi, A.I.R. 1970 Raj. 36 at p. 45.
9. *See* Sarat Chunder Dev *v.* Gopal Chunder Laha, I.L.R. (1892) 20 Cal. 296 : 19 I.A. 203 : 6 Sar 224 (P.C.) ; *see* also Ram Lal Sahu *v.* Mst. Bibi Zohra, A.I.R. 1939 Pat. 296 at p. 300.
10. Thayer's *Evidence at the Common Law*, 318 ; *see* 3 G.L.J. 629 at p. 633.

24. Election—Place of estoppel in jurisprudence.—The rule of estoppel has sometimes been dealt with as a part of the doctrine of election and coming under the prohibition against the adoption of inconsistent positions.[1]

Effect of election.

An election made with knowledge of the facts in binding. It cannot be withdrawn.[2]

25. Quasi-estoppel can never create a new jural relationship.—A persual of the undernoted decisions[3] and of decision in *Combe* v. *Combe*,[4] will show that the principle of quasi-estoppel can never create a new jural relationship or give rise to an entirely new cause of action. It can only avail to modify pre-existing legal relations, by preventing a party from going back on a subsequent promise so as to enforce the terms of the original agreement. In England the doctrine was evolved in order to mitigate the grossness of the so-called rule in *Pinnel's* case[5] the reluctant affirmance of which by the House of Lords in *Foakes* v. *Berer*[6] caused such dissatisfaction that legislative reform was contemplated but never materialised. In fact the doctrine goes no farther than Sec. 63 of the Indian Contract Act, and therefore there is no occasion for the Court to borrow it.[7]

Estoppel can arise only if a party has altered his position on the faith of a representation or promise made by the other. It can come into play when there has been a change of position in consequence of the representation of the conduct of the other party. No declaration, act or omission will amount to an estoppel unless it has caused the person to whom it concerns to alter his position and to do this, he must both believe in the facts stated or suggested by it and must act upon such belief. Representation or admission on matters of law or ignorance of legal rights cannot constitute any basis of estoppel. Any act done under a misapprehension of legal rights does not create an estoppel. A person cannot be estopped for a misrepresentation on a point of law. An admission of point of law is not an admission of a "thing" so as to make the admission a matter of estoppel within the meaning of Sec. 115 of the Evidence Act.[8]

26. Division of estoppel.—Lord Coke divided estoppels into three kinds, and this division has been usually followed by those who have since treated the subject, viz. first, by matter of record, second by deed; third, *in pais*.

27. Estoppel by matter of record.—Estoppel by matter of record is chiefly concerned with the admissibility and effect of judgments. This portion of the subject has been already disposed of (Secs. 40-44, *ante*).

What is known as an estoppel by record in English law is substantially covered, under our law, by the doctrine of *res judicata*, although, as was pointed out by Beg, C.J., in *Sita* v. *State*[9] an estoppel by record may sometimes stand for a wider principle than *res judicata*. The effect of that principle is, as found stated in American Jurisprudence[10] and in Corpus Juris Secundum[11] is a preclusion to deny

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1. 10 C.W.N. 747 at p. 752.
2. 4 O.C. 31 at p. 37.
3. Jorden *v.* Money, (1854) 2 H.L.C. 185 ; Hughes *v.* Metropolitan Rly. Co., (1877) 2 A.C. 439 ; Central London Property Trust Ltd *v.* High Trees House Ltd., (1947) K.B. 139.
4. (1951) 2 K.B. 215.
5. (1602) 5 Co. Rep. 117*a*.
6. (1884) 9 A.C. 605.
7. Rev. Fr. Joseph Valamangalam *v.* State of Kerala, A.I.R. 1958 Ker. 290 at p. 297 : 1958 K.L.T. 233.
8. Subbayya Chettiar *v.* Ayyappan Pillai, 1989 (1) K.L.N. 452 at pp. 453, 454.
9. A.I.R. 1969 All. 342 at p. 351 (F.B.).
10. 2nd Ed., Vol. 28, p. 600.
11. Vol. 331, p. 103.

the truth of matters set forth in a record whether judicial or legislative. But, that principle is, in this country, sometimes applied by special statutory provisions.[1]

Certainly the doctrine of issue estoppel is a sensible and useful doctrine, it prevents the Court being troubled by having to decide the same matter again that has already been decided, otherwise than by way of appeal. But in order to get an estoppel on its feet in any way, the question must be between precisely the same parties as were parties to the original suit, or of course, their privies. But before the doctrine of estoppel can operate at all, the question in issue in the subsequent proceedings must be precisely the question in issue in the prior proceedings. That is made very plain by a decision of the House of Lords in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[2]

Principle of conclusiveness of judgments.

The principle of conclusiveness of judgments as to the points decided is well settled and cannot be doubted. This rule not only prevents a new decision but also a new investigation and inquiry in order to avoid harassment to the same persons again and again. But before applying the principle of estoppel against a person, his declaration, act or omission must be clear, unambiguous and of an unequivocal character. Estoppel can arise only from a clear and positive statement.[3]

Issue estoppel has no place in the criminal law of England. The civil doctrine of issue estoppel can have no application to charges of perjury brought against persons acquitted in a previous trial.[4] The principle of law that a finding, given in a previous criminal trial, is binding and conclusive, in subsequent proceedings, between the parties, was laid down in *Pritam Singh* v. *State of Punjab*,[5] wherein their Lordships of the Supreme Court approved *Sambasivam* v. *Public Prosecutor, Federation of Malaya*.[6]

Criminal trials : finding given in a previous one is binding in a subsequent trial.

The aforesaid principle was reiterated by their Lordships of the Supreme Court in *Manipur Administration* v. *Thokchom Bira Singh*.[7] It was laid down by their Lordships, that estoppel precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a court of competent jurisdiction.[8] There is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. In order to invoke the rule of issue-estoppel not only the parties in the two trials must be the same but also the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be reagitated in the subsequent trial.[9]

Estoppel precludes evidence to prove a fact already proved, etc. by evidence.

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1. Shiv Ditta *v.* Kidar Nath, A.I.R. 1972 H.P. 20 at p. 23.
2. (1938) 4 All E.R. 747 : (1939) A.C. 1 : Re Manly's Will Trusts (No. 2) Tickle *v.* Manly, (1976) 1 All E.R. 673 at p. 676.
3. State of Bihar *v.* B.L. Agarwalla, A.I.R. 1966 Pat. 410 at p. 415.
4. Director of Public Prosecutions *v.* Humphrys, (1976) 2 All E.R. 497 at pp. 514, 538.
5. A.I.R. 1956 S.C. 415.
6. (1950) A.C. 458.
7. 1965 A.W.R. (H.C.) 358 : 1965 S.C.D. 8 : (1965) 1 Andh. L.T. 96 : (1965) 1 S.C.J. 451 : A.I.R. 1965 S.C. 87.
8. Union of India *v.* Amar Chand, A.I.R. 1965 H.P. 11 at p. 12.
9. Ravinder Singh *v.* State of Haryana, A.I.R. 1975 S.C. 856 at p. 862.

The essence of estoppel by judgment is that a party cannot be allowed to say one thing at one time and another at later time. A judgment could be an estoppel only as between the parties to it unless it is a judgment *in rem* which is binding against all the world. In *Srinivasa Aiyangar* v. *Srinivasa Aiyanagar*[1] and *Ramamurthi Dhora* v. *Secretary of State*,[2] it was held that judgments *in personam* could also create an estoppel against strangers. Those two decisions were dissented from in *Peari Mohan Shah* v. *Durlavi Dassya*,[3] and they were expressly overruled by the Full Bench of the Madras High Court in *Secretary of State* v. *Syed Ahmad Badsha Bahadur*.[4]

Estoppel by judgment.

Where the commutation proceedings were void in law the decisions arrived at therein cannot operate as *res judicata* between the parties, nor can they be relied upon as the basis of any estoppel.[5]

Lack of inherent jurisdiction deprives the judgment or order of any effect. Such a judgment or order cannot operate as an estoppel even against the person who sought the assistance of the Court whose jurisdiction is impugned.[6]

Lack of inherent jurisdiction.

An estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps on ground-work upon which it must have been founded.[7] A judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment.[8] The mere circumstances that a stranger has promoted litigation or assisted in a suit does not make him bound by the judgment, as a matter of fact, though not on the record, he has taken a direct interest in the institution and progress of the suit, has actually controlled the proceedings, examined witness, and preferred an appeal, he may be estopped by the judgment, quite as much as the party on the record.[9]

In the absence of judgment and decree passed in the prior suit the admitted facts cannot take the place of estoppel by record in a plea which has to be established by the production of the judgment and decree in the prior suit. As pointed out in *Hoystead* v. *Commissioner of Taxation*,[10] estoppel by judgment extends also to matters of admission fundamental to the decision.

Lord Shaw, delivering the judgment of the Board, observed—

> "In the opinion of their Lordships, it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a differnt assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of the fact."

Thus where the respondent (Government) claimed the right under Madras Proprietary Estates Village Service, Act, 1894, to enfranchise the village service *inams* in the zamindar appellant's estate irrespective of their reservation and

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1. I.L.R. 33 Mad. 483.
2. I.L.R. 36 Mad. 141.
3. 18 C.W.N. 954 : A.I.R. 1914 Cal. 281.
4. 14 M.L.W. 128 : A.I.R. 1921 Mad. 248.
5. Kameshwar Pandey *v.* Deolal Barhi, A.I.R. 1964 Pat. 247 at p. 249 : 1962 B.L.J.R. 960.
6. Ahsan Dar *v.* Mohd. Dar, A.I.R. 1963 J. & K. 15 at p. 17.
7. 6 C.L.J. 621 at p. 630 : I.L.R. 28 Mad. 338 : 12 B.L.R. 39 and United States *v.* County Court, 122 U.S. 306 (Amer.) ; Burbi *v.* Shannon, 99 Mass. 200 (Amer.).
8. 28 Mad. 388, appr. in 6 C.L.J. 621 at p. 630.
9. 6 C.L.J. 621 at p. 632 ; Tarleton *v.* Johnson, 25 Ala. 300 (Amer.).
10. (1926) A.C. 155 : 95 L.J.P.C. 79 : 134 L.T. 354.

obtained judgment upholding the right, *albeit* on the admission of the appellant's predecessor, it is estopped from contending that the Government had no such right. There are, however, limits to the operation of the estoppel.[1]

As explained by the Supreme Court in *Capital Multipurpose Co-operative Societies* v. *State of Madhya Pradesh*,[2] there is a presumption that the grant of approval which is made under Sec. 68-D of the Motor Vehicles Act is preceded by a consideration of all the relevant aspects of the matter.[3]

In *Sri Sri Kasi Biswanath Dev* v. *Paramananda Routrai*[4] the defendant participated in the proceeding and all the witnesses examined on his side were brought to the Court on several dates after the default had occurred. The plaintiff cross-examined the witnesses and the suit had already reached the stage of argument. It was only at that stage the defendant put in an application for dismissal of the suit. It is held that the defendant's conduct was rightly relied upon the Trial Court for estopping him from raising the plea at such a belated stage. It is a case of estoppel by conduct. If a man has led another to believe that a particular state of affairs is settled and correct, he will not be allowed to depart therefrom and assert they were erroneous and incorrect when it would be unjust and inequitable for him to do so.[5] Estoppel is a rule of evidence and the general rule is enacted in Sec. 115 of the Evidence Act. This is the rule of estoppel by conduct, as distinguished from an estoppel by record which constitutes the bar of *res judicata*.[6] Estoppel by record operates as an estoppel to the whole right and not to a fragment of it which might be given effect to or repelled by the decree of Court.[7] Estoppel results from the acts and conduct of the parties, and it is difficult to see how the decision of a court for which a party is not responsible and which might be erroneous, can operate as an estoppel. If it is a judgment *in rem* it is binding on all persons whether parties or not. If it is any other kind of adjudication, it binds the parties if it falls within Sec. 11, C.P.C., or the general principle of *res judicata* recognized by the decisions. Estoppel by record is what is provided for in Sec. 11, C.P.C.[8] The only relevant form of *res judicata* is issue estoppel. The substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But one canot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. One does not say that one

Rule of estoppel by conduct.

Estoppel by record as provided under Sec. 11, C.P.C.

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1. Sri Raja of Venkatagiri *v.* Madras Province, A.I.R. 1947 Mad. 5(2) at pp. 12-13: I.L.R. (1947) Mad. 190 : (1946) 2 M.L.J. 53 : 1946 M.W.N. 402.
2. A.I.R. 1967 S.C. 1815.
3. K.S. Achuthan *v.* State of Mysore, A.I.R. 1969 Mys. 215 at p. 220.
4. 1982 Cut. L.T. 206 at p. 213.
5. *See* Panchaud Freres, S.A. *v.* Establishments General Grain Co., (1970) 1 Lloyd's Rep. 53 ; Ismail *v.* Polish Ocean Lines, (1976) 1 All E.R. 902 at p. 907.
6. Sunderabai *v.* Devaji Shankar Deshpande, A.I.R. 1954 S.C. 82 at p. 84. 1953 S.C.J. 693 : (1953) 2 M.L.J. 782.
7. Badar Bee *v.* Habib Merican Noordin, (1909) A.C. 615 : 78 L.J.P.C. 161 : 101 L.T. 161 : Iones Brothers Ltd. *v.* Woodhouse, (1923) Ch. D. 117 ; *see* also Durga Prasad *v.* Jagat Jit Singh, A.I.R. 1928 Oudh 359 at p. 362.
8. *See* Secretary of State *v.* Syed Ahmad Badsha Bahadur, I.L.R. 44 Mad. 778 (F.B.) ; Samvedam Sarangapani *v.* Kandala Venkata Narasimhacharya, A.I.R. 1952 Mad. 384 at p. 387.

must be the alter ego of the other, but it does seem that, having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party.[1] The principle of estoppel or *res judicata* does not strictly apply to income-tax authorities.[2]

Estoppel or *res judicata* in income-tax proceeding.

In *Khan* v. *Golecha International Ltd.*,[3] it was held that the admission by the plaintiff, given to the Court and founding the judgment by consent, was just as efficacious for the purpose of issue estoppel as a judicial decision by the Court after argument founding a similar judgment.

A compromise was filed in a proceeding under Sec. 107, Criminal Procedure Code. The signatories declared *inter alia* that... "There is no apprehension of breach of peace as we, the Hindus and the Musalmans have amicably settled the matter nor will there occur any breach of peace in future. So we both parties having settled the matter amicably, hereby submit this petition and pray that the case be disposed of in terms of this compromise petition." It was signed by a number of persons but there was no indication that they represented the two communities. *Held*, that it may be that these persons, who signed the compromise, were important persons in the communities and it may be that both the communities should act according to the compromise effected by the so-called important persons. But in law it does not debar the parties from asserting their legal rights in a civil court.[4]

Compromise arrived at between two communities.

The written statement contesting the suit on its merits was filed by the defendant nearly three months after the execution of the agreement. There was no whisper about the agreement in the written statement of the defendant. What is more, with case reported as *Radha Krishna Bhaktha* v. *Ramanna Shetty*,[5] an agreement was executed eight days after the institution of the suit both the parties led oral and documentary evidence in support of their respective contentions and invited the Court to give a decision on merits without requesting the Court to record the alleged compromise and to pass a decree in terms thereof. The Court after considering the evidence placed by the parties, made a decree in favour of the plaintiff on 18th January, 1965, i.e. nearly two and half years after the execution of the alleged compromise. That decree was challenged by the defendant by preferring an appeal on 15th April, 1965. Nearly six months after the filing of the appeal, an application was made for the first time by the defendant on 9th August, 1965 requesting the Appellate Court to record the compromise, and to pass a decree in terms thereof. It was held that the Court could not record a compromise and pass a decree in terms thereof. That in view of the conduct of the defendant, he was also precluded by the principle of estoppel from inviting the Court to record the alleged compromise after contesting the suit on merits by giving a go by to the alleged compromise.[6]

Compromise not acted upon.

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1. Gleeson *v.* J. Wippel and Co. Ltd., (1977) 3 All E.R. 54 at p. 60 (C.D.).
2. Messrs. H.A. Shah & Co. *v.* Commissoner of Income-tax, A.I.R. 1956 Bom. 375 at pp. 376-77 : I.L.R. (1956) Bom. 79 : 58 Bom. L.R. 45.
3. (1980) 2 All E.R. 259 at p. 266 (C.A.).
4. Shaikh Piru Bux *v.* Kalandi Pati, A.I.R. 1970 S.C. 1885 at p. 1888 : 11 Orissa J.D. 16 : 35 Cut. L.T. 671 : 1969 S.C.D. 607 : (1969) 2 S.C.R. 563 : (1970) 2 S.C.J. 168.
5. A.I.R. 1972 Mys. 327.
6. Radhakrishanan Bhaktha *v.* Ramanna Shetty, A.I.R. 1972 Mys. 327 at p. 329.

Where application for reference says that compensation of at least Rs. 5,000 per acre should be paid it is difficult to regard this claim as an estoppel or an admission precluding the applicants from showing that the land is worth more.[1]

Estoppel by record; English law.

The doctrine of estoppel by record, as it obtains in England, is set out in Vol. 13 of Halsbury's *Laws of England* (Hailsham Edition). At page 402 the learned authors point out that of the several matters included by Lord Coke under this head, all are now obsolete except "that which appears on the records of the Courts of law". As to these they state that the judgment must be a final one and they divide judgments of this kind into two categories, those *in rem* and those *in personam*, or as they prefer to put it, *inter partes*.

Term *res judicata* as used in England and India difference between.

The term *res judicata* is used in different senses in England and in India. What the English lawyers call *res judicata*, namely the rule which prevents a party from suing again on the same cause of action is dealt within India by Order II, rule 2(2), whereas what courts term *res judicata* here is dealt within England under that breach of the law of estoppel by record which relates to judgments *inter partes*. But though the classification is different, the content and form are essentially the same, and the consequences which follow are the same.

In England the decision must be a final one: the matter must have been distinctly put in issue, and then only the precise point which was so put in issue and solemnly found against a party is deemed to have been finally decided and this is so in India as well under Sec. 11. At. p. 412 of Vol. 13 of Halsbury's *Laws of England*, it is stated—

> "The doctrine applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court. But if there be matter subsequent which could not be brought before the Court at the time, the party is not estopped from raising it."[2]

Issue does apply between the Crown and the defendant in criminal proceedings. It applies with mutuality. When one can determine the relevant issues with precision in certainty by referring to the earlier record and by what has transpired in the course of the earlier proceedings in relation to these issues estoppel can clearly operate.[3]

Difference between *res judicata* and estoppel.

There is, however, a difference between *res judicata* and estoppel. *Res judicata* ousts the jurisdiction of the Court while estoppel does not more than shut the mouth of a party to say one thing at one time and the opposite of it at another time.[4]

The distinction between the two doctrines was explained by Mahmood, J., in *Sitaram* v. *Amir Begum*[5] :

Where the similarity between *res judicata* and estoppel ends.

> "Perhaps the shortest way to describe the difference between the plea of *res judicata* and an estoppel is to say that while the former prohibits the Court from entering into an inquiry

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1. Anthony D'Silva *v.* Kerala State, A.I.R. 1971 Ker. 51 at p. 53.
2. Seth Ghasiram Seth Dalchand Palliwal *v.* Mst. Kundanbai, A.I.R. 1940 Nag. 163 at pp. 167-68 : 1940 : N.L.J. 1 : I.L.R. (1941) Nag. 513.
3. R. *v.* Hogan, (1974) 2 All. E.R. 142 at p. 154.
4. Bhaishanker Manashanker *v.* Morarji Keshavji, I.L.R. (1912) 36 Bom. 283 at p. 289 : 12 I.C. 535 ; Allahbux Pindok *v.* Nusserwanji & Co., A.I.R. 1936 Sind 99 at pp. 101-02.
5. I.L.R. 8 All. 324 : 1886 A.W.N. 101.

at all as to a matter already adjudicated upon the latter prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declarations or acts, has altered his position. In other words *res judicata* prohibits an inquiry *in limine*, whilst and estoppel is only a piece of evidence."

Case-law.

The doctrine of *res judicata* differs from *estoppel* chiefly in not resulting from an act of party himself but form a decision of the Court. The plea of *res judicata* is not merely a plea of estoppel. It amounts to an assertion that the very legal rights of the parties are such as they have been determined to be the judgment of a competent court and no other Court should proceed to determine this again. A matter once formally decided once for all as between those claiming under them. That which has been delivered in judgment must be taken for established truth. The operation of the doctrine is thus the transformation of a question of fact into question of law.[1]

Estoppel *per rem judicatum* where arises.

The question is when and in what circumstances an estoppel *per rem judicatum* arises. The answer to this question is to be found in the valuable judgment of Sachs, J., in *Hull* v. *Hull*[2] the effect of which may be summarised in this way. Estoppel operates to prevent a party in ancillary proceedings from challenging the ground on which the decree was pronounced in the suit, and from attacking the express findings of fact of the Trial Judge. Thus a respondent against whom a decree has been pronounced on the ground of adultery cannot be heard in ancillary proceedings to deny such adultery or to set up an absolute bar to a decree on this ground, e.g. connivance or condonation.[3] Alternatively, where a wife has denied her adultery on oath and the Trial Judge has pronounced a decree on the basis that such denial was accepted, the husband is estopped from alleging such adultery in ancillary proceedings.[4] Similarly, where the Trial Judge has made specific findings, e.g. that the husband did not strike the wife as alleged in a particular paragraph of the pleading, that finding is conclusive. Apart from these two categories of fact there is no estoppel. Applying these conclusion to the present appeal, it follows that the wife cannot be heard to deny, that she deserted the husband as found by the Trial Judge. To allow her to do so would be to allow her, to attempt to destroy the very basis on which the jurisdiction of the Court to award maintenance depends. Accordingly, she cannot set up just cause for leaving the husband, nor can she assert that he has treated her with cruelty within the meaning of the Matrimonial Causes Act, 1965, because this would be equivalent to asserting just cause. On the other hand one sees no reason why she should not raise any matters of complaint against the husband by way of mitigation of her desertion.[5]

Estoppel *per rem judicatum* when can be avoided.

It has long been recognised that estoppel *per rem judicatum* or issue estoppel is not an absolute bar to the matter in issue being tried again. The party concerned can avoid the effect of the previous decision if he can prove the same to have been obtained by fraud or collusion. To which one can add now that the party

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1. Smt. Radharani Dassi *v.* Smt. Binodamoyee Dassi, A.I.R. 1942 Cal. 92 at p. 98 : I.L.R. (1942) 1 Cal. 769 : 46 C.W.N. 245 : 74 C.L.J. 180.
2. (1960) 1 All E.R 378 : (1969) P. 118.
3. Tumath *v.* Tumath, (1970) 1 All. E.R. 114 : (1970) P. 85 *per* Salmon, L.J.
4. Field *v.* Field, (1964) 2 All E.R. 81 : (1964) P. 336.
5. Porter *v.* Porter, (1971) 2 All E.R. 1037 at pp. 1039-40.

concerned can avoid the effect of the previous decision if he can show that a new fact has come to light (which he could not have ascertained before by reasonable diligence) which entirely changes the aspect of the case.[1]

28. Doctrine of part-performance.—For the equitable principle of part-performance, see *Walsh* v. *Lonsdale*.[2] Under the English law equity will not fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon, the law of India is not inconsistent with the principles applied in equity to such cases, but on the contrary follows them.[3] Where a childless widow induced her grand-niece and her husband the plaintiff to come and reside with her under a promise that after the death of the widow the said plaintiff would be entitled to certain property. *Held* that it was a concluded contract from which the widow could not resile.[4] Where a purchaser under an unregistered conveyance paid the agreed price to his vendor and was placed in possession, it was held that in the absence of the circumstances showing that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance could not succeed in a suit to recover possession of the property from the former purchaser.[5] Where in pursuance of an agreement to transfer of property the intended transferee had taken possession, though the requisite legal documents had not been executed, the position is the same as if the documents had been executed—subject to the all important proviso that specific performance could be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined.[6] The principle enunciated in *Mohammad Musa* v. *Aghore Kumar Ganguly*,[7] appears to have been fore-shadowed in *Immudinpattain* v. *Periya*[8] and repeated in *Venkayyamma Rao* v. *Appa Rao*.[9] As regards the effect of this principle on Secs. 54 and 118 of the Transfer of Property Act and the applicability of it where a question of limitation arises there seems to be a diversity of judicial opinion. A short resume of the case-law on the point will therefore perhaps not be out of place.

Equity and English law.

Case-law.

In *Immudiapattain* v. *Periya*,[10] the transaction, by which a mortage was sought to be affected, was of 1882 and the suit was instituted in 1895 and the agreement before the Judicial Committee was that though the mortgage fell short of an actual transfer if showed a good contract for one and the defendant might call upon the heir of the contractor to implement the contract. Their Lordships held that at the date of the deed a transfer such as that alleged could not be effected except by a registered deed as required by the Transfer of Property Act of 1882 and observed

Transaction affecting mortgage; Privy Council view.

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1. Mellkenny *v.* Chief Constable, (1980) 2 All E.R. 227 at p. 237 (C.A.).
2. L.R. (1882) 21 Ch. D. 9.
3. Mohammad Musa *v.* Aghore Kumar Ganguly, I.L.R. 42 Cal. 801 (P.C.) : 19 C.W.N. 250, following the principles laid down in Maddison *v.* Alderson, (1883) L.R. 8 A.C. 467 and Potter *v.* Potter, (1750) Ves. Sen. 437.
4. Sri Rajah Malraju Lakshmi *v.* Sri Rajah Venkatta, I.L.R. 39 Mad. 509 : 29 C.W.N. 1054 (P.C.).
5. Puchha Lal *v.* Kunj Behary Lal, 18 C.W.N. 445 ; *see* also Khogendra Nath Chatterjee *v.* Sonatan Guha, 20 C.W.N. 149.
6. Gajendra Nath Dey *v.* Maulvi Ashraf Hossein, 27 C.W.N. 159 : 36 C.L.J. 48 ; Pitambar Gain *v.* Ram Charan Moral, 28 C.W.N. 157.
7. I.L.R. 42 Cal. 801 (P.C.).
8. I.L.R. 24 Mad. 377 (P.C.).
9. I.L.R. 39 Mad. 509 (P.C.).
10. I.L.R. 24 Mad. 377 (P.C.).

thus : "Certainly if such a right exists it would be an answer to the plaintiff's claim and the exact form in which it could be enforced need not be considered." A Full Bench of the Madras High Court in *Kurri Veerareddi* v. *Kurri Bapereddi*,[1] treated the observation quoted above, as *obiter dictum*. The next decision to which reference need be made is that of the Judicial Committee in the case of *Mohammad Musa* v. *Aghore Kumar Ganguly*.[2] In that case there was a compromise in a suit between the parties in 1873 under which certain conveyances were to be executed but the agreement of compromise was not registered nor embodied in the decree, and no conveyances were executed, but the compromise was acted upon and carried out by all the parties to it and their successors in title for 30 or 40 years. Their Lordships held that even though the compromise and the decree taken together was considered defective or inchoate the acts of the parties had supplied all defects. Shortly after another pronouncement was made by the Judicial Committee in the case of *Venkayyamma Rao* v. *Appa Rao*.[3] In this case their Lordships allowed specific performance of a conditional promise which have been but inchoate, but which by reason of the acceptance and performance of the condition, was held to have amounted to a complete contract. The suit in this case, however, had been filed within three years from the accrual of the cause of action. A Bench of the Madras High Court by a majority held that in the absence of a registered deed of exchange a defendant in a suit in ejectment could not rely upon the possession which the plaintiff had given him in part-performance of a contract and that the plaintiff in the suit was not estopped by his conduct from recovering possession.[4] The learned Judges in that case followed the case of *Kurri Veerareddi* v. *Kurri Bapereddi*.[5] In a Full Bench decision of that Court in the case of *Vizagapatham Sugar Co.* v. *Muthuramareddi*,[6] it was held that performance by way of delivery of possession and an enforceable right to specific performance are good defences to the action and the learned Judges in this decision purported to follow the decision of the Judicial Committee in the cases of *Venkayyamma Rao* v. *Appa Rao*[7] and *Mohammad Musa* v. *Aghore Kumar Ganguly*,[8] and to over-rule the decisions in *Kurri Veerareddi* v. *Kurri Bapereddi*[9] and *K.S. Ramanathan Chetty* v. *Ranganathan Chetty*.[10] In the same case the Division Bench after the expression of opinion of the Full Bench overruled the contention that the doctrine of part-performance is limited to cases when the right to sue for specific performance is not barred on the date of the subsequent suit. The Allahabad High Court in the case of *Salamat Zamin* v. *Masah Allah Khan*[11] appears to have held the parties down to the contract which in that case was a contract for exchange and was partly executed by mutual delivery of possession and dismissed the plaintiff's claim to recover possession from the

Equity supports transactions clothed imperfectly.

Absence of registered deed; plea of possession as part performance, etc.

Allahabad High Court view on contract for exchange.

1. I.L.R. 29 Mad. 336.
2. I.L.R. 42 Cal. 801.
3. I.L.R. 39 Mad. 509.
4. K.S. Ramanathan Chetty *v.* Ranganathan Chetty, I.L.R. 40 Mad. 1134.
5. I.L.R. 29 Mad. 336.
6. I.L.R. 46 Mad. 919.
7. I.L.R. 39 Mad. 509.
8. I.L.R. 42 Cal. 801.
9. I.L.R. 29 Mad. 336.
10. I.L.R. 40 Mad. 1134.
11. I.L.R. 40 All. 187.

defendant, though the time for specific performance of the contract had expired. The principle of this decision appears to have been approved of in a decision of that Court in the case of *Ram Sevak Rai* v. *Sheonaik Rai.*[1] The Bombay High Court has also applied this principle in the case of *Sandu Valji* v. *Bhikchand Surak Mull,*[2] in which other cases of that Court have also been referred to as having adopted it. In this last-mentioned case it was held that though the defendant's right to specific performance was barred the plaintiff according to the equitable principle of part-performance was not entitled to succeed. So far as the Calcutta High Court is concerned, while there is no doubt that the rightful owner is estopped in a suit for recovery of possession from setting up his own title by reason of the contract which had been performed in part there is some though very slight conflict of judicial opinion on the point as to whether this doctrine may be applied without reference to the question whether the right to claim specific performance of the contract is or is not still subsisting.

Contracts which have been partly performed and plea of estoppel.

The English authorities indicate that the doctrine is applicable only in these cases were specific performance can be obtained between the same parties in the same time as the subsequent legal question falls to the determined.[3] This limitation as to the applicability of the doctrine has been recognised in *Bibi Jawahir Kumari* v. *Chatterput Singh,*[4] *Singheeram Poddar* v. *Bhagbat Chandra Nandi,*[5] *Secretary of State* v. *Forbes,*[6] *Bepin Behari Mitra* v. *Tincouri Pathak,*[7] *Khogendra Nath Chatterjee* v. *Sonatan Guha,*[8] *Shyam Kishore Dey* v. *Umesh Chand Bhattacharya,*[9] *Gajendra Nath Dey* v. *Maulvi Ashraf Hossein,*[10] *Pitambar Gain* v. *Ram Charan Moral,*[11] and was implicitly recognised by Jenkins, C.J., in *Puchha Lal* v. *Kunj Behari Lal.*[12] On the other hand, the doctrine has been applied without reference to the question whether the right to claim specific performance was or was not subsisting in the cases of *Meherali Khan* v. *Aratunesa Bibi*[13] and *Shafikul Haq Chowdhury* v. *Krishna Govinda Dutta.*[14] The former of these two decisions is that of a learned Judge sitting singly and the exceptional circumstances of the latter case have been pointed out in the case of *Pitambar Gain* v. *Ram Charan Moral,*[15] and it has been explained in this case how that decision does not lay down any exception to the limitation as regards the applicability of the doctrine in cases only where specific performance can be obtained. The

Specific performance of contract when possible.

Applicability of the doctrine.

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1. I.L.R. 45 All. 388.
2. 25 Bom. L.R. 381.
3. Manchester Brewery Co. *v.* Coombs, (1901) 2 Ch. 608 and Potter *v.* Potter, (1750) 1 Ves. Sen. 437 which was relied upon by the Judicial Committee in Mohammad Musa *v.* Aghore Kumar Ganguly, I.L.R. 42 Cal. 801.
4. 2 C.L.J. 343.
5. 10 C.L.J. 543.
6. 16 C.L.J. 217.
7. 15 C.W.N. 976.
8. 20 C.W.N. 149.
9. 24 C.W.N. 463.
10. 27 C.W.N. 159.
11. 28 C.W.N. 157.
12. 18 C.W.N. 445.
13. 25 C.W.N. 905.
14. 23 C.W.N. 284.
15. 28 C.W.N. 157.

preponderance of authority therefore is in favour of the limited applicability of the doctrine.

Estoppel out of part performance whether can create title.

It is clear, however, that the estoppel arising out of the equitable doctrine of part-performance will not create title in the plaintiffs if otherwise they had none. The Judicial Committee in the case of *Maung Shwee Goh* v. *Maung Inn*,[1] referred to Sec. 54 of the Transfer of Property Act and it would seem that their Lorships were of opinion in considering whether a contract creates a charge upon or interest in land one has to go by the statute and not any principle of English Equity. It is true, as has been pointed out by the Calcutta High Court in the case of *Jnan Chandra Das* v. *Hari Mohan Sen*,[2] that the Judicial Committee did not consider in that case whether the equitable doctrine of part-performance was inapplicable in this country by reason of Sec. 54 of the Transfer of Property Act, still in a case where the plaintiffs seek to recover possession on the strength of his title they cannot succeed when there has been no transfer by a registered deed such as is necessary under that section.[3]

Doctrine of part-performance and rule of estoppel.

The doctrine of part-performance is an extension of the rule of estoppel which may form a valid plea to resist an action in which the title of the defendant was not found upon a completed contract. Where there is a mere executory contract, the remedy of the party aggrieved is by a suit for specific performance of the contract instituted within the period of limitation. In the case of a completed contract where all the formalities required by law have been duly fulfilled, the case of the party rests upon a perfected title. In between these two stages, comes part-performance. This gives rise to certain rights which are higher than the rights arising under the contract and which fall short of the rights under a completed transfer.[4]

Part-performance in pre-nuptial settlements.

The doctrine of the part-performance, which has in certain English cases been applied to per-nuptial settlements in consideration of marriage cannot, however, be applied to a gift made by way of *sankalap* at the time of the marriage, which is a sacrament and not the outcome of a contract. In *Rama Gopal* v. *Tulsi Ram*,[5] decided by a Full Bench of the Allahabad High Court, it has been held that, by the mere fact that mutation had taken place and possession taken by a party, the absence of registration cannot be cured by virtue of what is known to English law as the doctrine of part-performance.[6]

Section 53-A, Transfer of Property Act, creates rights of estoppel.

Section 53-A of the Transfer of Property Act creates no real right: it merely creates rights of estoppel between the proposed transferee and transfer or, which have no operation against third person not claiming under those persons.[7]

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1. I.L.R. 44 Cal. 542.
2. 22 C.W.N. 522.
3. *See* also Jagabandhu Saha *v.* Radhakrishna Pal, I.L.R. 36 Cal. 920.
4. Hira Mani Singh *v.* Anmol Singh, A.I.R. 1928 All. 699 at p. 703 : 26 A.L.J. 944.
5. A.I.R. 1928 All. 641 : 26 A.L.J. 952.
6. Hira Mani Singh *v.* Anmol Singh, A.I.R. 1928 All. 699 at p. 703 : 26 A.L.J. 944.
7. S.N. Banerji *v.* Kuchwar Lime and Stone Co. Ltd., A.I.R. 1941 P.C. 128 at p. 130 : 1942 A.L.J. 149 : 1941 A.W.R. (P.C.) 109 : 44 Bom. L.R. 324 : 74 C.L.J. 557 : 46 C.W.N. 374 : (1942) 1 M.L.J. 1 : 55 L.W. 79.

The petitioner sat for the Secondary School Leaving Certificate Examination, held by the Board of Secondary Education, Government of Madras in March, 1952. In due course, the S.S.L.C. book was despatched to him with the marks obtained by him at the public examination entered in it, with a rubber stamp certificate, which ran as follows :

"Certificate completed."[1]

"Eligible for admission to University Course of studies, Andhra, Madras or Annamalai Universities."

Held that it was a case of legal or equitable estoppel which satisfies practically all the conditions embodied in Sec. 115 of the Evidence Act. The University must be held to be precluded from taking any action to the detriment of the petitioner on the ground that a wrong endorsement had been made as to his eligibility.[2]

Legal or equitable estoppel.

29. Doctrine of standing by.—To found a plea of estoppel on the doctrine of standing by it must be affirmatively established that the parties against whom that estoppel is sought to be pleaded were aware of what was being done and consciously stood by.[3]

30. Doctrine of *caveat emptor*.—If the buyer does not avail himself of the knowledge or means of knowledge open to him or his agents he cannot be heard to say that he was deceived by the vendor's misrepresentations: for the rule is "*caveat emptor*", and the knowledge of his agents is as binding on him as his own knowledge.[4]

31. Admissions, whether operate as estoppel.—Admissions made in the course of a judicial proceeding may or may not amount to an estoppel.[5] Where land was inherited by mother of the appellant and father of respondents in equal shares and this state of affairs had been brought about by father of the respondents by admitting the claim of appellant's mother to half of the estate. The plaintiff respondents cannot be allowed to change their position after the expiry of several years.[6] Mere admissions of an understanding contrary to the terms of a mortgage-deed, even in depositions and pleadings, do not operate as estoppel, or prevent the mortgagor from redeeming his property.[7] An admission on a point of law is not an admission of a thing, so as to make the admission matter of estoppel.[8]

The difference between an admission and estoppel is a marked one. Admissions being declarations against an interest are good evidence but they are not conclusive and a party is always at liberty to withdraw admissions by proving that they are either mistaken or untrue. But estoppel creates an absolute bar. To bring the case within the scope of estoppel as defined in Sec. 115 of the Evidence Act : (1) there must be a representation by a person or his authorised agent to another in any form—a declaration, act or omission ; (2) the representation

Difference between admission and estoppel.

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1. A certificate is deemed to have been completed when the public examination marks are entered in it.
2. Registrar, University of Madras *v.* Sundara Shetti, A.I.R. 1956 Mad. 309 at pp. 310, 315 : I.L.R. (1956) Mad. 402 : (1956) 1 M.L.J. 25 : 1956 M.L.W. 196.
3. Ede China Gurunadham *v.* Palakurti Venkata Rao, A.I.R. 1959 A.P. 523 at p.p. 530 : I.L.R. (1959) A.P. 523 : 1959 Andh. L.T. 486 : (1959) 2 Andh. W.R. 79.
4. Jose Pedro Longuinhas Almeida Coutinho *v.* Vassanta Vitola Camotim, A.I.R. 1968 Goa 98 at p. 100.
5. 4 O.C. 408 at p. 417.
6. Smt. Sewti Devi *v.* Kanati Parshad, A.I.R. 1973 Punj. 126 at p. 131.
7. Abdul Rahim *v.* Madhavrav Apaji, I.L.R. 4 Bom. 78 at p. 82 : 8 B.H.C.R. (A.C.J.) 236 and 9 B.H.C.R. 65.
8. Jagwant Singh *v.* Silan Singh, I.L.R. 21 All. 285 : 19 A. W.N. 66 (L.R. Sup. Vol. I.A. 47 and 11 B.L.R. 391) ; *see* also 3 A L.J. 534.

must have been of the existence of a fact and not of promises *de futuro* or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth ; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused antoher to act on the faith of it, and to alter his former position to his prejudice or detriment ; (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice ; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge there can be no estoppel ; (8) only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee.[1]

It has been held that even an admission made under a wrong impression of the law will not bind a party.[2]

When the facts are fully set out and admitted, appellants' opinion about the legal effect of those facts is of no consequence in construing the section. No estoppel arises from such admission.[3]

It has been held in *Jagwant Singh* v. *Silan Singh*[4] and certain cases that an admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel within Sec. 115, Evidence Act.[5]

It is only when there has been one representation on a question of fact that a party is estopped from putting forward a contrary representation on the same question of fact.[6] No representations on matters of law will constitute any basis for estoppel.[7]

Where the admissions were wrong in point of fact and were evidently made in ignorance of legal rights. No binding effect on the persons' interests.[8]

The doctrine of estoppel comes into play only when the admission was designed actually or apparently to influence the conduct of the party claiming the estoppel and when the said party has changed his position in reliance on the admission. It does not apply to an erroneous admission on a point of law[9] or when the admission is gratuitous[10] and a party making such an admission is entitled to retract the same[11] and to prove the admission was mistaken or untrue.[12]

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1. Chhaganlal Keshavlal Mehta *v.* Patel Narandas Haribhai, (1982) 1 S.C.C. 223 at pp. 230, 231.
2. *Vide* Sankaran Nambi *v.* Nangalli Amma, A.I.R. 1935 Mad. 1062 : 161 I.C. 682 : 70 M.L.J. 592; *see* also Nachippa Chettiar *v.* Muthu Karuppan Chettiar, A.I.R. 1946 Mad. 398 at p. 408.
3. Kalidas Dhanjibhai *v.* State of Bombay, A.I.R. 1955 S.C. 62 at p. 65.
4. I.L.R. 21 All. 285.
5. Bimalabala Singha *v.* Deb Kinkar Ghosh, A.I.R. 1932 Pat. 267 at p. 269.
6. Munnangi Sumitramma *v.* Mudunuru Subbadu, A.I.R. 1943 Mad. 22 at p. 23.
7. A. Muthuswami Ayyar *v.* P.B. Longanathe Mudali, A.I.R. 1935 Mad. 404 at p. 409 ; Mohori Bibi *v.* Dharmodas Ghose, I.L.R. (1903) 30 Cal. 539 : 30 I.A. 114 : 8 Sar. 374 (P.C.) ; Jagwant Singh *v.* Silan Singh, (1899) 21 Al.l 285 : (1899) A.W.N. 66; Rajambal Ammal *v.* Shanmuga Mudaliar A.I.R. 1923 Mad. 11 : 70 I.C. 653 ; Venkatachala *v.* Arunthavathachi, A.I.R. 1923 Mad. 586 : 72 I.C. 548 ; Swaminatha Iyer *v.* Swaminatha Iyer, A.I.R. 1927 Mad. 458 : 99 I.C.772.
8. Mst. Munia *v.* Manohar Lal, A.I.R. 1941 Oudh 429 at p. 431.
9. Gulab Chand *v.* Bhaiyalal, A.I.R. 1929 Nag. 433 ; Ram Bharose *v.* Ram Bahadur Singh, A.I.R. 1948 Oudh 125.
10. Mohamad Iman Ali Khan *v.* Husain Khan, I.L.R. 26 Cal. 81 (P.C.) ; Budh Ram *v.* Uttamchand, A.I.R. 1928 Lah. 726 at p. 728.
11. Sita Ram *v.* Pir Baksh, A.I.R. 1931 Lah. 6.
12. Abdul Kareem *v.* Rashiduddin, A.I.R. 1931 Oudh 246 ; Mst. Chinto *v.* Narinjan Singh, A.I.R. 1957 Punj. 317 at p. 320.

Where the admission was made in a criminal revision when the plaintiffs had been convicted and if the admission was not made their conviction would have been upheld by the High Court, the admission, being *in terrorem* loses much of its significance.[1]

There can be no estoppel on a point of law relating to the validity of the nomination of the party as a *chela* and successor.[2]

A wrong belief on a point of law cannot strictly be said to be caused by a misrepresentation on the part of another. Where a defendant who under the Hindu law is entitled to a one-fourth share of a property is allowed by plaintiff to get one-half of the property the latter is not estopped from claiming the legal share in the property by reason of his joining with the defendant in making application in the Revenue Court praying that mutation be made in favour of plaintiffs and the defendant half and half.[3]

The opinion of counsel or of a party as regards the provison of law under which an order already passed should be deemed to have been made is neither an act nor a declaration nor such an omission as is referred to in Sec. 115, Evidence Act.[4]

No estoppel can ensue upon a representation, not of a fact, but of a mere opinion on a point of law.[5]

Even if an erroneous statement was made by counsel in the course of arguments, the party cannot be held to be estopped from taking the correct legal position afterwards.[6]

As held in *Sarsuti Prasad* v. *M. Ethisham Ali*,[7] the question of the proper construction to be placed on a deed is a question of law and there can be no estoppel by a pleading of law inasmuch as the other side must be presumed to know what the law is.[8]

The plaintiff from the mere fact of not having raised the legal plea that the proceedings ought to be under Sec. 47, and not under Order XXI, rule 58, is not estopped from pleading that in defence in a regular suit.[9]

The question whether the partition is effective in the absence of registration is a question of law. In order to operate as an estoppel the representation must be of a fact and not on a matter of law.[10]

Whether the admissions would operate as estoppel or not, they remain evidence. They may not be conclusive proof. It cannot be, however, accepted that the admissions are not evidence open to consideration with the rest of it.[11]

32. Admission of a counsel.—The effect of the admission of a counsel was the subject-matter of a recent decision of the Court of Appeal in *H. Clark (Doncaster) Ltd.* v. *Wilkinson*,[12] Lord Denning, M.R., summed up the position thus :

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1. Syed Mohd. Salie Labbai *v.* Mohd. Hanif, A.I.R. 1976 S.C. 1569 at p. 1582.
2. Baba Kartar Singh Bedi *v.* Dayal Das, A.I.R. 1939 P.C. 201 at p. 204.
3. Jagat Narain Singh *v.* Salik Ram Singh, A.I.R. 1938 Oudh 110 at p. 112.
4. Ashfaq Hussain *v.* Moharram Ali, A.I.R. 1948 Oudh 220 at p. 222.
5. Dharam Prakash *v.* Mst. Kalawati Devi, A.I.R. 1928 All. 459 at p. 464.
6. Allahabad Bank Ltd., Lahore *v.* Punjab National Bank Ltd., Ferozepore, A.I.R. 1939 Lah. 303 at p. 304.
7. A.I.R. 1933 Oudh 123.
8. Abdul Qavi *v.* Mahboob Ali, A.I.R. 1931 Oudh 133 at p. 134.
9. Padam Prasad *v.* Sambhu Dayal, A.I.R. 1934 All. 699 at p. 700.
10. Govind *v.* Mst. Chandrabhaga, 12 N.L.R. 1 : A.I.R. 1922 P.C. 20 : 49 I.A. 16: I.L.R. 49 Cal. 334 : 65 I.C. 954 (P.C.); Nainsukhdas *v.* Gowardhandas, A.I.R. 1948 Nag. 110 at p. 116.
11. Jawala Singh *v.* Prem Singh, A.I.R. 1972 Delhi 221 at pp. 226-27.
12. (1965) 2 W.L.R. 751 at p. 756.

"The question then is distinctly raised : Is a client bound by an admission made by counsel in the course of interlocutory proceedings ? Pennycuick, J., held that the client was bound. He was much influenced by a passage in Halsbury's *Laws of England*,[1] under the title 'Barristers' where it is said 'The statements of counsel, if made on the trial of an action or in the course of an interlocutory proceedings in the presence of the client or his solicitor or some one authorised to represent the solicitor, and not repudiated at the time, bind the client, and may be used as evidence against him'.....

"That passage in Halsbury's *Laws of England* appears to be based on a dictum of Burrough, J., in *Colledge* v. *Horn*.[2] It is stated too widely. An admission made by counsel in the course of proceedings can be withdrawn unless the circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of it, it may not be allowed to be withdrawn.[3] But otherwise an admission can be withdrawn."

An admission made by a counsel in the course of a proceeding can be withdrawn unless circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of that admission, it may not be allowed to be withdrawn.[4]

Admission by Government in its affidavit.

Admissions by the Government in its affidavit which are mere expression of opinion limited to the context and not specific assurances are not binding on the Government to create any estoppel.[5]

33. Whether estoppel only refers to contract.—The argument that estoppel only refers to cases of contract is untenable.[6]

Even though the matter may have passed from the stage of a representation into an agreement, there are cases where the Courts are entitled to entertain a plea of estoppel in order to prevent fraud or circuity of action. Authority for his position is to be found in the passage from Bigelow on *Estoppel*, 6th Ed., pp. 639-40.[7]

34. Both parties equally acquainted with facts.—Where the truth of the matter is known to both parties, there can be no estoppel and the principles of Sec. 115 of the Evidence Act do not apply to such a case.[8]

The correct rule of estoppel applicable in the case of an adoption is that it does not confer status. It merely shuts out the mouth of the person who tries to deny the adoption. Where both parties are equally conversant with the true state of facts, the doctrine of estoppel has no application.[9]

When the plaintiff has obtained transfer of the property from the previous lessee with eyes open that the latter had already committed themselves to the

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1. 3rd Ed., Vol. 3, p. 52, para 76.
2. (1825) 3 Bing. 119 at p. 122.
3. *See* R.N. Kelly *v.* Bushby, (1835) 3 Knapp 375.
4. Abdul Hameed Khan *v.* Commissioner of Income-tax, Andhra Pradesh, Hyderabad, A.I.R. 1967 A.P. 211 at p. 214.
5. Singhal, Dr. N.C. *v.* Union of India, A.I.R. 1980 S.C. 1255 at p. 1261, *see* also J.K. Steel Ltd. *v.* Union of India, (1969) 2 S.C.R. 481 at p. 498, *see* also C.V. Enterprises *v.* M/s Braithwaite and Company Ltd. A.I.R. 1984 Cal. 306.
6. Kannammal *v.* Virasami, I.L.R. 51 Mad. 486 at p. 487 ; 2 M.L.J. 114.
7. Sunderabai *v.* Devaji Shankar Deshpande, A.I.R. 1954 S.C. 82 at p. 85.
8. Mohori Bibi *v.* Dharmodas Ghose, 30 I.A. 114 : I.L.R. 30 Cal. 539 (P.C.) ; Union of India *v.* Jethabhai Jesinbhai Patel & Co., A.I.R. 1960 Pat. 30 at p. 31 ; Raj Kumar Rajindra Singh *v.* H.P. Administration, A.I.R. 1964 H.P. 19.
9. Fullamoni Dei *v.* Netrananda Sahu, A.I.R. 1967 Orissa 103 at p. 104.

payment of the heavy amount to the lessers the interim injunction restraining the basis for recovering damages from the plaintiff cannot be granted.[1]

When both parties are equally conversant with the true state of the facts, it is absurd to refer to the doctrine of estoppel.[2]

Section 115 does not apply, where the statement relied on is made to a person who knows the real facts and is not misled by the untrue statement.[3]

Three essential conditions for estoppel under this section.

In the case of *Ram Singh* v. *Baldeo Prasad*,[4] a Bench of the Allahabad High Court has held that in order to operate as an estoppel under Sec. 115, Evidence Act, three conditions must be fulfilled : (1) there must be a representation made by the opposite-party with a view of cause belief, (2) that representation should have been believed under such circumstances that its falsity could not be ascertained in spite of due diligence, and (3) actions arising out of such belief. Where both parties were perfectly aware of the circumstances and merely made a temporary arrangement for their mutual convenience, there can be no estoppel.[5]

There can be no estoppel where the truth of the matter appears on the face of the proceedings.[6]

Where the nominal transferee and the purchaser from him were both aware of the true nature of the deed of relinquishment, they cannot set up a title by estoppel.[7]

In *Union of India* v. *K.P. Mandal*,[8] both the parties knew that the arbitrator did not answer to the description of the officer referred to in the arbitration agreement and was not competent to make and award. Nevertheless, the parties with full knowledge that the officer had no authority appeared before the said officer, filed their respective states of fact and counter states of fact, lead their own evidence and made applications to the Court for extension of time. It was held by the Appeal Court that the parties would be estopped from challenging the award, even though the arbitrator had no authority to make the award.

In the cited case the contractor was prevented by estoppel from questioning the validity of the arbitration proceeding.[9]

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1. Atma Ram Properties (P) Ltd. Messrs *v.* Union of India, A.I.R. 1982 Delhi 582 at p. 583.
2. Hanapa *v.* Narapa, I.L.R. 23 Bom. 406 at p. 408 ; Yaramati Krishnayya *v.* Chundru Papayya, I.L.R. 20 Mad. 326 ; *see* also 4 N.L.R. 28 ; 3 N.L.R. 72 ; Mohori Bibi *v.* Dharmodas Ghose, I.L.R. 30 Cal. 539 (P.C.) ; Lorind Chand, Firm *v.* Punjab National Bank, A.I.R. 1940 Lah. 254 at p. 255. Section 115, Evidence Act, does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties, Lachman Singh *v.* Collector, Moradabad, A.I.R. 1933 All. 641 at p. 642—Where it is manifest that the true state of fact was known to the party or could have been known to him by the exercise of oridnary diligence, the principle of estoppel is not attracted ; Bansidhar Dhandhania *v.* Hazari Ram Marwari, A.I.R. 1933 Pat. 210 at p. 218—There is no estoppel when the true state of affairs is known.
3. Narayan Vithal Mawal *v.* Raoji Bin Monoji Dhole, I.L.R. 28 Bom. 393 at p. 397 : 6 Bom. L.R. 418.
4. 1932 A.L.J. 605 : A.I.R. 1932 All. 643.
5. Deota Din Singh *v.* Raj Narain Singh, A.I.R. 1934 All. 75 at p. 76 ; *see* also Harish Chandra Singh *v.* State of Bihar, A.I.R. 1984 Patna 337.
6. Tara Lal Singh *v.* Sarobar Singh, I.L.R. 27 Cal. 407 at p. 413 (P.C.) : 27 I.A. 33 : 4 C.W.N. 533, cited in-6 Bom. L.R. 419 ; Balmokand *v.* Small Towns Committee, Talagang, A.I.R. 1935 Lah. 960 at p. 961.
7. 4 C.L.J. 22 : 10 C.W.N. 650 : 13 M.I.A. 585.
8. A.I.R. 1958 Cal. 415.
9. *See* also Union of India *v.* B.N. Sen, A.I.R. 1963 Cal. 456 at p. 460.

Both parties under mistaken apprehension.

When both the parties are acting under a common misapprehension there cannot be any estoppel against the plaintiff until the position is cleared up.[1]

Both the parties labouring under the mistake of law.

No question of estoppel can ever arise where both the parties are labouring under the mistake of law and one party is not more to blame than the other.[2]

35. Party aware of the true facts.—In *New Monkhooshi Tea Co. Ltd., in re*,[3] and application under Sec. 155, Companies Act, was filed for rectification of the share register of the company. The applicant proceeded herself on the basis that three persons were originally the recorded owners in her petition for share certificate. The order for succession certificate also indicated clearly that the Court proceeded on the basis that the names of three persons appeared as the owners of these shares. *Held* that there was no question of the applicant being misled by this representation contained in the share certificate.

36. Doctrine of election.—The doctrine of election is the principle that the exercise of a choice by a person left to himself of his own freewill to do one thing or another binds him to the choice which he has voluntarily made. The Court exercising jurisdiction in equity will bind him to his election and preclude him from going behind the same.[4]

In Spencer Bower's *Estoppel by Representation*,[5] referring to the doctrine of election as applied to instrument, it is stated :

> "It may happen that one of two parties to an instrument, in the course of his dealings with the other in pursuance of or in relation to, that instrument, finds, or thinks he has found, that is it voidable at his option as against such other party. Thereupon it is open to him to take up one of two inconsistent attitudes; he may either treat the instrument as void and not binding on him, or he may think it to his advantage, instead of exercising his right in this respect, to treat it as valid and subsisting; but if, by words or (as is usually the case), by conduct, he leads the other party to believe that he is definitely choosing the one course in preference to the other, and in the belief, to alter his position for the worse he is estopped, as against the other party, from afterwards approbating what he has thus reprobated, and reprobating what he has thus approbated."

The illustration given at page 297, drawn from Re *Does*,[6] is apposite.

37. Estoppel by election.—As has been stated by Lord Atkin in *C.A. Lissenden* v. *Bosch Ltd.*,[7] where a person concerned has the choice of two rights either of which he is at liberty to adopt, but not both, and if he adopts the one he cannot afterwards assert the other.[8]

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1. Steuart & Co. Ltd. *v.* C. Machkertich, A.I.R. 1963 Cal. 198 at p. 203.
2. Sales Tax Officer, Banaras *v.* Kanhaya Lal Makund Lal Saraf, A.I.R. 1959 S.C. 135 at p. 143 : 1959 S.C.J. 53 : 1959 S.C.R. 1350 : 1959 Mys. L.J. 38 ; Ramkirpal Sheo Prasad *v.* Municipal Committee, A.I.R. 1963 M.P. 240 at p. 241.
3. A.I.R. 1967 Cal. 196 at p. 199.
4. K. Shanmugham Pillai *v.* S. Shanmugham Pillai, A.I.R. 1968 Mad. 207 at p. 211.
5. 2nd Edn. by Turner at p. 296.
6. Exp. Alsoop, 29 L.J. Rev. 7.
7. (1940) A.C. 412 at p. 429.
8. Union of India *v.* Bharat Fire and General Insurance Ltd., New Delhi, A.I.R. 1961 Punj. 157 at p. 160.

A party who seeks the assistance of the Court is not entitled to approbate and reprobate or blow hot and cold, as it is sometimes put. The principle is clearly stated in *Vershures Creameries* v. *Hull and Netherlands Steamships Co.*[1] Scrutton, L.J., puts it in this way : "A plaintiff is not permitted to approbate and reprobate". The doctrine of election is not confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain more advantage, to which he could not only be entitled on the footing that it is valid, and then turn round and say it is, void for the purpose of securing some other advantage, that is, to approbate and reprobate the transaction. The principle has been followed in the Madras High Court,[2] *vide* the cases in *Ramasami Chettiar* v. *Chidambaram Chettiar*[3] and *Venkatarayadu* v. *Ramakrishnayya.*[4] Those are cases of orders passed by courts involving the payment of cost to the successful party by the unsuccessful party.

What is doctrine of election.

In *Baluram* v. *Brij Nath Singh,*[5] the following propositions were laid down :

> "Upon the principle underlying the aforesaid decision a person who takes benefit under an order *de hors* the claim on merits cannot repudiate that part of the order which is detrimental to him because the order to take effect in its entirety....There is no justification for extending the rule in *Tinkler* v. *Hilders,*[6] to cases like the present. In our judgment, it must be limited only to those cases where a person has elected to take a benefit otherwise than on the merits of the claim in the *lis* under an order to which benefit he could not have been entitled except for the order. Here the appellant, by withdrawing the pre-emption price, has not taken a benefit *de hors* the merits "....."

As pointed out by the Supreme Court the question of election in the case of orders of Court ordinarily arise only in cases of orders which have nothing to do with the merits of the case.

Section 115 of the Evidence Act deals with estoppel. When a person having two alternative courses of action mutually exclusive chooses to adopt one of them and rejects the other expressly or impliedly, he is said to have elected to choose one of them and he is subsequently precluded from adopting the other course which he chose or intended to reject.[7]

Principle of estoppel by election applies to both civil and criminal proceedings.

The plain dictionary meaning of litigation is 'judicial controversy or a contest in a Court of law'. Therefore, litigation takes in civil as well as criminal litigation. Hence the principle of estoppel by election applies to both civil and criminal proceedings.[8]

The right of appeal is a statutory right and cannot be taken away or cannot be regarded as having been lost of mere equitable or other than statutory considerations.[9]

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1. (1921) 2 K.B. 608 : 91 L.J.K.B. 39 : 125 L.T. 165.
2. Bonagiri Sreeramulu *v.* Karumuri Venkatanarasimham, A.I.R. 1938 Mad. 1004 at p. 1005 : (1938) 2 M.L.J. 835 : 48 L.W. 476 : 1938 M.W.N. 1013.
3. A.I.R. 1927 Mad. 1009 : 105 I.C. 620 : 26 M.L.W. 527.
4. A.I.R. 1930 Mad. 268 : 123 I.C. 337 : 58 M.L.J. 137.
5. A.I.R. 1961 S.C. 1327.
6. (1849) 154 E.R. 1176.
7. **Kurien *v.* Renjitha, 2000 (1) K.L.T. 388 at pp. 393, 394.**
8. *Ibid.*
9. Chennaveeriah *v.* Mysore Revenue Appellate Tribunal, Bangalore, A.I.R. 1971 Mys. 66 at pp. 68-69 : (1970) 2 Mys. L.J. 425.

It was held that if the successful party received the costs ordered to be paid by the unsuccessful party, he could not afterwards come to Court and say that the order itself was passed without jurisdiction. It is of course obvious that acquiescence in an order passed by a court will not render the order valid if it is an order passed, without jurisdiction but the principle followed in *Venkatarayadu* v. *Ramakrishnayya*,[1] is that a person who has chosen to adopt an order cannot subsequently be allowed to object to it.

Where a man is entitled to one of two inconsistent rights and he has with full knowledge done an unequivocal act indicating his choice of one, he cannot afterwards pursue the other. Such cases do not require detriment to the other party as foundation for their application.[2]

As Lord Blackburn said in *Scarf* v. *Jardine*,[3] quoting a passage from Coke on Littleton, "where a man has an option to choose one or other of two inconsistent things, when once he has made his election it canot be retracted, it is final and cannot be altered". This passage as well as the law contained in it received express approval from Lord Atkin in the House of Lords in *United Australia Ltd.* v. *Barclays Bank Ltd.*[4]

Necessary factors.

All that is necessary is that the party should have sufficient information and knowledge to be able to recognise that he has two rights inconsistent with each other knowing that if he chooses one of these two rights and enforces that right it necessarily is an act of election and necessarily precludes him from contending that the act adopted and ratified by him is invalid and that the other remedy and right is the proper one.[5]

Benefits and burden in deed and right to elect.

When deed confers on a person certain benefits burdened with certain obligations, that person has the right to elect whether he would take the benefits under that deed or not. If he does elect to take the benefits under the deed, he must also bear the burdens created thereby.[6] These principles are well established. A classic statement of the law on the subject is to be found in the well-known observations of Lord Redesdale in *Birmingham* v. *Kirwan*.[7]

Removal of encroachment.

The words "in addition to and not in derogation of" occurring in Sec. 19 of the Bihar Public Land Encroachment Act, 1956 seem to indicate that, if under any other law in force, remedy is provided for removal of encroachment, that remedy would not be barred merely because a party unsuccessfully sought the aid of the Bihar Act for the same purpose. The principle of election may not also apply because of the language of Sec. 19 of the Bihar Act.[8]

The husband has made an application under rule 68 of the Matrimonial Causes Rules, 1971[9] for leave to apply for a transfer of property order, and a

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1. A.I.R. 1930 Mad. 268 : 123 I.C. 337 : 58 M.L.J. 137.
2. R. Samurda Vijayam Chettiar *v.* Srinivasa Alwar, A.I.R. 1956 Mad. 301 at p. 304 : 1956 M.W.N. 92 : (1956) 1 M.L.J. 276 : (1956) M.L.W. 62.
3. (1882) 7 A.C. 345 at p. 360.
4. (1941) A.C. 1 at p. 30.
5. Haridas Mafatlal Gagalbhai *v.* Vijyalakshmi Navinchandra Mafatlal Gangalbai, A.I.R. 1956 Bom. 721 at p. 726.
6. Dowager Rani Lalitha Kumari Devi *v.* Raja of Vizianagaram, A.I.R. 1954 Mad. 19 at p. 48 : 66 L.W. 231.
7. (1805) 2 Sch. & Lef. 444 (449) (II.).
8. Bhartiya Hotal, Messrs. *v.* Union of India, A.I.R. 1968 Pat. 476 at p. 478.
9. Sl. 1971 No. 953.

variation of settlement order under Sec. 4 of the Matrimonial Proceedings and Property Act, 1970. The Counsel for the wife submits there is an estoppel. *First* the husband was under a duty to disclose that he intended to seek a transfer order.[1] *Secondly*, there is an estoppel by election.[2] The wife has put herself in a worse position than she might otherwise have been in and has acted to her deteriment in that she agreed to pay the £300 costs although there was no claim against her and she could not have been forced to do so. She agreed to pay her own costs in the custody proceedings which are said to be upward of £ 1,000, she remarried thus losing her right to periodical payments and to any transfer of property order under Sec. 4 of the 1970 Act, she agreed to hand over the aeroplane, she has debts which she was expecting to be able to discharge with the money from her share in the equity and finally she was looking to her share to finance additional accommodation for the children in Switzerland. The Court thinks her case is unanswerable and the husband has no longer any ground, or indeed right, on which to make this application.[3]

38. Estoppel against person under legal disability.—Not only the English law, but also the balance of the judicial authority in India, is decidedly in favour of the rule that where an infant has induced a person to contract with him by means of false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract.[4]

If the seller has induced the other party to buy under the belief that he was under no disability to sell he would certainly be estopped from denying his capacity to sell.[5]

39. Transaction void or opposed to public policy—Estoppel.—It is well settled principle of law that if the document is void *ab initio* there would be no question of estoppel.[6]

None to be allowed benefits of his own wrong.

The principle of public policy that no man is allowed to benefit by his own wrong[7] also applies in cases where a person has connived at encouraged or promoted an act. Where a person has persuaded a widow to allow himself to cohabit with her, he cannot take advantage of his own wrong and thereby deprive her of the rights which have vested in her by inheritance. The circumstances brought about by the seducer himself would estop him from claiming the property.[8]

Estoppel in transactions void for immoral purposes or opposed to public policy.

If the object of a transfer of property is immoral, the transfer is void, and there cannot be any conveyance of any interest effected by the transfer. But the principle of equity enunciated in the case of *Ayerst* v. *Jenkins*[9] would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy.[10]

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1. *See* Greenwood *v.* Martins Bank Ltd., (1932) 1 K.B. 371 : affd. H.L. (1933) A.C. 51 : (1932) All E.R. Rep. 318; and Spencer Bower on *Estoppel* 2nd Ed., (1966) p. 49, para, 59.
2. *See* Managhten *v.* Paterson, (1907) A.C. 483. and Spencer Bower on *Estoppel*, 2nd Ed., (1966), p. 285, para 39.
3. Marsden (J.L.) *v.* Marsden (A.M.), (1973) 2 All E.R. 851 at pp. 852, 855, 856.
4. Khan Gul *v.* Lakha Singh, A.I.R. 1928 Lah. 609 at p. 615 (F.B.) : 9 Lah. 701 : 10 L.L.J. 413 : 30 P.L.R. 60.
5. U. Pyinnya *v.* Maung Law, A.I.R. 1929 Rang. 354 at p. 358 (F.B.).
6. Biranchi Narayan Thakur *v.* Biranchi Narayan Thakur, A.I.R. 1953 Orissa 333 at p. 334 : 19 Cut. L.T. 346.
7. *See* Beresford *v.* Royal Insurance Co. Ltd., (1938) 2 All E.R. 602 : (1938) A.C. 586.
8. Chintu *v.* Mst. Chando, A.I.R. 1951 E.P. (Simla) 202 at p. 203.
9. (1873) 16 Eq. 275 : 21 W.R. 878 : 29 L.T. 126.
10. Sabava Yellappa *v.* Yamanappa Sabu, A.I.R. 1933 Bom. 209 at p. 212 : 142 I.C. 708.

Estoppel where house leased contrary to terms of lease of land.

The respondents were landlords of houses built on lands given on long lease by the Delhi Improvement Trust. Under the terms of the lease the lessees undertook not to use the said land and buildings that may be erected thereon during the said term for any other purpose than for the purpose of residential house. Buildings were used for commercial purposes contrary to the terms of the lease-deed. The landlords instituted the proceedings for eviction against tenants. The question was whether the landlords were estopped or otherwise prohibited from getting possession of the property from the tenants because they themselves had let it out for commercial purposes. *Held* that there is no estoppel here because both the landlord and the tenant knew that the tenancy was not one permitted under the terms of the lease of the land. In any case there can be no estoppel against the statute. The lease in its inception was not void nor is the landlord estopped from claiming possession because he himself was a party to the breach of the conditions under which the land was leased to him.[1]

40. Parties cannot be prevented by any estoppel from relying on the rights under the Act.—In *Ramalingam* v. *Gurumurthi Reddy*,[2] a Bench of the Madras High Court has pointed out that the tenant cannot be bound by a contract involving a curtailment or deprivation of his rights under the Act.

In England this aspect of the matter denying freedom of contract to the tenants to agree to forego rights under the Rent Restriction Acts has frequently come up for decision in various aspects. Reference may be made to the following statement of the law in 23 *Halsbury*, 3rd Ed., page 722, paragraph 1467 :

> "*Contracting out of the Acts.*—A tenant cannot contract out of his rights under the Rent Restrictions Acts. Thus he cannot bind himself to pay more than the proper rents. Similarly, so long as a statutory tenant remains in occupation he cannot by any contractual arrangement forfeit his rights to be protected...Even if a tenant contracts to vacate the premises and later refuses to leave the landlord cannot rely on the agreement but must show some ground on which an order for possession may be made under the Acts.....
>
> The parties cannot be prevented by any estoppel from relying on their rights under the Acts whether the estoppel results from agreement or conduct, or, it stems, from a decision of the Court."

From this it is seen that a statutory tenancy cannot by an agreement be converted to a mere contractual tenancy, and that in all these cases courts will only look at the legal substance of the transaction and not to the form alone.[3]

Agreement for purchasing land at a certain rate higher than the rate payable under the law.

If in order to avoid losing the land the petitioner sub-lessee entered into an agreement for purchasing it at a certain rate, which was final so far as the decision of the Rehabilitation Authorities is concerned but was higher than the rate at which the petitioner was liable to pay under the law, he cannot be estopped from claiming that he should not be made to pay more than what he is required to pay under the Displaced Persons (Compensation and Rehabilitation) Rules, 1955.[4]

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1. Faqir Chand *v.* Ram Rattan Bhanot, A.I.R. 1973 S.C. 921 at pp. 922, 924.
2. (1954) 2 M.L.J. 752.
3. Messrs. Isherdas Sahni & Brothers *v.* Rajah V. Rajeswara Rao, (1968) 2 M.L.J. 233 at pp. 245-46.
4. Sardha Ram *v.* Central Government through Ministry of Rehabilitation, New Delhi, A.I.R. 1972 Punj. 296 at p. 298.

41. Plaintiffs cannot take advantage of their own irregularity.—In *Atmakuri Rajeswar Rao* v. *Jogindha Patro,*[1] the defendants were tenants of the suits lands from year to year. The particulars of the lands in the cultivation of each of the tenants were shown in the schedule attached to the plaint. Different defendants were in separate and exclusive possession of the respective lands as shown in the schedule.

Held that though separate suits should have been filed against different defendants, there was one suit and one trial as there were common questions of law and fact. Plaintiffs could not take advantage of their own irregularity in filing a single suit.[2]

Estoppel and renunciation of right by a Mohammedan expectant heir.

When deeds acknowledging receipt of some cash and moveable properties as consideration for not claiming any rights in future in the properties mentioned in the deed were executed by the expectant heir governed by Muslim law, it was held that though a renunciation by an expectant heir in the lifetime of his ancestor is not valid, or enforceable against him after the vesting of the inheritance, yet the principle of estoppel remains untouched by this statement and that the executants were estopped by their conduct, on an application of Sec. 115, Evidence Act, from claiming any right to inheritance which accrued to them, on their father's death, covered by the deeds of relinquishment for consideration.[3]

Identical question was raised and negatived in *M.R. Seturatnam* v. *Venkatachela Goundan,*[4] their Lordships observed thus :

> "But the plaintiff in disregard of the provisions of the Code has united in the same suit not merely several causes of action, but several actions or suits against separate defendants, with the result that in effect the litigation has been conducted and treated throughout as though the defendants were a community with common interests. The plaintiff therefore cannot now be heard to object to the use of evidence to which the irregularity of his procedure has given relevance and to which he apparently took no exception when it was tendered at the trial....."

The petitioners cannot be allowed to blow hot and cold in the same breath.

Receipt of compensation under Rajasthan Cash Jagir Abolition Act—Estoppel against challenge to the vires of the Act.

Right to the compensation, of whatever nature or content, flowed from the abolition of the cash *jagirs* under the Rajasthan Cash Jagir Abolition Act. Acceptance of the compensation under the Act for the full length of the period of twelve years completely negatives the scope of attack upon the abolition of the grant. The foundation of the compensation is the abolition of the cash *jagirs*. Section 3(2) under which the compensation is available is integrally connected with Sec. 3(1) which has abolished the cash *jagirs* from a specified date and it is only on such abolition that compensation is rendered possible. Acceptance of compensation, therefore, gives a quietus to the claim to have the Act adjudged as *ultra vires.*[5]

42. Taxation matters.—The general principle that the rule of estoppel by record does not apply to taxation matters is well knwon—*See* the Supreme Court judgments in *Dwarkadas Kesardeo* v. *Commissioner of Income-tax, Central, Bombay*[6]

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1. (1968) 34 Cut. L.T. 1131.
2. Atmakumari Rajeswar Rao *v.* Joginadha Patro *alias* Jogi Patro, (1968) 34 Cut. L.T. 1131 at pp. 1133, 1135.
3. Gulam Abbas *v.* Haji Kayyam Ali, A.I.R. 1973 S.C. 554 at pp. 555, 557, 558.
4. A.I.R. 1920 P.C. 67.
5. Rani Inder Kumari *v.* State of Rajasthan, A.I.R. 1975 S.C. 1058 at p. 1060.
6. (1962) 44 I.T.R. 529 (S.C.).

and *New Jehangir Vakil Mills Co. Ltd., Bhavnagar* v. *Commissioner of Income-tax, Bombay, North Kutch and Saurashtra.*[1] There is no estoppel in law against a party in a taxation matter.[2] In *Firm Bhagat Ram Mohanlal* v. *Commissioner of Excess Profits Tax, Nagpur,*[3] their Lordships of the Supreme Court observed at page 379 as follows :

Supreme Court view.

> "It is undoubted law that the Income-tax Authorities are not prevented by the fact of registration from going behind the certificate and deciding who the real partners of the firm are."

It is true that this decision deals with the principle of estoppel as between the very parties to the registration certificate, and not as against a third party, but as is well known, the provisions of Sec. 115 of the Indian Evidence Act do not, in terms, apply to proceedings before the Sales Tax authorities.[4]

In England also there can be no estoppel against the Crown in taxing matters—*See* Halsbury, Vol. 20, 3rd Ed., Page 735, paragraph 1481.

Doubtless as regards proprietary interest, there may be estoppel by conduct known as estoppel by *pais.*[5]

The same principle seems to be applicable in America also. In *Corpus Juris Secundum,* Vol. 31 at pages 434-436 the law on the subject was summed up as follows :

American law.

> "Taxation being a governmental rather than a proprietary function, ordinarily there can be no estoppel against Government or Government agency, with reference to enforcement of taxes."

The "exceptional circumstances" are referred to in *American Jurisprudence,*[6] Vol. 516 at pages 839 and 845 :

> "Thus if a person in good faith is prevented from paying tax on the assertion by the person authorised to levy taxes to the effect that no tax was payable there may be no estoppel so far as realisation of penalty or interest from him for the tax that is ultimately found to be payable is concerned. But it does not affect his liability to pay the tax."[7]

If the law says that no jurisdiction can be assumed without issue of notice and serving it on the assessee it cannot be circumvented by invoking equitable principle of estoppel and participation of assessee. It is not an error in exercise of jurisdiction but an error which debars assessing authority from proceeding in the matter.[8]

43. Income-tax Act.—It is well settled that there is no estoppel in income-tax proceedings nor is the principle of *res judicata* applicable.[9] There can be no question of the assessee waiving any right accruing to him. In *Basheshar Nath* v. *Commissioner of Income-tax, Delhi and Rajasthan,*[10] their Lordships of the Supreme Court observed :

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1. (1963) 49 I.T.R. 137 : A.I.R. 1964 S.C. 318.
2. Dunlop India Limited *v.* Union of India, A.I.R. 1977 S.C. 597 at p. 607.
3. A.I.R. 1956 S.C. 375 : 1956 S.C.A. 394 : 1956 S.C.J. 312 : 1956 S.C.R. 143.
4. Nowranglal Agarwala *v.* State of Orissa, A.I.R. 1965 Orissa 44 at p. 47 : 31 Cut. L.T. 193.
5. *See* Attorney-General and the Prince of Wales *v.* Collom, (1916) 2 K.B. 193 and also (1949) 1 K.B. 227.
6. Published by the Lawyers, Co-operative Publishing Department.
7. Nowranglal Agarwala *v.* State of Orissa, A.I.R. 1965 Orissa 44 at p. 49 : 31 Cut. L.T. 193.
8. Laxmi Narain *v.* Commissioner of Sales Tax, Lucknow, A.I.R. 1980 All. 198 at p. 202.
9. Makhanlal Ram Swarup *v.* Commissioner of Income-tax, Lucknow, (1961) 61 I.T.R. 214 at p.217.
10. A.I.R. 1959 S.C. 149 at p. 172.

"..Waiver differs from estoppel in the sense that it is contractual and as agreement to release or not to assert a right, estoppel is a rule of evidence."

Supreme Court view.

In this connection the case of *Dawsons Bank Ltd.* v. *Nippon Menkwa Kabushiki Kaisha*[1] may be referred to. Though the Supreme Court in the case refered to above deal with the question of relinquishment of the fundamental right guaranteed under Art. 14 of the Constitution the observations referred to above by S.K. Das, J., are opposite. Another passage which may be usefully referred to is the following passage at page 180 which summarises the American law relating to the waiver of a fundamental right :

Privy Council view.

"As a general rule, rights relating to procedure and remedy are subject to waiver, but if a right is so fundamental in its nature as to be regarded by the State as vitally integrated in immemorially established processes of the administration of justice, it cannot be waived by anyone."

The existence of a valid notice is a condition precedent for the exercise of the jurisdiction by the Income-tax Officer to assess or re-assess. The want of notice affects the proceedings for assessment and does not in any manner affect the right of the assessee, which he could validly abandon. There could be no waiver respect of such a notice.[2]

It is well settled that the doctrine of estoppel does not apply in cases of successive assessments. The taxing department is not bound by any contention it took up in one assessment when the question arises with regard to a different assessment.[3]

Estoppel against assessment of income-tax.

44. Estoppel in income-tax assessment.—The mere inclusion of an item in the return on which no tax is leviable under the law would not create an estoppel against an assessee.[4]

Where the assessee company obtained a particular benefit and escaped a particular obligation by reason of a representation made by it to the taxing department the assessee cannot be permitted to deny the truth of the representation made by it.[5]

Where the provisional assessment was made at the instance of the petitioner's husband, *held* that though such a provisional assessment was not permitted by the provisions of the Sea Customs Act, yet when the petitioner's husband had taken advantage of the same, the petitioner could not now turn round and challenge it.[6]

Provisional assessment.

45. Insolvency.—It is clear from the observations made by the Court in the case of *Yokahama Specie Bank Ltd.* v. *Curlender and Co.*,[7] that immovable property in a foreign country is not transferred to the Receiver in Insolvency by operation in an Indian statute relating to insolvency. It would be difficult to say that there was an effective vesting of the right in that property in the receiver by operation of law, *viz.*

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1. A.I.R. 1935 P.C. 79.
2. Messrs. Tansukhrai Bodulal *v.* Income-tax Officer, Nowgong, Assam, A.I.R. 1961 Assam 35 at p. 41.
3. Kantilal Chimanlal Shah *v.* Commissioner of Income-tax, Bombay, North, Kutch and Saurashtra, A.I.R. 1955 Bom. 53 at p. 54 : 56 Bom. L.R. 810 : I.L.R. (1954) Bom. 1260.
4. Messrs. Karam Chand Thapper *v.* Bros. (Coal Sales) Ltd., Jaipur *v.* Sales Tax Officer, City Circle "A", Jaipur, A.I.R. 1953 Raj. 51 at p. 54 : 1941 R.L.W. 420 : I.L.R. (1961) 11 Raj. 688.
5. Commissioner of Income-tax, Bombay City I *v.* Army and Navy Stores Ltd., Bombay, A.I.R. 1958 Bom. 23 at p. 24 : 59 Bom. L.R. 518.
6. Baroness Wilhelmine Von Maltazan *v.* Collector of Customs, A.I.R. 1958 A.P. 122 at p. 128 : (1957) 2 Andh. W.R. 207.
7. A.I.R. 1926 Cal. 898.

under Sec. 28(2) of the Provincial Insolvency Act. The utmost that can be said is that the insolvent would be *estopped* from dealing with that property by reason of the fact that an order of adjudication has been passed against him. Till he has obtained his discharge under the provisions of the Act, he would not be entitled to deal with that property.[1]

46. Trustees.—Where on earlier occasions the claim of reversioners of the person creating the trust have been negatived as the persons in possession ascribed their right to the property to the existence of the trust, such persons are estopped from denying the validity of the trust.[2]

47. Licensee's estoppel.—"The rule that tenant cannot deny his landlord's title extends to the case of persons coming in by permission as a mere lodger, a servant or other licensee....."[3]

48. *Pucca* delivery order.—The conditions in the agreement between the mill and the original buyer is not likely to be the same as between the intermediate buyers. An intermediate buyer enters into a contract for the purchase of jute goods on certain terms and conditions. It is given a *pucca* delivery order which will not entitled it to get delivery of the goods on the terms and conditions of its own contract, but it is compelled to give an undertaking that it will enter into a fresh contract with the mills on terms which are different.

The mills take the precaution of putting in a term that they are not bound to accept the transferee. In view of this term there can be no estoppel, where the delivery order is transferred. In other words, far from there being a representation on behalf of the mill that delivery will be given to the holder of the delivery order, as a matter of fact, there is a clear representation that it will not be so done.[4]

49. Estoppel by acquiescence.—A man can be said to have acquiesced in what the other side knew to be a true fact.[5]

The proper sense of the word "acquiescence" is that if a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and takes no objection while the act is in progress, he cannot afterwards complain.[6]

Estoppel by acquiescence has no application to an *ex post facto* submission, not amounting to ratification, and inducing no action or omission. Acquiescence after a *fait accompli*, if not prolonged beyond the verge of limitation, is no bar to a right of suit already accured.[7] If bare acquiescence is a valid defence, it must be an acquiescence while the act acquiesced is in progress, and not after it has been completed.[8] The doctrine of acquiescence or laches will apply only to cases in which they can be regarded as a positive extinguishment of right. When they merely go to the remedy, the Courts have no power to arbitrarily substitute an extinguishing prescription different to that determined by the Legislature.[9] The equitable doctrine of laches and acquiescence

After *ex post facto* submission.

After *fait accompli.*

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1. Patel Jeshbhai Revendas *v.* Patel Narsingbhai Girdharbhai, A.I.R. 1968 Guj. 101 at pp. 105-106.
2. Pichai Pillai *v.* Lingam Iyer, A.I.R. 1928 Mad. 268 at p. 269 : 108 I.C. 199.
3. Doed Johnson *v.* Baytup. (1835) 3 A. & E. 188 ; Uttam Gulabrao Sakhare *v.* Champatrao Gulabrao Gawande, A.I.R. 1960 Bom. 238 at p. 239 : 1958 Bom. L.R. 1150 : 1958 N.L.J. 446 : I.L.R. (1958) Bom. 1356.
4. Juggilal Kamlapat *v.* Pratabmull Rameshwar, 70 C.W.N. 741 at p. 755.
5. Sarjug Devi *v.* Dulhin Kishori Kuer, A.I.R. 1960 Pat. 474 at p. 480.
6. Salilala *v.* Smt. Ngaurtaiveli, A.I.R. 1980 Gau. 70 at p. 72.
7. 5 Bom. L.R. 274 at p. 283.
8. De Bussche *v.* Alt, L.R. 8 Ch. D. 286 ; *see* Kunhammed *v.* Narayanan Mussad, I.L.R. 12 Mad. 320 at p. 322.
9. 2 M.H. C.R. 270.

is applicable to suits for which a period of limitation is prescribed by the Limitation Act, but mere delay in asserting a right will not amount to acquiescence.[1] Commission to make partition after disposal of suit—Irregularity in procedure—Acquiescing parties estopped by their own conduct from taking exception to such proceedings after their conclusion merely on the ground of their irregularity.[2]

Doctrine of laches; applicability.

Once an order of remand by the Appellate Authority is acquiesced in and the parties had taken their chance before the Rent Controller then neither of them can be later on, permitted on, challenge the validity of the proceedings before the Rent Controller.[3]

Effect of acquiescence in order of remand.

Acquiescence does not simply mean standing by. It does not mean aquiescence only. It means assent, after the party has come to know of his right.[4] What is meant by acquiescence ? It may involve no more than a merely passive attitude, doing nothing at all. It requires as an essential factor that there was knowledge of what was acquiesced in.[5]

Meaning of acquiescence.

Acquiescence is only a form of estoppel and it is of the essence of acquiescence that the party acquiescing should be aware of, and by words of conduct should represent that he assents to what is a violation of his rights, and that the person to whom such representation is made should be ignorant of the other party's rights, and should have been deluded by the representation into thinking that his wrongful action was assented by the other party.[6]

Acquiescence; A form of estoppel.

50. Doctrine of acquiescence.—In order to claim a right by acquiescence, a person must show that he had been mistaken as to his legal right and that he had expended some money or done some act on the faith or his mistaken belief, that the other side knew of the existence of his own right which was inconsistent with the right claimed by him and that the plaintiff knew of the person's mistaken beleif in his right and that the plaintiff must have encouraged the defendants in their expenditure of money directly or by abstaining from asserting his legal right.[7]

The mere conditional acceptance by the use of the words "without prejudice" to his rights under the contract for sale cannot in any manner derogate from the fact that he had acquiesced in the breach of the contract committed by the second respondent.[8]

The question of estoppel or acquiescence is essentially a question of fact which has to be decided on proper materials before the Court.[9]

Estoppel or acquiescence.

In the *Ganges Manufacturing Co.* v. *Sourajmull*,[10] Garth, C.J., observed thus :

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1. Uda Begam *v.* Imam-ud-din, I.L.R. 1 All 82 at p. 86 : 2 M.H.C.R. 114 diss. ; 2 M.H.C. 273 appr.
2. 124 P.R. 1893.
3. Santosh Singh *v.* Messrs. Sat Pal Jayanti Prashad, 1981 Cur. L.J. 36 at p. 39.
4. Chaitanya Das Banerjee *v.* Ranji Pal Chowdhury, A.I.R. 1938 Cal. 263 at p. 266 : I.L.R. (1938) 1 Cal. 512 : 67 C.L.J. 16.
5. Bell *v.* Alfred Franks and Bartlett Co. Ltd., (1980) 1 All E.R. 356 at p. 360 (C.A.).
6. Moolji Sicca & Co. *v.* Ramjan Ali, A.I.R. 1930 Cal. 678 at p. 684 : 129 I.C. 612.
7. K.V. Narayan *v.* S. Sharana Gowda, A.I.R. 1986 Kant. 77 at p. 85.
8. H.G. Krishan Reddy & Co. *v.* M.M. Thimmiah, A.I.R. 1983 Mad. 169 at p. 183.
9. Bhagat Rajinder Kumar Sawhney *v.* State of Jammu and Kashmir, A.I.R. 1960 J. & K. 50 at p. 52.
10. I.L.R. 5 Cal. 669.

Whether rule of estoppel in the Act exhaustive.

"The enactment in Sec. 115 is no doubt in one sense a rule of evidence. It is founded upon the well-known doctrine laid down in *Pickard* v. *Sears*,[1] and other cases. But estoppels in the sense in which the term is used in English Legal Phraseology are matters of infinite variety and are by no means confined to the subject which are dealt with in Chapter VIII of the Evidence Act. A man be estopped, not only from giving particular evidence, but from doing acts or relying upon any particular arguments or contention, which the rules of equity and good conscience prevent his using as against his opponent. A large number of cases of this kind will be found collected in the notes to *Doe* v. *Oliver*."[2] In *Rupchand* v. *Sarveswar*,[3] Woodroffe, J., pointed out the Secs. 115-117 of the Act are not exhaustive of the doctrine of estoppel by agreement and referred to *Daltan* v. *Fitzegerald*.[4] In *Sarat Chunder Dey* v. *Gopal Chunder Laha*,[5] the Judicial Committee observed that the question of estoppel which arose in the case must be determined by Sec. 115 of the Evidence Act and that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England. In *Alamgir* v. *Kamrunnessa*,[6] it seems to have been held that apart from Secs. 115-117, upon equitable principles a man might be debarred from relying upon any particular state of things. In *Asmatunnessa* v. *Harendra Lal Biswas*,[7] it was said that the law of estoppel in force in this country is contained in Sec. 115 of the Evidence Act. In *Mitra Sen Singh* v. *Janki Kunwar*,[8] it was said that the law of estoppel in India is compendiously set forth in Sec. 115 of the Indian Evidence Act. In *Bhaiganta Bewah* v. *Himmat Bidyakar*,[9] it was held that Secs. 115-117 of the Evidence Act are not exhaustive as to the rule of estoppel in force in India. In *South Indian Export Co. Ltd.* v. *Subbier*,[10] Sadasiva Ayer, J., referring to case of *Sarat Chunder Dey* v. *Gopal Chander Laha*,[11] "held.... that if we are to find limitation to the right of the representee to claim an estoppel, we cannot go beyond what is to be found in English cases, there being nothing in Sec. 115 on the subject."[12]

Conduct amounting to acquiescence.

In the Full Bench decision of the Patna High Court in *M/s. Bokaro and Ramgur Ltd.* v. *Dr. Prasun Kumar Banerjee*,[13] it was laid down that, if a party took a willing part in the deliberations before the arbitrator after the expiry of four months without any objection, protest or the like, it was estopped from challenging the validity of the award on the ground of its having been made after the expiry of the period or, in the alternative, it waived the right to put a stop to the proceeding going ahead on the expiry of the period. On the contrary, its conduct amounted to acquiescence.[14]

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1. 6 Ad. & E. 469.
2. 2 Smith's *Leading Cases*, 8th Ed., pp. 775, etc.
3. I.L.R. 33 Cal. 915.
4. (1897) 1 Ch. 440 : S.C. on appeal (1897) 2 Ch. 86.
5. 19 I.A. 302 : I.L.R. 20 Cal. 290.
6. 4 C.L.J. 442 at p. 460.
7. I.L.R. 35 Cal. 904.
8. I.L.R. 46 All. 728 (P.C.)
9. 20 C.W.N. 1335.
10. 29 I.C. 957 (Mad.).
11. 19 I.A. 202 : I.L.R. 20 Cal. 290.
12. *See* Mowji Shamji *v.* National Bank of India, I.L.R. 25 Bom. 499 at p. 516.
13. A.I.R. 1968 Pat. 150 (F.B.).
14. State of Bihar *v.* S.K. Sahay, A.I.R. 1971 Pat. 37 at p. 38 : 1970 B.L.J.R. 400.

When petitioner did not object to the second test being held, he nevertheless participated in the second test, appeared for the interview and thus took a chance of being selected on the second time. The conduct of the petitioner amounted to acquiescence in the matter and giving up his right if any to challenge the decision of the Selecting Authority to give up the earlier selection proceedings.[1] Where the petitioner, applied in pursuance of the advertisement issued and also appeared before the Selection Committee on numerous occasions, and therefore, gave up his case, if any, under the earlier resolution, he cannot now be permitted to wriggle out and contend that he should be treated as having been absorbed on permanent basis even though he failed to qualify before the Selection Committee.[2]

Selection.

In the case of *M.J. Velu Mudaliar* v. *Sri Venkateswara Finance Corporation*,[3] the plaintiff was a firm.

The defendants challenged the maintainability of the suit on the ground that the partnership was not registered under the Indian Partnership Act and that the names of the partners who were suing, were not entered as such in the certificate of registration.

The issue framed in the Lower Court was focussed only on the controversy in respect of the firm's registration. The defendants did not ask for an issue to be framed to cover their plea that the names of the partners suing on behalf of the firm were not found in the register.

Held that in the face of an acquiescence on the part on the defendants in the limited scope of the issue it was not open to them to canvass the question in the appeal on the ground that the plaintiff-firm failed to prove the fact in controversy.

It is only where a creditor assents to or is a party or privy to or where he acquiesces in the conveyance or assignment, that he cannot rely on the conveyance or assignment as an act of bankruptcy.[4]

It was held in *Mustafa Hussain Syed* v. *Mst. Saidul Nisan*[5] that the acquiescence in order to deprive a man of his rights must amount to fraud.[6] Even if it be assumed that the plaintiff had actually asked the appellant to make a decent construction such a conduct on his part would not estop him now from claiming rights in the site of the land.[7] In *Mustafa Hussain Syed* v. *Mst. Saidul Nisan*,[8] it was held that—

> "The plea of acquiescence cannot, therefore, be held as established on the ground that the plaintiff raised no objection when a building was construed on his land and that there was long delay in enforcing his rights, if any, in respect of the land in question."

There could be no acquiescence unless the plaintiff knew the position at the time of acquiescence, but if there has been acquiescence it will be an answer to the suit for an injunction to restrain the use of hall as has been held in *Sayers* v. *Collyer*.[9] Lord Halsbury points out that :

When there be no acquiescence.

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1. P. Papanna *v.* Hon'ble Chief Justice, High Court Karnataka, 1989 Lab. I.C. 1841 at p. 1848 (Knt).
2. Satish Chandra Pandey *v.* Banaras Hindu University, Varanasi, 1989 Lab. I.C. 1051 at p. 1054 (All.)
3. A.I.R. 1971 A.P. 63.
4. K.S.A. Kuchelanarayanan Chettiar *v.* Messrs. S.P. Sheik Abdul Kader & Co., A.I.R. 1964 Mad. 106 at p. 108 : (1964) 1 M.L.J. 99.
5. A.I.R. 1927 Oudh 66 : 99 I.C. 255 : (1926) 3 O.W.N. Sup. 282.
6. Dan Bahadur Singh *v.* Talewand Singh, A.I.R. 1937 Oudh 226 at p. 228.
7. Ram Kishan *v.* Karam Singh, A.I.R. 1949 All. 673 at p. 676.
8. (1926) 3 O.W.N. Sup. 282 : A.I.R. 1927 Oudh 66.
9. (1885) 28 Ch. D. 103 : 54 L.J. Ch. 1 : 51 L.T. 723 : 33 W.R. 91 : 49 J.P. 244; Serene Cowasjee *v.* N.M. Cowasjee, A.I.R. 1937 Rang. 387 at p. 389.

"Mere misrepresentation of a matter of legal inference from facts which are known to both parties is not a ground of estoppel."

Privy Council view

There is a Privy Council decision in *Vertannes* v. *Robinson*,[1] wherein it has been held that mere acts of acquiescence will not constitute an estoppel when the plaintiff has not acted on the strength of any representation, but on an error common to himself and the opposite- party.[2]

No estoppel can arise from ignorance of law which both parties are supposed to know.[3]

Trade-mark infringement.

It is settled law that if the defendants are aware of the real legal position, and put upon the market perfumery in bottles with a label and get-up that is colourable imitation of label and get- up of perfumery in bottels of the plaintiff in order to obtain trade which otherwise might go to the plaintiffs, there is no room for the doctrine of acquiescence to operate in their favour.[4]

It is settled law that a party which acquiesces in the procedure of trial court cannot afterwards be permitted to turn round and attack it in the event of the decision having gone against him.[5]

Acquiescence in jurisdiction.

Where a court is without jurisdiction to entertain any particular action, and no such objection as to jurisdiction is raised by the petitioner before the Court, the petitioner is not estopped from raising the point of jurisdiction in the High Court in the writ application.[6]

It was contended on behalf of the contesting respondents that the petitioner had acquiesced in the hearing of the appeal by respondent No. 3 (Regional Deputy Director of Education). He could not, therefore, complain against his decision. *Held* that : it is well settled that jurisdiction does not originate in the consent of the parties, and further that where it is absent, it cannot be re-established by consent or acquiescence. This being the correct legal position, the Court does not think the petitioner can be shut out from getting relief from the High Court on the ground that he had acquiesced in the appeal being taken up and decided by respondent No. 3.[7]

In *Chandrik Prasad* v. *State of Bihar*,[8] absence of the jurisdiction of the certificate officer to realise the alleged dues against the petitioner was patent. *Held* that acquiescence could not be a ground for refusing relief.

The law is well settled that acquiescence by parties would not confer jurisdiction on any court or other authority to hear and determine a matter where such Court or authority lacks inherent jurisdiction to hear and determine the same.[9]

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1. A.I.R. 1927 P.C. 151 : 102 I.C. 639 : 54 I.A. 276 : I.L.R. 5 Rang. 427 (P.C.).
2. Sankaran Nambi *v.* Nangeeli Amma, A.I.R. 1935 Mad. 1062 at p. 1065.
3. Gurulingaswami *v.* Ramalakshmamma, I.L.R. 18 Mad. 53 ; Ma Mo Gyi *v.* U. Chit Pe, A.I.R. 1926 Rang. 131 ; M.S. Chetyar, Firm *v.* Kaliamma, A.I.R. 1935 Rang. 423 at pp. 424-25 : 42 M.L.W. 340 : 1935 M.W.N. 994.
4. O.K. Mohideen Bawa *v.* Rigaud Perfume Manufactures, A.I.R. 1932 Rang. 114 at p. 118.
5. Mula *v.* Babu Ram, A.I.R. 1960 All. 573 at p. 579 : 1960 A.L.J. 314 : 1960 A.W.R. 210.
6. Bengal Coal Co. Ltd. *v.* Chairman, Central Government Industrial Tribunal, A.I.R. 1963 Pat. 118 at pp. 120-21 : 1962 B.L.J.R. 681 : (1962) 2 L.L.J. 414; *Contra see* Ishwari Prasad Munuri *v.* Shib Narayan Banerjee, A.I.R. 1984 Cal. 213.
7. Gopal Singh Higher Secondary School Nayagaon, Saran *v.* State of Bihar, (1975) 1 S.L.R. 234 at p. 238.
8. 1969 B.L.J.R. 906 at p. 912.
9. Nabir Bhatt *v.* Mala Hamza, A.I.R. 1976 J. & K. 25 at p. 27.

Election.

A person is not estopped from challenging the validity of the election of a society because of his participation in the same.[1]

Acquiescence is a matter of legal inference from the facts established in a case.[2]

In the case reported in *Maharashtra State Road Transport Corporation* v. *Balwant Regular Motor Service, Amarwati,*[3] an order of the Regional Transport Authority was challenged by the private operators in different Civil Applications. One of the applications was Special Civil Application. During the pendency of this application the parties agreed to settle the matter on certain terms. The Regional Transport Authority announced its decision in the terms of compromise. Private operators acted upon this order and derived benefits and advantages from it for nearly one year and nine months.

Held that there was acquiescence in Regional Transport Authority's order on the part of private operators as to disentitle them to the grant of writ under Art. 226 of the Constitution. It is well established that the writ of *certiorari* will not be granted in a case where there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. The principle has been clearly stated by Sir Barnes Peacock in *Landsay Petroleum Co.* v. *Prosper Armstrong Hurd, Abram Farewall and John Kemp,*[4] as follows :

> "Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material...."

This passage was cited with approval by the Supreme Court in a case : *Moon Mills Ltd.* v. *M.R. Mehar, President, Industrial Court, Bombay.*[5]

R. Thathadesika Thathachariar v. *K.V. Alagia Manavala Jeerswamy,*[6] the relief sought by the plaintiffs was a direction to the defendants to have the elephant painted with Thengalainamam on all occasions inside and outside the temple. According to the defendant, ever since 1894 only Vadagalainamam was painted on the temple elephant and Thengalai Vaishnavites had acquiesced for such a usage and such conduct would amount to a waiver or abandonment of their claim. It was held that this plea could not stand a moment's scrutiny, for the defendant's assertion that the temple elephant bore only Vadagalainamam from 1894 was not established. The finding of the courts was that there was absolutely no evidence to prove that the temple owned any elephant between 1894 and 1940. On such a finding which cannot be challenged, no questions of acquiescence or waiver or abandonment of the rights of Thengalai Vaishnavities arise.

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1. Committee of Management of Hindu Inter College, Kosi Kalan *v.* Regional Deputy Director of Education, Agra Region, Agra, 1988 All. L.J. 831 at p. 835.
2. Beni Ram *v.* Kundan Lal, I.L.R. 21 All. 496 at p. 504 (P.C.).
3. A.I.R. 1969 S.C. 329 at p. 335.
4. (1874) 5 P.C. 221 at p. 239.
5. A.I.R. 1967 S.C. 1450 : (1968) 1 S.C.J. 364.
6. A.I.R. 1978 Mad. 210 at p. 218.

The question of acquiescence cannot be reduced to a rule of thumb. The true position has been stated by the Division Bench in *Kuwarji* v. *Bhurelal*[1] and by Niyogi, J., in *Nandkishore* v. *Damodar*.[2]

In the first case,[3] Stone, C.J., observed at page 165—

View of the Nagpur High Court.

> "The word 'acquiescence' is used by the learned lower appellate Judge as though it were an effective defence once it was shown that the plaintifff has stood by with knowledge of his rights and without suing for a year or two—such a time as would show laches on his part or would show that he was slow to exercise his remedies. If that were sufficient to rise the defence of acquiescence we would observe that no meaning whatever could be given to the Articles, we have been examining of the Limitation Act. Under the law relating to limitation knowledge of one's right to sue does not contract, though ignorance of the facts creating the cause of action may expand, the time allowed in which to sue. The limitation periods proceed on the basis that the plaintiff could have sued before...."

In the second case,[4] a plea of acquiescence against the *lambardar* in a suit for possession of *abadi* site was negatived by Niyogi, J., in the following words :

> "The plaintiff's inaction, while defendant 2 was extending the house and his mere omission to assert his right and object to the acts of the defendants, would not by themselves constitute acquiescence."

Where a party relies upon omission or inactivity of the other as depriving the latter of his legal rights nothing short of conduct amounting to fraud can sustain a plea of acquiescence.

In the well-known case of *Willmott* v. *Barber*,[5] there is a lucid exposition by Fry, J., of the elements necessary to establish fraud in a case of this kind.[6]

English law.

Where the lease was for erecting a house covered with tiles or a thatched roof, the mere fact that the lessee constructed a *pucca* house, without interference by the landlord does not amount to an equitable estoppel.[7]

When presumption of acquiescence will arise.

Where the tenancy has lasted for four years with the knowledge of the landlord; and the rent has been paid by the sub-tenant in the presence of the landlord and on several occasions passed on to him by the tenant, a presumption of acquiescence will arise. Such a presumption will not be displaced by a bare denial of the landlord that he had acquiesced.[8]

Silence not acquiescence.

Merely because the plaintiff had claimed storage charges at the rate of Rs. 4 per ton per month and there was silence on the part of the defendant, it cannot be deemed that there was acquiescence on the part of the defendant, and that there was an implied undertaking on its part to pay godown rent at that rate.[9]

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1. A.I.R. 1939 Nag. 163.
2. A.I.R. 1942 Nag. 59.
3. Kuwarji *v.* Bhurelal, A.I.R. 1939 Nag. 163.
4. Nandkishore *v.* Damodar, A.I.R. 1942 Nag. 59 : I.L.R. (1942) Nag. 232.
5. (1880) 15 Ch. D. 96 at pp. 105-06.
6. *See* Bakharia Dhuria *v.* Manak Gangaram, A.I.R. 1954 Nag. 97 at p. 98.
7. Ram Lal Sahu *v.* Mst. Bibi Zohra, A.I.R. 1941 Pat. 228 at p. 232.
8. Mahabir Singh *v.* Anant Ram, A.I.R. 1966 All 214 at p. 215.
9. Union of India *v.* Watkins Mayor & Co., A.I.R. 1966 S.C. 275 at p. 278.

In *Beni Ram* v. *Kundan Lal*,[1] certain land had been let out to five tenants for the construction thereon of a saltpetre factory at an annual rent of Rs. 28. The saltpetre factory had been constructed but after sometime it ceased to exist and a number of other buildings were build at a cost of three to four thousand rupees. The landlord had not objected to the erection of these buildings but continued to receive rent from the lessees even after they had been completed. On these facts the first two Courts as well as the High Court came to the conclusion that by the rules of equity he could not eject the tenants. The decision however was reversed by the Privy Council, and Lord Watson, in stating the grounds for doing so observed as follows :

> "The respondents knew that the predecessors of the appellants were the owners of the land let, and that their own title was limited to their occupation of the land as tenants, upon the terms and for the periods provided by the original lease of 1858. In order to raise the equitable estoppel which was enforced against the appellant by both the appellate courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering or inactive intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation.
>
> Their Lordships have had no difficulty in coming to the conclusion that the respondents have filed to discharge themselves of that onus....."

Reference may also be made here to the well-known case in *Ariff* v. *Jadunath Majumdar*,[2] which was decided on the following facts. In 1913 the appellant having verbally agreed with the respondent to grant him a permanent lease of a plot of land on Rs. 80 per month led him into possession. Shortly afterwards the respondent with the knowledge and approval of the appellant erected structures on the land at a cost of over Rs. 10,000. In December, 1918, the appellant refused to grant the respondent the agreed lease and in 1920 sued to eject him. At the time of the suit the respondent's right to sue for specific performance had become barred. Their Lordships of the Judicial Committee while dealing with the doctrine of equitable estoppel as explained in the case in *Ramsden* v. *Dyson*,[3] observed as follows :

Privy Council view.

> "This is no case of money being expended by the respondent in any mistaken belief as to his legal rights or of the appellant knowing of the existence of any such mistaken belief, or encouraging the respondent by abstaining from asserting a right inconsistent with the acts of the respondent....The structures were erected on the land... not in any mistaken belief of the respondent of his rights in regard to the land but in assertion of the rights which he correctly believed to be his."

In *Baneswar* v. *Amulya Charan*,[4] Mukerji, J., quoted Lord Campbell in *Cairncross* v. *Lorimer*[5] :

> ".....mere quiescence or absence of interference is not sufficient to create an estoppel."

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1. I.L.R. 21 All. 496 : 26 I.A. 58 : 3 C.W.N. 502 : 7 Sar 523 : 1 Bom. L.R. 400 (P.C.).
2. A.I.R. 1931 P.C. 79 at p. 81 : 131 I.C. 762 : 58 I.A. 91 : I.L.R. 58 Cal. 1235 (P.C.).
3. (1866) L.R. 1 H.L. 129 : 12 Jur. (N.S.). 506 14 W.R. 926.
4. A.I.R. 1925 Cal. 288 : 82 I.C. 309.
5. (1860) 7 Jur. (N.S.) 149 : 8 Macq. H.L. 827 : 3 L.T. 130.

In *Amritsarya Ram* v. *Diwan Chand*,[1] Tek Chank, J., referred to *Willemott* v. *Barber*,[2] where Fry, L.J., laid down that to constitute acquiescence which would estop the plaintiff the following essentials must co-exist :

To constitute acquiescence which would estop, necessary ingredient.

"In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have spent some money or must have done act on the faith some of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his legal right, which is inconsistent with the right claimed by the plaintiff. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment, nothing short of this will do."[3]

Inducing others to commit act infringing other right, etc.

In *De Busshce* v. *Alt*,[4] Thesiger, L.J., observed that if a person having a right and seeing another about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. To the same effect are the observations of Lord Cottenham in *Duke of Leeds* v. *Earl of Amherst*.[5] In *Cairncross* v. *Lorimer*,[6] Lord Campbell enunciated the principle of acquiescence in these words :

Principle of acquiescence.

".....Generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had if it had been done by his previous licence."

In *Hari Bhushan* v. *Sheikh Abdul*,[7] the rule of estoppel is stated as follows :

Loss of true owner's title by his conduct.

"Where a person in *bona fide* belief that a certain property belongs to him spends money upon it and the true owner stands by and allows him to spend money and make improvements upon his land, the true owner is estopped from asserting his title to the land as against the person making improvements in such *bona fide* belief."[8]

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1. A.I.R. 1929 Lah. 625 : 114 I.C. 70.
2. (1880) 15 Ch. D. 96 : 28 W.R. 911 : 43 L.T. 95.
3. *See* Mapal *v.* Rana, A.I.R. 1938 Lah. 88 at p. 89 : I.L.R. (1938) Lah. 296: 41 P.L.R. 51.
4. (1878) 8 Ch. D. 286 : 47 L.J. Ch. 381.
5. (1846) 41 E.R. 886 : 20 Beav. 239.
6. (1861) 3 L.T. 130 : 3 Macq. H.L. 829.
7. A.I.R. 1927 Cal. 54 : 97 I.C. 441.
8. *See* Venkataswami Naidu *v.* Muniappa Mudaliar, A.I.R. 1950 Mad. 53 at p. 55 : 62 L.W. 741 : (1949) 2 M.L.J. 406 : 1949 M.W.N. 601 ; Imami *v.* Ibrahim, A.I.R. 1929 Oudh 292; Mustafa Hussain *v.* Saidul Nisan, A.I.R. 1927 Oudh 66.

In *R.M.P.A.L. Chettiar, Firm* v. *Ko Maung Gale*,[1] relying on the case in *Cairncross* v. *Lorimer*,[2] the Rangoon High Court has laid down the principle of estoppel.[3]

The Court will restrain the possessor of the legal right from exercising it if, amongst other things, he has known that the tenant under a mistake as to his legal rights has expended money on the faith of his mistaken belief, and has encouraged him (the tenant) in his expenditure of money, directly or by abstaining from asserting his legal right.[4]

Vague evidence.

Vague evidence that the tenants of the estate in the past had been selling the lands as if they had some interest in them higher than that a mere tenancy-at-will, is not enough to justify the Court in giving the tenant the benefit of the rule of estoppel.[5]

In *Beni Ram* v. *Kundan Lall*,[6] their Lordships of the Privy Council say (p. 63 of 26. I.A.)—

> "If there be one point settled in the equity law of England, it is that, in circumstances similar to those of the present case, the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter which has been affirmed by the Courts below."

The interest of an under-*raiyat* with occupancy rights is not heritable.[7] Where such a tenant constructs a house after filling up a ditch on his land he is not entitled to call in aid the equitable estoppel.[8]

In *Beni Ram* v. *Kundan Lal*,[9] their Lordships of the Judicial Committee held

Lessor suit for eviction when no bar.

that the lessor is not restrained by any rule of equity from bringing a suit for evidence merely by reason of the tenant having erected permanent structures on the land leased, such building having been within the knowledge of the lessor, and there not having been any interference on his part to prevent it.

Where a tenant makes a grave within the area of the site granted in the *abadi* during the absence from the village of the zamindars the mere fact that their servants stood by and allowed the grave to be made does not amount to acquiescence by the zamindars.[10]

Acquiescence whether equitable estoppel.

If the person, who built on the land, knew of the ownership, no act on the part of the owner would cause that person to believe that he was the owner: no act or omission of the true owner then makes it inequitable for him to assert his legal rights.

The provisions of Sec. 115, Evidence Act, apply if the owner causes a person aware of his ownership to believe that he has been given a licence to build and to act on such belief.[11]

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1. A.I.R. 1935 Rang. 191.
2. (1850) 3 H.L.C. 829.
3. *See* Madan Gopal Bagla *v.* P.V.S. Sundaran, A.I.R. 1940 Rang. 172 at p. 174.
4. *Per* Fry, J., in Wilmott *v.* Barber, (1880) 15 Ch. D. 96.
5. Devji Arjan Dalvadi *v.* Bhoja Vaija Kachar, A.I.R. 1935 Bom. 219 at p. 221.
6. I.L.R. (1899) 21 All. 496 : 26 I.A. 58 : 7 Sar. 523 (P.C.).
7. Sudhanya Kumar Das *v.* Saik Ismail, A.I.R. 1925 Cal. 956 : Iswar Sant *v.*Torendra Nath Kulia, A.I.R. 1926 Cal. 163.
8. Jugesh Chandra Bose *v.* Maqbul Hussain, A.I.R. 1936 Pat. 384 at p. 386.
9. I.L.R. (1899) 21 All. 496 : 26 I.A. 58 : 7 Sar. 523 (P.C.).
10. Khuda Baksh *v.* Jai Shankar, A.I.R. 1929 All. 386 at p. 386 : 115 I.C. 628.
11. Shaik Dhunoo *v.* Seth Sheolal, A.I.R. 1931 Nag. 158 at p. 159 : 134 I.C. 852.

In the case reported in *Siromani* v. *Hem Kumar*,[1] there was partition of joint family property amongst sons when unregistered deed was executed. There was no issue in the Trial Court regarding the alleged acquiescence of the widow, nor was it pleaded on behalf of the sons that there was an agreement by which widow gave up her share in favour of the other coparceners. *Held* that it was not possible to accept the argument that there was acquiescence on the part of the widow or that she relinquished her share in favour of the other coparceners.

51. Estoppel by agreement.—An instance of an estoppel by agreement is the estoppel on a person taking under an instrument, whether it be a testament or a deed *inter vivos*, of which *Dalton* v. *Fitzgerald*[2] is an example.[3] The parties having come to an agreement which was accepted by the Consolidation Officer, the order passed by him would operate as an order based upon consent and agreement of the parties. Such an order having become final will operate as an estoppel in subsequent litigations between the parties.[4] There can be no estoppel by agreement, where the justice of the case does not require it.[5] An estoppel by agreement may be found to exist, where there is an agreement, either express or to be implied from the conduct of the parties to, or from the nature of the transaction itself, which justice requires should be enforced.[6]

Estoppel by agreement.

It is crystal clear and is indisputably established that the agreement relied upon by the Union is a valid subsisting agreement. It is in force. It is neither repudiated nor terminated. It is binding upon both the parties. Once the agreement is held to be binding, the employer is estopped from contending that the workmen involved in the dispute who were salesmen were not workmen within the meaning of the expression under the Act.[7]

Where even though a clear plea of estoppel from the recital in the document the defendant, not only failed to invoke the doctrine of estoppel before the learned Subordinate Judge but joined issue with the plaintiff upon the question in dispute and accordingly an issue was raised and evidence adduced on it, he cannot rely on the doctrine of estoppel to prevent the plaintiff from proving the fact in issue.[8]

Mortgage.

Where the appellant had himself mortgaged the property, representing to the mortgagee that he had the power to mortgage and that the property was such that could be mortgaged he is estopped from pleading that his representation, on which the mortgagee advanced the money was incorrect.[9] In a case like this, the mortgagor may well consider it futile to contest the mortgagee's suit. It cannot be rightly said that he is likewise estopped from objecting to the Court selling the property. It is true in some cases a mortgagor may not be estopped, if it is found that the mortgagee was aware of the character of the property ; but in a majority of cases

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1. A.I.R. 1968 S.C. 1299 at p. 1301.
2. 2 Ch. 86.
3. Rup Chand Ghosh *v.* Sarveswar Chandra, I.L.R. 33 Cal. 915 at p . 922.
4. Sukhbasi *v.* Ram Charan, 1968 A.L.J. 123 at p. 124 ; *see* also K.C. Kapoor *v.* Smt. Radhika Devi, 1981 All. L.T. 1172.
5. Rup Chand Ghosh *v.* Sarveswar Chandra, I.L.R. 33 Cal. 915 at p. 922.
6. *Ibid.*
7. Workmen of M/s. Hindustan Levers Ltd. *v.* Management of M/s. Hindustan Lever Ltd., A.I.R. 1984 S.C. 516 at p. 529 : 1984 Lab. I.C. 276.
8. His Holiness Divya Darshan Rajendra Ram Doss *v.* Davendra Doss, A.I.R. 1973 S.C. 268 at pp. 270, 271.
9. Muhammad Muzamill Ullah Khan *v.* Mithu Lal, I.L.R. 33 All.. 783 ; Bishundhar Dayal *v.* Parshadi Lal, 16 I.C. 629.

this is not so. The mortgagor in such cases makes a representation as regards a fact, namely, that the property is alienable. It is not a case of inherent disability, as in cases of mortgages by a minor or a disqualified proprietor, in which estoppel, being against statute, does not apply.[1]

Executor of wills.

Where a person actually entered upon his duties as executor, applied for probate and got an order in his favour but for some reason did not actually take out a probate. *Held* that he would be estopped from saying subsequently that he is not under any obligation as executor.[2]

Suit by mortgage.

It is well established that a person named as mortgagee in the deed can sue on the mortgage, whether he has any interest in the mortgage or not.[3]

In 1785 Lord Mansfield, G.J., observed in *Roe* v. *Pegge*[4] :

> "...The Court never suffers a mortgagor to set up the title of a third person against his mortgagee."

Lord Mansfield had previously made a similar remark in *Goodtitle* v. *Bailey*,[5] that it shall not be permitted to a mortgagor to dispute the title of his mortgagee. This view has not, so far as their Lordships are aware, been challenged and is treated as axiomatic in the text-books on the subject. *See* Robin's *Law of Mortgages*, Vol. 1, p. 654 and Fisher and Lightwood's *Law of Mortgage*, 7th ed., p. 376, where it is stated—

> "Since no one is allowed to dispute a title which he has himself granted, the mortgagor cannot set up against his mortgagee the title of a third person."

In Jones of *Mortgages*, 6th Ed, Vol. 2, para. 1482, it is said—

> "The mortgagee's title cannot be questioned in defence to the bill."

Caspersz on *Estoppel*, 4th Ed., in Sec. 400 says—

> "Neither mortgagor nor mortgagee can deny the title of the other for the purposes of the mortgage."

Ghose on the *Law of Mortgage*, 5th Ed., Vol. 1, p. 322 says—

> "As a rule, any person who comes into possession of the mortgaged property under the mortgagor is treated as being in privity with him and is estopped from denying the title of the mortgagee."[6]

A remark to the same effect will be found in *Hillaya Subbaya* v. *Narayanappa Timmaya*[7] and in Mulla's *Transfer of Property Act*, 2nd Ed., P. 410. An exhaustive discussion of the case-law on the point both English and American, will be found in the judgment of Mookerjee and Carnduff, JJ., in *Debendranath Sen* v. *Mirza Abdul Samed Seroji*.[8]

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1. S. Tahir Hasan *v.* L. Chander Sen, A.I.R. 1935 All. 678 at pp. 682-83 : 157 I.C. 511.
2. Namberumal Chetti *v.* Verraperumal Pillai, A.I.R. 1930 Mad. 956 at p. 959 ; *see* also Mani Swami Chetti *v.* Maruthammal, I.L.R. 34 Mad. 211, which applies the principle of Srinivasa Moorthy *v.* Venkatavarada Aiyangar, I.L.R. 34 Mad. 257.
3. *See* Sachitanada Mohapatra *v.* Baloram Gorain, I.L.R. 24 Cal. 644 ; Yad Ram *v.* Umrao Singh I.L.R. 21 All. 380 and Subramanian Chettiyar *v.* V.K. Shivalker, A.I.R. 1937 Rang. 508 : (1937) Rang. L.R. 432.
4. (1785) 99 E.R. 896.
5. (1777) 98 E.R. 1260.
6. *See* Mst. Shanta Bai *v.* Narayanarao Amritrao, A.I.R. 1949 Nag. 81 at pp. 81, 82.
7. I.L.R. 36 Bom. 185 : 12 I.C. 913.
8. 1 I.C. 264 at p. 270 : 10 C.L.J. 450.

In the instant case, the amount as stipulated in the agreement having been paid to the appellant and the respondents having acted as per the agreement, the appellant is estopped, from making a claim contrary to the terms of the agreement and insist upon the enforcement of the rights that he had waived in law.[1]

In the under-mentioned case the petitioners submitted to the jurisdiction of the arbitrator and participated in the proceedings before him for adjudication thereof without any protest whatsoever. Despite the said terms and conditions in the said contract, both the petitioners and the respondents did agree to have adjudication of the arbitrator upon claims and counter-claims filed in the proceedings before him on their merits. Thus, the petitioners were held to be estopped from challenging the jurisdiction of the arbitrator to arbitrate in the said claims and counter-claims referred to him.[2]

It is well settled that a jurisdiction cannot be conferred on a Court by consent, acquiscence or waiver where there is none, nor can it be ousted where it is. Acquiescence, waiver or consent of the parties may be relevant in objections relating to pecuniary or territorial jurisdiction of the Court, but these factors have no relevance where the Court lacks inherent jurisdiction which strikes at the very root or authority of the Court to pass any decree and renders the decree, if passed, a nullity.[3]

In the instant case the Collector, while making the Award, relied upon the said agreement and fixed the compensation of the entire area at Rs. 2 per square yard only. It was held by the Supreme Court that having taken advantage of the agreement in part and having repeatedly agreed to the terms of the compromise between the appellant and the Improvement Trust the State Government cannot be permitted to back out and thus is bound to modify the scheme in view of its stand taken earlier.[4]

The rule of estoppel between mortgagor and mortgagee cannot be invoked in a case where the suit is not based on the mortgage but in one in repudiation of the mortgage.[5]

Mortgagee cannot deny mortgagor's title.

It is well established that a mortgagee cannot deny the title of his mortgagor and set up adverse possession unless he actually leaves the holding and re-enters under a different status.[6] Where a mortgagee had instituted suit to have the sale set aside at which defendant had purchased the mortgaged property, he is not estopped from instituting a suit to enforce his mortgage against the property.[7] The estoppel referred to in Sec. 65(*a*), Transfer of Property Act, is an estoppel that will only operate personally against the mortgagor and not against a subsequent transferee of the mortgagor.[8] It has been held in *Debendra Nath Sen* v. *Abdul Samed*,[9] wherein reliance is placed on the English case of *Doe* v. *Stone*[10] that it is no more open to a

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1. R.T. Charitable Trust *v.* Special Deputy Collector, A.I.R. 1992 A.P. 130 at pp. 141, 142.
2. International Airports Authority of India *v.* M/s. Noor Mohammed, 1993 (1) Bom. C.R. 155 at p. 165.
3. Kali Das Wadhwani *v.* Jagjiwan Das, 1986 All. L.J. 554 at p. 557.
4. Akhara Brahm Buta *v.* State of Punjab, A.I.R. 1993 S.C. 366 at p. 366.
5. Mst. Rajana *v.* Musaheb Ali, A.I.R. 1937 Oudh 431 at p. 432.
6. Jai Nandan Tewari *v.* Umrao Koeri, A.I.R. 1929 All. 305 at p. 306.
7. Rasik Chandra Chakravarti *v.* Jagabandhu Chakravarti, A.I.R. 1929 Cal. 392 at p. 394.
8. Achhaibir Singh *v.* Rajmati, A.I.R. 1929 All. 483 at p. 484.
9. (1909) 10 C.L.J. 150 : 1 I.C. 264.
10. (1946) 3 C.B. 176.

person standing in the shoes of the mortgagor than to the mortgagor himself to set up as against the mortgagee any preceding estate which he himself had created.

Case-law.

In *Kanwar Singh* v. *Abdur Ali Khan*,[1] it was held that where one of the co-sharers granted a permanent lease of the joint holding without the consent of the other co-shares, such co-shares are entitled to treat the lease as a nullity and to eject the lessee.[2]

If a vendor of an immoveable property who owns the adjoining immovable property represents in the conveyance that the immovable property conveyed by him has an existing common passage over the other immovable property retained by him, he may well be estopped later from denying existence of common passage over the other land.[3]

52. Acquiescence and ratification.—A Bigelow says in his book on *Estoppel* :

> "It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel, at best. An estoppel is certain, being a legal inference or conclusion arising from acts or conduct ; while acquiescence and ratification, like waiver, are but matter of fact might have been found otherwise."

In this connection, it would be helpful to quote the following passage from the decision of their Lordships of the Judicial Committee in *Rangaswami Gounden* v. *Nachiappa Gounden*[4]:

Privy Council view.

> ....An alienation by a widow is not a void contract, it is only voidable...Now, in all cases of voidable contracts there is a general equitable doctrine common to all systems, that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If he did something which showed that he treated the alienation as good he would lose his right of complaint. In some cases it has been expressed as an election to hold the deed good."

Where the *mahants* of an *asthal* executed a *mukarrari istamrari patta* with regard to the land in favour of the defendant and his successor accepted rent from the defendant, the successor is estopped from denying defendants tenancy rights in the same.

The recognition of the defendants' tenancy rights in the lands would be no bar to the successor seeking an enhancement of the rent that has been fixed by the *mukarrari* deed.[5]

In Bowstead's *Law of Agency* (7th Ed.) at page 59, the following passage occurs :

Expressed or implied; ratification of transaction be.

> "The ratification of an act or transaction may be express or implied. A ratification will be implied whenever the conduct of the person, in whose name or on whose behalf the act or transaction is done or entered into is such as to show that he intends to adopt or recognise such act or transaction in whole or in part."

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1. A.I.R. 1928 All. 525.
2. Pancham Banerji *v.* Anant Prasad Pandey, A.I.R. 1932 All. 457 at p. 459 : 193 A.L.J. 477.
3. Richard De Souza *v.* Abdul Wahed, A.I.R. 1963 Cal. 110 at p. 111.
4. 46 I.A. 72 : 23 C.W.N. 777 : I.L.R. 42 Mad. 523 : 17 A.L.J. 536 : 21 Bom. L.R. 640 : 29 C.L.J. 539 : A.I.R. 1918 P.C. 196.
5. Sheo Narayan Gir *v.* Jugeshwar Kuer, A.I.R. 1950 Pat. 9 at pp. 12, 13.

In Katiar's *Law of Agency* at page 319, the following passage occurs :

> "So also although silence *per se* is no evidence of ratification, yet it may be accompanied by such circumstances as to lead a reasonable man to an inference that it is due to the principle consenting to the validity of the unauthorised act or contract."

It was held in the judgment of Achhru Ram, J., in *Hanuman Chamber of Commerce Ltd.*, v. *Jassa Ram*[1] :

Arbitration proceedings.

> "Where the initial reference to arbitration on behalf of his firm is made one of the partners there is nothing to prevent other partners from ratifying his act which was unauthorised at its inception. Ratificatoin need not be by any express act or declaration and may be implied from conduct. It may be inferred from mere acquiescence or silence or inaction on the part of such other partners."[2]

What constitute election or ratification.

In order to constitute election or ratification it is not essential that a reversioner should assent to the transaction impeached only when he is *in titule*. The ratification can be effected even during the lifetime of the widow and before the reversion falls as pointed out by Lord Dunedin in the famous case of *Rangaswami Gounden* v. *Nachiappa Gounden*.[3]

There is no justification for limiting this doctrine to cases of alienation by Hindu widows. Though the Hindu widow's estate is unknown to English law, still the principle is given effect to in several decisions of English Courts.[4]

Excess of statutory powers acquiescence.

An excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel. The Court declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provision. Courts of equity would not permit the statute to be made an instrument of fraud.[5]

53. Estoppel by omission or negligence.—In support of a plea of estoppel on the ground of negligence, it must be shown that the party against whom the plea is raised owed a duty to the party who raises the plea. As Halsbury has observed—

English law.

> "before any one can be estopped by a representation inferred from negligent conduct, there must be a duty to use due care towards the party misled, or towards the general public of which he is one."[6]

Point requiring proof in a plea of estoppel based on negligence.

Before a plea of estoppel on the ground of negligence can be upheld another requirement is that the negligence on which it is based should not be indirectly or remotely connected with the misleading effect assigned to it, but must be the proximate or real cause of that result.[7] Negligence, according to Halsbury,

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1. A.I.R. 1949 E.P. 46.
2. *See* also Permeshwar Lal & Co. *v.* Jai Narain, A.I.R. 1952 Punj. 373 at p. 374.
3. 46 I.A. 72 : 23 C.W.N. 777 : I.L.R. 42 Mad. 523 : 17 A.L.J. 536 : 21 Bom. L.R. 640 : 29 C.L.J. 539 : A.I.R. 1918 P.C. 196.
4. Anantam Veeraju *v.* Valluri Venkayya *alias* Venkamma, A.I.R. 1960 A.P. 222 at p. 229 : I.L.R. (1959) A.P. 951 : (1960) 1 Andh. W.R. 340.
5. Ramadas Sheony, K. *v.* Chief Officers, Town Municipal Council, Udipi, A.I.R. 1974 S.C. 2177 at p. 2182.
6. Halsbury's *Laws of England*, Vol. 15, p. 243, para. 451.
7. Halsbury's *Laws of England*, Vol. 15, p. 245, para. 453.

which can sustain a plea of estoppel must be in the transaction itself and it should be so connected with the result to which it led that it is impossible to treat the two separately.[1]

On the question of estoppel by negligence the observations of their Lordships of the Privy Council in the case of *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.*,[2] are worthy of perusal :

Estoppel by negligence.

"The appellants and the respondents are limited companies carrying on the business of bankers in Madras. The appeal is against the judgment of the Appellate Court of Madras who have held the appellants liable to the respondents for the conversion of their property. The question arises out of a series of frauds committed by a firm of merchants named C.K. Narayana Iyer & Sons, who will be referred to hereinafter as 'the merchants'.....Their practice was to purchase the groundnuts from the up-country growers, and have them despatched by rail to Madras....The groundnuts were covered in respect of each consignment or wagon load by a document called a 'railway receipt', which contained particulars of the goods and the names of the consignor and consignee. In all the consignments in questions in these proceedings, the merchants were entitled to obtain delivery of the goods under the railway receipts, either because they were named as the consignees or because, if they were not so named, the document had been endorsed by the named consignee....

"Both the appellants and the respondents had been in the habit of making loans to the merchants on the security of the goods covered by the several railway receipts; the practice was that the merchants should deliver to the bank the relevant railway receipts by way of pledge, giving at the same time to the bank a promissory note for the amount advanced and a letter of lien....The character and effect of this course of business was discussed by the Board in *Official Assignee of Madras* v. *Mercantile Bank of India*.....[3]

"The railway-receipts concerned in this case were 35 in the number. The merchants, in accordance with the practice....were given by the respondents the receipts and they fraudulently obtained a second advance from the appellants. It was found that in January and February, 1929, the merchants followed a systematic course of fraud in their dealings with both the appellants and the respondents. After having obtained railway-receipts from either the appellants or the respondents, as the case may be, they repledged them with the other bank, that is to say, if the railway-receipts had been pledged in the first instance with the appellants they took them to the respondents and obtained advances on them as if they had not been already pledged, and conversely, if they had been first pledged with the respondents they took them to the appellants and obtained advances from them. There was, however, one difference between the two banks, in that the practice of the appellants was to place their stamp on the railway receipt when they took it by way of pledge.

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1. New Marine Coal Co. (Bengal) Private Ltd. *v.* Union of India, A.I.R. 1964 S.C 152 at p. 158 : (1964) 1 S.C.A. 491 : 1964 S.C.D. 595 : (1964) 2 S.C.R. 859.
2. A.I.R. 1938 P.C. 52 at pp. 53-59 : 65 I.A. 75 : 1938 A.L.J. 273 : 1938 A.W.R. (P.C.) 90 : 40 Bom. L.R. 713 : 66 C.L.J. 510.
3. A.I.R. 1934 P.C. 246 : (1935) A.C. 53 : 152 I.C. 730 : 61 I.A. 416 : I.L.R. 58 Mad. 181 : 104 L.J.P.C. 1 : 152 L.T. 170 (P.C.).

That practice was not adopted by the respondents until about the end of the period covered by the fraudulent operations.....

"The appellants...claimed that they are entitled to succeed in the action on the ground which is set out in their amended defence in the following paragraph :

'The plaintiff bank having placed C.K.N. & Sons in possession of the railway receipts without any thing there into indicate that the plaintiff bank had any interest therein or that C.K.N. & Sons were not the owners thereof, enabled C.K.N. & Sons to hold themselves as out the owners thereof and thereby to pledge and said railway receipts for value with the defendant bank, who acted in good faith and the plaintiff bank is therefore estopped from setting up its title against that of the defendants bank to the relative goods ro their value'.

"It has been this plea which has been the subject of debate in the present appeal. Both courts below have decided against it. It is admitted that the respondents made the advances completely *bona fide*, they only did what they had done for some time previously without any misadventure...In delivering the railway receipts to the merchants the respondents followed a practice which had long been consistently followed both by the appellants and the respondents....On these facts it would *prima facie* seem impossible to say that the respondents made any representation to the appellants that the merchants had authority or were entitled to obtain an advance on the goods for themselves. There would appear to be no reason for saying that the respondents committed any breach of any duty owing either to the appellants or to anyone else. All that the respondents did was it would seem, to deal with their own property, as pledgees, in the usual course of business which was well-know to and had been followed both by the appellants and the respondents.....It has however, been strenuously contended on behalf of the appellants that the circumstances here raise what is called an estoppel, and that the respondents are precluded by their conduct from denying as against the appellants that the merchants had the right, which they pretended to have, of pledging the goods, as owners, the *bona fides* of the appellants not being in question. The estoppel is relied on as giving to the appellants the substantive right of claiming a valid pledge of the goods, taking priority over the pledge to the respondents, since though estoppel has been decribed as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. Of the many forms which estoppel may take, it is here only necessary to refer to that type of estoppel which enables a party as against another party to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence or by conduct or by representation or by a holding out of ostensible authority. The argument has been variously put on behalf of the appellants. They have claimed to succeed upon the broad rule stated by Ashhurst, J., in *Lickbarrow* v. *Mason*,[1] that 'wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.' The decision of the Board in *Commonwealth Trust Co.* v. *Akoley*[2] was cited as one in which it was said that the case was a plain case for the application of that principle.

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1. (1787) 2 Term. Rep. 63 : 1 H.B. 357 : 6 East 21 : 1 R.R. 425.
2. (1926) A.C 72 : 94 L.J.P.C. 167 : 41 T.L.R. 641 : 134 L.T. 33.

"What is there stated, it may be, would cover this case if it is applied without qualification. But in their Lordships' Judgment it is impossible to accept without qualification as a true statement of law the principles there broadly laid down.....This was, it seems, the opinion of Lord Sumner, who, in a striking instance of a case where estoppel by conduct or representation was negatived, the case in *Jones Limited* v. *Waring & Gillow Ltd.*[1] :

'There was no duty between Jones Ltd., and Waring & Gillow, Ltd. and without that, the wide proposition of Ashhurst, J., in *Lickbarrow* v. *Mason*,[2] would not apply (*see* observations of Lord Macnaghten and Lord Lindley in *Farquharson & Co.* v. *King & Co.*,[3] and of Lord Parmoor in *London Joint Stock Bank* v. *Macmillan*,[4] which were apparently overlooked in *Commonwealth Trust Co.* v. *Akotey*[5]).'

"Lord Sumner thus puts the principle of estoppel as depending upon a duty. The passage to which he refers in Lord Parmoor's speech in *London Joint Stock Bank* v. *Macmillan*,[6] pointed out that the rule expressed by Ashhurst, J., was too wide and said that the accurate rule was stated by Blackburn, J., in *Swan* v. *North British Australasian Co.*[7] There, Blackburn, J., referring to the judgment in the Court below of Wilde, B., said :

'He omits to qualify the rule he has stated by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake ; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or , what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.'

"To the same effect in *Farquharson & Co.* v. *King & Co.*,[8] at page 342 Lord Lindley said :

'It is, of course, true that by employing Capon (the fraudulent clerk) and trusting him as they did, the plaintiffs enabled him to transfer the timber to anyone; in other words, the plaintiffs in one sense, enabled him to steal by both by themselves and others. In that sense every one who has a servant enables him to steal whatever is within his reach.'

"Lord Lindley then pointed out the dictum of Ashhurst, J., is too wide. This has been pointed out by other Judges. It was indeed not necessary to the decision of the case which was before Ashhurst, J. The case in *Commonwealth Trust Co.* v. *Akotey*[9] is also inconsistent with the case in *Johnson* v. *Credit Lyonnais*,[10] where it was held that the conduct of the plaintiff in leaving the dock warrants, which were the indicia of title, in the hands of a vendor of the goods after he had been paid by the plaintiff as purchaser, without any change being made in the books of the dock

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1. (1926) A.C. 670 : 95 L.J.K.B. 913 : 135 L.T. 548 : 32 Com. Cas. 8 : 70 S.L. 756 : 42 T.L.R. 644.
2. (1787) 2 Term. Rep. 63.
3. (1902) A.C. 325 : 71 L.J.K.B. 667 : 86 L.T. 810 : 51 W.R. 94 ; 18 T.L.R. 665.
4. (1918) A.C. 777 : 88 L.J.K.B. 55 : 119 L.T. 387 : 23 Com. Cas. 415 : 62 S.J. 650 : 34 T.L.R. 509.
5. (1926) A.C. 72 : 94 L.J.P.C. 167 : 41 T.L.R. 641 : 134 L.T. 33.
6. (1918) A.C. 777 : 88 L.J.K.B. 55 : 119 L.T. 387 : 23 Com. Cas. 415 : 62 S.J. 650 : 84 T.L.R. 509.
7. (1868) 2 H. & C. 175 : 32 L.J. Ex. 273 : 10 Jur. (N.S.) 102 : 11 W.R. 862.
8. (1902) A.C. 325 : 71 L.J.K.B. 667 : 86 L.T. 810 : 51 W.R. 94 : 18 T.L.R. 665.
9. (1926) A.C. 72 : 94 L.J.P.C. 167 : 41 T.L.R. 641 : 134 L.T. 33.
10. (1878) 3 C.P.D. 32 : 47 L.J.C.P. 241 : 37 L.T. 657 : 26 W.R., 195.

company, did not disentitle the plaintiff from claiming for conversion against the defendants, who in good faith made advances to the fraudulent vendor on the security of the dock warrants thus left in his hands.....

".....In their Lordship' judgment, it cannot be said that the respondents owed any duty to the appellants in the matter. There was no relationship of contract or agency. They had no reason to think that the documents would ever be handed to the appellants. Mr. Miller's contention that estoppel does not depend on the existence of a duty is, in their Lordships' Judgment, refuted by the authorities already cited and many other like authorities which it is not necessary to cite.

"Mr. Miller however argued that the necessity of a duty to constitute an estoppel only applied to an estoppel based on conduct or negligence, whereas, an estoppel based on representation was different. He contended that the mere form of the railway receipts contained a representation by the respondents to any person to whom the merchants might produce it, that the merchants had the power to obtain a pledge on the security of the goods. There was, he contended, in this way a representation of authority which bound the respondents because it enabled the merchants to mislead the appellants. No question of duty or negligence arose on this view of the position, so he submitted. The document on its face conveyed a representation when presented by the merchants to the respondents that the merchants were invested with full disposing power. No authority was cited which in their Lordships' judgment would justify any such wide proposition. It is not indeed true to say without qualification that people are not bound to contemplate the possibility of, or take precautions against, forgery or fraud being committed. *London Joint Stock Bank* v. *Macmillan,*[1] is a case in which the banks' customer was held liable because he had facilitated the fraudulent alteration of a cheque by so drawing the cheque as to leave a space which the forger could fill up and thus alter the amount of the cheque. But that decision was expressly based on the existence of a duty arising from the contract between banker and customer and was distinguished on that ground from *Scholfield* v. *Londesborough,*[2] where any duty was negatived. Even if there is a duty as between the banker and the customer in drawing a cheque, it must be shown that there was a breach of the duty by the neglect of some usual and proper precaution. It was by the absence of such proof that the case in *Silngsby* v. *District Bank Ltd.*[3] was distinguished from the case in *London Joint Stock Bank* v. *Macmillan.*[4] In the present case not only was there an absence both of any duty or of anything amounting to a neglect of usual precautions but there was in their Lordships' judgment no ground for finding any representation.....

"There are very few cases of actions for conversion in which a plea of estoppel by representation has succeeded. Such a case was *Henderson* v. *Williams,*[5] which was relied on by Mr. Miller.....That was a very different case from the present. A similar principle of holding out has been applied in the cases where a share certificate with a transfer in bank has been placed in the hands of a stockbroker or one in a similar position, and where it has been held that there was a representation which constituted an estoppel.

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1. (1918) A.C. 777 : 88 L.J.K.B. 55 : 23 Com. Cas. 415 : 62 S.J. 650 : 34 T.L.R. 509.
2. (1896) A.C. 514 : 65 L.J.Q.B. 593 : 75 L.T. 254 : 45 W.R. 124.
3. (1932) 1 K.B. 544 : 101 L.J.K.B. 281 : 146 L.T. 377 : 37 Com. Cas. 39 : 48 T.L.R. 114.
4. (1918) A.C. 777 : 88 L.J.K.B. 55 : 23 Com. Cas. 415 : 62 S.L. 650 : 34 T.L.R. 509.
5. (1895) 1 Q.B. 521 : 64 L.J.Q.B. 308 14 R. 375 : 72 L.T. 98 : 43 W.R. 274.

Such a case is illustrated by *Fuller* v. *Glyn, Mills, Currie & Co.*[1] As was said in *London Joint Stock Bank* v. *Simmons*,[2] at page 213 by Lord Waston : 'brokers in the ordinary course of business are employed to sell, to buy, and to raise money upon as well as to keep in custody the securities of their customer's and accordingly it was reasonable assumption that the broker had full authority to deal with the securities. It is not necessary to discuss such cases further or express any opinion about them, because the material circumstances were not present here. The railway receipt though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. .....It is clear that no plea of estoppel could be raised in the cases where the merchants pledged the goods themselves after having obtained delivery under the railway receipt. It is not necessary to refer to cases where an agent entrusted with documents with a specific authority to deal with them for his principal, has fraudulently used them for his own purpose. Such cases are quite different.

"Nor is there any basis for the contention that the respondents are liable because they omitted the precaution of putting their stamp upon the railways receipts in regard to the transactions in question ; it is true that at a later date the respondents did stamp the railway receipt and that the appellants in practice did so throughout, but it is clear, in their Lordships' judgment that, that would have made no difference to course adopted by the merchants.....There is, however, a more general answer to any argument based upon the respondent's failure to stamp. It is not suggested that it was a usual practice, so that failure to adopt it could be charged against the respondents but even if it were, it would still be of no avail to the appellants because there was no duty as between the appellants and the respondents to adopt any such practice. As already pointed out, the existence of a duty is essential, and this, is peculiarly so in the case of an omission. This is so even if the case were put on representation or holding out. The duty may be, in the words of Blackburn, J., 'to the general public of whom the person is one'. There is a breach of the duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim.....In their Lordships' judgment the appellants fail to establish these conditions.

"Section 115, Evidence, Act, does not call for particular discussion here. It is conceded that the law it enacts is the same as the English law."[3]

A person left with his wife, cheques ready signed, but not having the amount filled in. She filled up one so imperfectly as to enable the bearer to alter £50 into £350 and it was decided that the husband was estopped from setting up against the banker, who had acted with ordinary caution in paying the cheque in the usual course of business, that his agent had only drawn the cheque for the smaller sum, inasmuch as it was his negligence, through his agent, that enabled the fraudulent holder to cheat the banker.[4] *A* claimed under a mortgage, which was neither registered, nor accompained by possession. *B* claimed under a later mortgage which was registered and accompanied by possession and had no notice of *A*'s

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1. (1914) 2 K.B. 168 : 83 L.J.Q.B. 764 : 110 L.T. 318 : 19 Com. Cas. 186 : 58 S.J. 235 : 30 T.L.R. 162.
2. (1892) A.C. 201 : 61 L.J. Ch. 723 : 66 L.T. 625 : 41 W.R. 108 : 56 J.P. 644.
3. *See* Sarat Chunder Dey *v.* Gopal Chunder Laha, 19 I.A. 203 at p. 215 : I.L.R. (1893) 20 Cal. 296 : 6 Sar. 224 (P.C.).
4. Young *v.* Grote, 4 Bind. 254 : 12 J.B. Moore 484.

mortgage. *A* sued the mortgagor for a sum of money unconnected with the mortgage, obtained a decree, and in execution thereof brought the mortgaged property to sale, but at the time of the sale gave no notice of his mortgage. *B* purchased the property. *A* subsequently sued to enforce his mortgage lien upon the property, but he was held to be estopped from doing so, as he had omitted to give notice of his mortgage to *B*, when bidding for the property.[1] *A* in execution of a money-decree, brought to sale the right, title, and interest of *B* in certain property ; but he gave no notice that this property had been mortgaged to him, and his mortgage-lien was in existence at the time of the sale. *C* became the purchaser. *A* afterwards obtained a decree on the mortgage-bond and assigned this decree, in execution of which the assignee attached the same property. It was held that as *A* had suppressed the fact of his charge on the property and so had induced *C* to purchase, he was precluded from afterwards setting up the mortgage-lien, and that *A*'s assignee could not do what *A* himself would not be allowed to do,[2] in which latter case it was pointed out that the rule that registration of a mortgage amounts to notice to all subsequent purchasers of the same property does not apply to a case where there has been a fraudulent concealment by a judgment-creditor of his judgment-debtor's interest in the property brought by the judgment-creditor to sale.[3] The holder of a service tenure died leaving a brother who was then out of India. Shortly before his death he made in invalid assignment of his holding to a third person who performed the service and granted *pattas* of the land. The holding was resumable on failure of the service. The brother of the late service tenure-holder returned after three years and obtained registration of his tenure—he then sued to enforce acceptance of *pattas* tendered by him, but it was held that his conduct justified the tenant's belief that the assignee was authorised to collect rent from them.[4] As to the estoppel of a legal representative, *see* the case of *Natha Hari* v. *Jamni*,[5] in which it was ruled that the legal representative of a deceased person, though not a party to the suit, would be bound by an execution sale, if he either knowingly allowed the suit to be defended by another person claiming to the legal representative, or if, knowing of the sale, he stood by and allowed the purchaser to pay in the belief that he had acquired a good title.

The decree-holder who is bound to notify before the sale all encumbrances on the property about to be sold, cannot subsequently set up an encumbrance in his own favour not set up in the execution proceedings.[6] There is a strong body of authorities for the view that an execution sale of properties not belonging to the judgment-debtor does not estop the judgment-debtor from asserting against the purchaser a title subsequently acquired.[7] The principle of estoppel will not apply where it has not been established that a party was under a duty to speak and that by reason of his failure to warn the other party the position of the latter has been altered; a purchaser at an execution sale is bound by the same rule of estoppel as the judgment-debtor.[8] The parties are only estopped from denying their own

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1. Tukaram Bin Atmaram *v.* Ram Chandra Bin Budharam, I.L.R. 1 Bom. 314.
2. Dullab Sarkar *v.* Krishna Kumar Bakshi, 3 B.L.R. (A.C.) 407 ; *see* also Hari *v.* Lakshman, I.L.R. 5 Bom. 614 and Agar Chand *v.* Rakhma Hanmant, I.L.R. 12 Bom. 678.
3. *See* also Mohammad Hamiduddin *v.* Shib Sahai, I.L.R. 21 All. 309 [Other cases are those of Jagannath *v.* Gangi Reddi, I.L.R. 15 Mad. 303 and Kastur *v.* Venkatachalapathi, I.L.R. 15 Mad. 412, the facts of which are similar to those of Dullab Sarkar *v.* Krishna Kumar Bakshi, 3 B.L.R. (A.C.) 407].
4. Khadar *v.* Subramanya, I.L.R. 11 Mad. 12.
5. 8 Bom. H.C. Rep. A.C. 37.
6. Kalidas Saha Chowdhury *v.* Prosonna Kumar Das, 24 C.W.N. 269 ; Prosonno Kumar Mukherjee *v.* Srikantha Routh, I.L.R. 40 Cal. 173 at p. 184, where all the authorities are cited.
7. *See* Prosonno Kumar Mukherjee *v.* Srikantha Routh, I.L.R. 40 Cal. 173 at p. 185.
8. Kanchan Mandar *v.* Kamala Prosad, 21 C.L.J. 441, following Debendra *v.* Mirza Abdul, 10 C.L.J. 150.

statements when the denial operates to the injury of another and when their conduct did influence the position of that person. Where a party fails to make his rights known, where fairness and good conscience require that he should do so to protect the interest of others, he cannot be heard as against them to assert such rights.[1] When silence is of such a character and under such circumstances that it would be a fraud upon the other party for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel.[2]

Silence amounting to representation.

The main condition subject to which alone silence amounts to a representation is that a legal duty was owed by the representator to the representee to make the disclosure the omission of which is relied upon as creating an estoppel.[3]

In order to create an estoppel, there must be a duty owing by the person estopped to speak or to act which he has failed to perform.[4]

Wilful misleading.

As pointed out in *Baswantapa* v. *Ranu*,[5] there must be something like wilful misleading of the purchaser by some breach of duty.[6]

54. Estoppel by omission or mistake.—Unless there is a duty imposed by law on the party to do or say something the omission to do that thing or say that thing cannot give rise to estoppel.[7]

Where the various consignments imported by the defendants were not taxed by the Municipal Committee, the Committee was not estopped from holding the defendants liable.[8]

Where *A* had not appointed *B* executor of the will a misdescription of his position by *B* would not make him so or raise on estoppel against him.[9]

Nomination.

A nomination, which is clearly based on erroneous view of the legal position, can hardly amount to estoppel. When a candidate is informed on an erroneous assumption that he has been nominated to some other institution when in fact the Government has no power to nominate and if on merits the candidate is not entitled to admission in the Government college, no right can flow from such an erroneous act of nomination.[10]

55. Estoppel against tenant.— It is to be noted that by virtue of Sec. 116 of the Indian Evidence Act, a tenant is estopped from denying the title of his landlord at the time the lease is given. That only provides for a restricted kind of estoppel. There may be other kinds of estoppel which might operate and which have been applied by the Indian Courts on principles of equity, justice and good conscience. This is clear from the pronouncement of their Lordships of the Privy Council in *Kumar Krishna Prosad* v. *Baraboni Coal Concern, Ltd.*[11] It may be pertinent to reproduce the observations of their Lordships to the following effect :

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1. Thomas Barklay *v.* Syed Hussain Ali Khan, 6 C.L.J. 601.
2. Jakhomull *v.* Saroda, 7 C.L.J. 604.
3. Chowdhury Ally Meah *v.* Maymyo Municipal Committee, A.I.R. 1940 Rang. 187 at p. 189 : Joy Chandra Banerjee *v.* Sreenath Chatterjee, I.L.R. (1905) 32 Cal. 357 : 1 C.L.J. 23.
4. *See* Jones Brothers Ltd. *v.* Woodhouse, (1923) 2 K.B. 117 : 92 L.J.K.B. 638 : 129 L.T. 317 : 67 S.J. 518.
5. I.L.R. 9 Bom. 86.
6. Nandkishore *v.* Damodar Balaji, A.I.R. 1942 Nag. 59 at p. 60 : I.L.R. (1942) Nag. 232 : 1942 N.L.J. 154.
7. Smt. Prabati Debi *v.* Kashmirilal Sarma, A.I.R. 1959 Cal. 69 at p. 71.
8. Kamaruddin Yusuf Ali Bohra *v.* Municipal Committee, Khandwa, A.I.R. 1939 Nag. 195 at p. 196.
9. Atisukhlal Bhaidas *v.* Natwarlal Icharam Desai, A.I.R. 1939 P.C. 238 at p. 239 : 183 I.C. 885.
10. State of Tamil Nadu *v.* N. Hari Prasad, A.I.R. 1988 Mad. 212 at p. 223.
11. A.I.R. 1937 P.C. 257.

> "The section does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor anyone claiming through a tenant shall be heard to deny that, that particular landlord had at that date a title to the property. In the ordinary case of a lease intended at a present demise...the section applies against the lessee any assignee of the term any sub-lessee or license. The principle does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion though in such cases there may be other grounds of estoppel, *e.g.* by attornment, acceptance of rent, etc. Nor does the principle apply to prevent a tenant from pleading that the title of original lessor has since come to an end."

Therefore, what a tenant cannot be permitted to do is to deny the title of the original lessor. Similarly, he cannot be permitted to deny the derivative title of a reversioner if he has attorned to him. However, if he has not attorned to him or if he has not paid any rent to him, he can certainly deny the derivative title of a reversioner. Similarly, he can also contend as against the original lessor that he has ceased to be his landlord because of some subsequent transfer. These are the permissible limits where the estoppel will not be applied as against the tenant. The question is whether a tenant denying the title of the landlord within the permissible limits should be made to suffer by a forefeiture of his tenancy. There can be no doubt that if a tenant denies the title of his landlord outside the permissible limits, he should forfeit his tenancy, as he cannot be permitted to deny his landlord's title unless he has delivered back possession to the landlord openly. But can it be said that he should suffer the penalty of forfeiture even though his denial is within the permissible limits where the principle of estoppel cannot be applied against him ?

In this connection, a Division Bench of the Calcutta High Court in *Abdulla* v. *Mohd. Muslim,*[1] laid down that the denial of the right of an assignee from the original lessor by the tenant would not work a forfeiture of the tenancy. There is no reason as to why a tenant who denies the title of the assignee or the reversioner within the permissible limits should be made to suffer the penalty of forfeiture.[2]

Originally the landlord had not alleged in the eviction application that he was the owner of the suit premises. The landlord made an application for amendment by adding the words, "the petitioner is the owner of the property in suit". In para 18 (*a*)(2) of the eviction application. Leave to amend was granted on payment of Rs. 50/- as costs. The costs were paid and accepted by the tenant. It was held that the tenant was estopped from challenging the order allowing amendment.[3]

It is well settled that a tenant, in so far as he claims as a tenant, is not permitted to dispute the title of the landlord from whom his tenancy and possession have been derived. This is a rule of estoppel expressly enacted in the Evidence Act itself. On that basis, even a trespasser-landlord can maintain a suit for eviction as against his tenant and it would not be open to the tenant to challenge the title of the landlord in any manner whatsoever. The reason for this long-standing rule is simple to understand. The tenant comes into possession from and by reason of the landlord. As as such, he shall hand over possession to that

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1. A.I.R. 1926 Cal. 1205.
2. Smt. Sugga Bai *v.* Smt. Hiralal, A.I.R. 1969 M.P. 32 at pp. 33- 34.
3. Begum Hamid Ali Khan *v.* Col. B.H. Zaidi, A.I.R. 1982 Delhi 352 at pp. 353, 354.

person from whom he originally came to acquire it and shall not raise pleas or obstacles in that regard.[1]

In the under-noted case it was held that even though there was no express grant or dedication, as soon as the defendant acted on the said representation by purchasing or taking lease of the plots for consideration the grant implicit in the representation came in existence. The disputed strip of land has been described as a new road in the documents and the evidence shows that there was specific representation by the vendor that the said strip of land was set apart as the common passage of the prospective buyers including the plaintiff and as matter of fact the said passage was shown in a sketch map which the defendant is withholding. It must, therefore, be held that there was representation of grant of user of the disputed road even though there was no express grant or dedication. As soon as the plaintiff acted on the said representation by purchasing the suit plots for consideration the grant implicit in the representation come into existence and the defendant claiming through the original vendor is, therefore, estopped from challenging the implied grant of user of the disputed strip of land.[2]

The argument that by depositing Rs. 500/- towards arrears of rent and the withdrawal of the same by the plaintiffs amounted to waiver is not at all tenable, only more so because, it was in connection with the execution levied by the plaintiffs for the delivery of possession of the premises held to have been in wrongful occupation of the defendant. In such cases, the acceptance of rent cannot amount to waiver because it was in a different proceeding altogether. On the two grounds, namely (*i*) that the deposit of Rs. 500/- was in connection with another proceeding and the acceptance was only to put to terms the respondents for stay of the execution proceeding levied for recovery of possession of the portion, which was not tenancy and (*ii*) once a default had occurred, mere acceptance by itself will not amount to waiver, the argument that the principle of waiver should be applied has no force.[3]

Third party—Joinder of.

In *(Pasumarthi) Subbaraya Sastri* v. *Mukkamala Seetha Ramaswami*,[4] where the plaintiff bought a suit to eject the defendant from a site and to remove a *pial* erected by him thereon and the plea of the defendant was that the land belonged to the Municipal Council, that he put up a *pial* with its permission it was held that—

> "The municipality was necessary party to the suit and not having been made one, in spite of objection taken from the start, the suit must be dismissed."

In this case the learned Judge mainly relied upon *Umed Mal* v. *Chand Mal*,[5] and the observations made by Dicey on *Parties to an Action*, R. 113. This case was referred in *Uttam Gulabrao Sakhare* v. *Champatrao Gulabrao Gawande*,[6] and Mudholkar, J., as he then was, distinguished it and held that—

> "Where in an ejectment suit instituted by the plaintiff as landlord against the defendant in actual juridical possession of the house, the defendant pleads that the house in question belonged to third party and not to the plaintiff and the title of the third party is disputed by the plaintiff, though the third party is proper party to the suit, his joinder was not

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1. Vithalbhai Pvt. Ltd., *v.* Union Bank of India, A.I.R. 1992 Cal. 283 at p. 284.
2. Alo Rani Banerjee *v.* Malati Roy, A.I.R. 1992 Cal. 302 at pp. 305, 306.
3. Sugam Chand Agrawal *v.* Jivt Shah, A.I.R. 1984 Pat 184 at pp. 185, 186.
4. A.I.R. 1933 Mad. 664.
5. A.I.R. 1926 P.C. 142.
6. A.I.R. 1960 Bom. 238.

necessary to enable the plaintiff to obtain the relief which he claimed against the defendant."

In *Lodai Mollah* v. *Kally Dass Roy*,[1] it was held *per* Field, J., that :

"Where a person sued for rent sets up the title of a third party, and alleges that he holds under, and pays rent to him; such third party ought not to be made a party to the suit so as to convert a simple suit for arrears of rent into one for the determination of the title to the property in respect of which the rent is claimed ?"

In *Srila Sri Subramaniya Desika Gnana* v. *Ananthakrishnaswami Naidu*,[2] it was held that—

"In an ejectment suit on basis of lease deed, *prima facie*, persons claiming adverse rights to the plaintiff's title should not be made parties in the absence of special circumstances".

In *Pravat Chandra Giri* v. *Amulya Chandra Bhaduri*,[3] the decision in *Lodai Mollah's* case[4] was followed.

In *Mst. Singar Kanwar* v. *Dhoopchand*,[5] it was held that—

"In a rent suit where the defendant admitted the execution of rent note but pleaded that he executed it under undue influence and that one *H* was the real landlord, it was held that *H* was not necessary party."[6]

In *Gagan Behari Patnaik* v. *Rameshwar Lal*,[7] it was held that—

"Subject to the various exceptions, a suit for rent should not be converted into a complicated title suit and a third party claiming a title rival to that of the plaintiff-landlord is not a necessary party."

Similar view was taken in *Chamiar Kanchelan* v. *Kandan Damodran*.[8]

A review of the above decisions would show that they fall in three categories, *viz.*—

(*i*) that the third party is necessary party;[9]
(*ii*) the third party is not even a proper party;[10]
(*iii*) that the third party is a proper party.[11]

However, the question whether the third party claiming title to the property in a suit for ejectment is a proper party or not, would also depend upon the nature of the plaintiff's title. In cases where there is a contractual relationship, of landlord and tenant and the defendant has been inducted into possession of the suit property as tenant by the plaintiff and the rule of estoppel contained in Sec. 116 of the Evidence Act operates against the tenant, no question of impleading a third person as a party setting up title to the suit property can arise. However, in cases where the plaintiff claims title to the suit property on

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1. (1882) I.L.R. 8 Cal. 238.
2. A.I.R. 1932 Mad. 688.
3. A.I.R. 1927. Cal. 340.
4. (1882) I.L.R. 8 Cal. 238.
5. 1953 Raj. L.W. 320.
6. Lodai Mollah *v.* Kally Dass Roy, (1882) I.L.R. 8 Cal. 238 ; Pravat Chandra Giri *v.* Amulya Chandra Bhaduri, A.I.R. 1927 Cal. 340.
7. I.L.R. (1966) Cut. 456.
8. A.I.R. 1960 Ker. 284.
9. (Pasumarthi) Subbaraya Sastri's case, A.I.R. 1933 Mad. 664.
10. Lodai Mollah's case, (1882) I.L.R. 8 Cal. 238 and other cases which have followed it.
11. Uttam Gulabrao's case, A.I.R. 1960 Bom. 238.

the basis of inheritance assignment, etc., and the tenant has not attorned to him and the above mentioned rule of estoppel does not operate against him and it is open to him in the suit to set up the title of a third person, such third person in appropriate cases can be regarded as a proper party. In *Lodai Mollah's* case,[1] Field, J., observed :

> ".....The affect of an assignment, or of an adoption, or of a claim founded inheritance, may be to deprive of the property, and so of the rents and profits, of some other person who, but for such assignment or adoption or claim founded on inheritance, would be entitled thereto. This class of cases may be further divided into (*a*) cases where the defendant has attorned to the plaintiff, and (*b*) cases where the defendant has not attorned to the plaintiff. Where the plaintiff claims by a derivative-title, and the defendant has attorned to him, the defendant is not defendant is not thereby stopped from showing that the title is really not in the plaintiff but in some other person.[2].. .Ordinarily, a tenant who had attorned would not set up this defence unless some person had satisfied him of a better title and prohibited him from paying rent to the plaintiff. There is no plausible reason why this third person should be made a party to the suit for rent, and it is really for his own interest that he should not be a party. If he is a party he will be bound by the adjudication upon the question of title....If he is not a party, he has the chance of the tenant's plea being successful, and so of himself stepping into the place of landlord without personal litigation. If the tenant's plea is unsuccessful, he can litigate the question of title himself with better preparation and with experience gained from the contest at which he looked on without being a party."

In the absence of permission in writing by the Rent Controller, residential building cannot be converted into a non-residential one, and even if it is used for some time for non-residential purposes, it does not lose its original character of a residential one. Even if the original owner had let out the premises for locating an office, in other words for non-residential purposes, he alone is estopped from recovering the possession for his own use as residence. It is not fair to permit him to recover the possession for his own use as residence but that does not apply to his successor-in-title.[3]

Conversion of residential building into non-residential one—Landlord estopped from seeking its possession during his life time.

Having raised a specific plea in the counter statement, it is not open to the tenant to change her case in the course of the evidence and make a suggestion when the landlord was in the witness box that she was permitted to pay the rent in the same manner in which she was paying the prior landlord. It might be that the prior landlord had not taken any proceeding for eviction of the tenant or of the recovery of rent even when there was accumulation of rent for several months. But that does not mean that there was an implied contract between the present landlord and the tenant that the latter could pay the rent as and when she pleased.[4]

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1. (1882) I.L.R. 8 Cal. 238.
2. *See* the cases of Rogers *v.* Pitcher, (1815) 6 Taun. 202 ; Claridge *v.* Mackenezia, (1842) 4 Man. & G. 143 ; and Gregory *v.* Doidge, (1826) 8 Bing. 474.
3. Pokuru Vardarajam *v.* State of Andhra Pradesh, A.I.R. 1976 A.P. 90 at p. 92.
4. Thayammal *v.* K. Subramaniam, A.I.R. 1989 Mad. 317 at p. 319.

Where the fact show that the previous landlords clearly waived the so-called breaches on the part of the tenant it is not open for the present landlords to maintain an action on the ground of nuisance and annoyance.[1]

In the case reported in *Smt. Raj Rani* v. *Dwarka Das*,[2] the petitioner instituted eviction proceeding against the tenant and succeeded in getting the eviction order from the Additional Rent Controller. Tenant's appeal to the High Court was dismissed and at his request was allowed two month's time to vacate the premises and deliver vacant possession. Since the tenant refused to vacate the premises the landlady approached the competent authority (slums) under Sec. 19 of the Slum Area (Improvement and Clearance) Act, 1956. It was held that the tenant was estopped from showing that he could not get alternative accommodation because of his request for two months period at the time his appeal was decided by the High Court. The Delhi High Court has held in *Smt. Raj Rani* v. *Amar Nath*,[3] that the tenant is not estopped from showing that he is not in position to get alternative accommodation in spite of the said requests.

The omission of the landlords to object to the user of the premises for purposes not in consonance with the agreed user does not invariably errect an estoppel. A breach of covenant in regard to the user of the building is a continuing breach. Any acquiescence in the breach of the receipt of rent with knowledge of such breach will constitute a waiver upto the time of the acceptance of the rent or the acquiescence in the user. If the landlord does not take exception to the user but acquiescences in the breach, it does not constitute a sanction irrevocably given to the changed user of the premises at a later period or for all time to come.[4]

It would appear from the above that it was on the ground of expediency that it was held that the third person need not be joined as a party in such a suit because it is in his own interest that he should file a separate suit for the proper adjudication of his own title.[5]

56. Waiver.—Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. Waiver must be an intentional act with knowledge. Firstly some distinct act ought to be done to constitute a waiver; next it must be intentional and lastly it must be with knowledge.[6]

Waiver is an intentional relinquishment of a known right or advantage, benefit claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position of gain advantage through the aid of courts. Waiver sometimes partakes the nature of an election.

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1. Kumari Parvati Kevalram Moorjani *v.* Mandanlal Anraj Porwal, A.I.R. 1988 Bom. 354 at p. 360.
2. A.I.R. 1972 Delhi 208 at p. 209.
3. A.I.R. 1972 Delhi 206.
4. Nirmal Kumar Moulik *v.* Smt. Champabala Roy, A.I.R. 1971 Cal. 407 at pp. 409, 410.
5. Urban Improvement Trust *v.* Raj Kumari, A.I.R. 1969 Raj. 131 at pp. 133, 134, 135.
6. Life Insurance Corporation of India, Bombay *v.* Ramdas Agarwal, A.I.R. 1979 Pat. 124 at p. 127 ; *Indian Contract Act* by Pollock and Mulla, 1972 Ed. at p. 451.

Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Wavier actually requires tw parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the Court in saying that there was no consent.[1]

A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights.[2]

General principle.

The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non-observance of the statutory provision in *cuilibet licet renuntiare juri prose introducto*.[3] If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an act is intended to have a more extensive operation as a matter of public policy.[4]

In Halsbury's *Laws of England*,[5] it is stated in para 248 at page 143 :

> "As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may however, be imposed in such terms that they cannot be waived by agreement, and in certain circumstances, the Legislature had expressly provided that any such agreement shall be void."

In the foot note it is pointed out that there are many statutory provisions expressed to apply notwithstanding any agreement to the contrary, and also a stipulation by which a lessee is deprived of his right to apply for relief against forfeiture for breach of covenant.[6]

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1. Dasa Muni Reddy, P. *v.* P. Appa Rao, A.I.R. 1974 S.C. 2089 at pp. 2091-2092.
2. *See* Dhanukdhari Singh *v.* Nathima Sahu, (1907) 7 C. W.N. 848 at p. 852 ; Associated Hotels of India Ltd. *v.* S.B. Sardar Ranjit Singh, A.I.R. 1968 S.C. 933 at p. 937 ; *see* also Sugam Chand Agrawal *v.* Jivt Shah, A.I.R. 1984 Pat. 184; Smt. Raj Kumari *v.* Board of Revenue, 1985 All. L.J. 45.
3. *See* Maxwell on *Interpretation of Statutes*, 11th Ed., pp. 375, 376.
4. Lachoo Mal *v.* Radhey Shyam, A.I.R. 1971 S.C. 2213 at p. 2214-2215.
5. Vol 8, 3rd Ed.
6. Law of Property Act, 1935.

Rule of waiver and public policy.

There is a difference between a statute solely meant for the benefit of an individual and a statute which has public policy for its benefit, that is, an advantage or benefit intended for an individual and one in which the public have an interest. And therefore an individual who has the benefit given to him by a statute may waive it if he thinks fit, but he cannot waive it where the public have an interest. Therefore the rule of waiver cannot apply to matters based on public policy.[1]

In *Graham* v. *Ingleby*,[2] it has been stated—

> "that an individual cannot waive a matter in which the public have an interest."

This principle has been subsequently reiterated in *Gaekwar Baroda State Railway* v. *Hafiz Habibul-Haq*[3], *Jogeshwar Mahta* v. *Jhapal Santal*,[4] *Shankarlal Bansilal* v. *Raghunathdas Anandram*,[5] *Postmaster-General, Bombay* v. *Chenmal Mayachand*[6] and *Madras and Southern Mahratta Railway by its General Manager* v. *Chengali Sydalli*.[7]

"Waiver" according to Halsbury's *Laws of England*,[8] is the abandonment of a right and is either express or implied from conduct. A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted upon it is sufficient consideration. Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right.

In the case reported in *Vasudeo Bakaram Kurne* v. *Ramdayala Puna Bisne*[9] the plaint was defective and therefore the plaintiff sought permission of the Court to withdraw the suit with liberty to bring a fresh action on the same cause of action. The Trial Court, therefore, passed an order permitting him to withdraw the suit but directed him to pay the costs of the defendant within two months of the date of that order or, at any rate, before the institution of a fresh suit. The second suit was then filed on the same cause of action but the costs were not deposited either within two months of the date of order or before the institution of the second suit. The costs were deposited pending the second suit. The suit was dismissed on finding on a preliminary issue. The defendant-lawyer withdrew the same pending the appeal. *Held* that the conduct of the defendant shows that he could not have any intention to waive his right. If he wanted to waive, he could not have withdrawn the deposited costs before the disposal of the suit. It is always open to a party to give up his rights which may be contained in a document which by law is not required to be in writing and registered. In this connexion it would be useful to the observations of a Division Bench of the Madras High Court presided over by Varadachariar and Horwill, JJ., in *V. Krishnaswami Rao* v. *R. Srinivasa Desikan*[10] wherein the suit was filed by the mortgagee for sale of the mortgaged property.

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1. Abdul Waheed Khan Pathan Soudhagar *v.* Mrs. Reny Charles Pavey, A.I.R. 1965 Mys. 303 at p. 306.
2. (1841) 1 Ex. 651.
3. 65 I.A. 182 : 1938 A.L.J. 488 : 1938 A.W.R. (P.C.) 123 : 42 C.W.N. 705 : A.I.R. 1938 P.C. 165.
4. A.I.R. 1924 Cal. 638.
5. A.I.R. 1935 Bom. 433.
6. A.I.R. 1941 Bom. 389 : 43 Bom. L.R. 758.
7. A.I.R. 1950 Mad. 402 : (1950) 1 M.L.J. 186 : 63 L.W. 244 : 1950 M.W.N. 108.
8. 3rd Ed. Vol. 14, para 1175.
9. A.I.R. 1971 Bom. 220 at pp. 221, 224.
10. A.I.R. 1937 Mad. 261.

The mortgagor pleaded an oral agreement between himself and the mortgagee to the effect that the mortgage amount had been settled at a certain figure and that the mortgagee would accept certain property in full discharge of his mortgage debt. An objection was raised on behalf of the mortgagee that Sec. 92 of the Evidence Act was a bar to the proof of such a subsequent oral agreement. Varadachariar, J., speaking on behalf of the Bench negatived that contention and held that the mortgagor was entitled to adduce evidence to prove the oral agreement about the mode of satisfaction of the mortgage debt.

The party who has promised the forbearance will be estopped from going back on his promise, at any rate without giving notice to the promisee. The similarity between the common law and equitable doctrines is so striking that it is tempting to regard both as a species of estoppel. This was in fact the view taken by Denning, L.J., in *Charles Richards Ltd.* v. *Oppenheim.*[1]

The same principle was reiterated by Asquith, Denning and Bickett, L.JJ., in *Combe* v. *Combe.*[2] Such a question came up for consideration before a Division Bench of the Punjab High Court in *Dominion of India* v. *Ram Rakha Mall.*[3] In that case the plaintiff firm by a tender had contracted to supply the Government a certain quantity of bran, to its various military farms at various periods. The plaintiff had deposited a certain sum as security for due performance of the contract. By the terms of the contract, the Government undertook to arrange for railway wagons, but did not guarantee the supply. The plaintiff however, was to supply before hand the wagon programme. The non-supply of wagons, however, was not to be the ground for non-fulfilment of the contract. There was a contemporaneous oral agreement that the Government would supply the wagons. On the requisition of the plaintiff the Government sent wagon permits to the plaintiff. But on two occasions there were some clerical mistakes on the permit. In spite of the repeated reminders of the plaintiff the mistakes were not corrected and the wagons could not be had. The plaintiff had purchased the required quantity of bran at various centres, and was fervently applying for wagons. The goods could have been transported, at whatever cost, by other means of transport, but till the plaintiff firm was left under the impression that the wagons would soon be made available to it, and was acting under that belief. In view of this belief created by the employees of the Government, the plaintiff was prevented from arranging alternative means of transport. It was only a week before the expiry of three months that the Government wrote to say that the supply may be made from local zamindars and even then it was not said that the plaintiff had been in default in not making full supplies in spite of their failure to supply the wagons. The Division Bench laid down that the plaintiff did all that he could do to perform his part of the contract and it could not be said that he had failed to perform his contract and therefore the security was liable to forfeiture. Further on the Division Bench held that in equity the Government could not be allowed to go back on the oral promise made by the authority concerned to supply the wagons and therefore the security deposited by the plaintiff for due performance of the contract could not be forfeited on the ground that the plaintiff firm did not perform its part of the contract. For that proposition the Division Bench relied on the case of *Combe* v. *Combe.*[4]

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1. (1950) 1 K.B. 616.
2. (1951) 1 All E.R. 767.
3. A.I.R. 1957 Punj. 141.
4. (1951) 1 All E.R. 767.

Thus, it is open to the parties to waive their contractual rights embodied in a document and if on that representation the other party does something to its own prejudice, the party waiving its rights is not entitled to strict performance according to the original contract, because it would be estopped from doing so.

In the case of *Vallyan* v. *Government of Madras*,[1] the Privy Council held that the defendants were under no duty to point out the error of the plaintiffs in filing the suit without giving a notice under Sec. 80, C.P.C. and that the defendants "might have been negligent in their own interest in not raising the plea at an earlier stage". It was observed further that negligence cannot give rise to an estoppel unless there is a duty of care "and that" if in the result the appellants find themselves precluded by the Limitation Act from prosecuting any action which might otherwise have been open to them, that is a fortuitous result for which the respondents cannot be held responsible".

It was held in the case of *Wasant Shripat* v. *G.M. Khandekar*[2] that delay, however long, would not necessarily by itself be a ground for holding that the defendant has waived the notice. These decisions of the Privy Council and Nagpur High Court are authorities for the proposition that mere negligence or delay *per se* in raising the plea of Sec. 80 of the defendant does not constitute waiver. The word "waive" is defined in the Chambers *Twentieth Century Dictionary* in the legal sense as "to give up voluntarily as a claim or a contention". Obviously waiver postulates a voluntary and deliberate mental act. Non-adoption of the plea of want of notice in the written statement may conceivably be attributable to ignorance of law or sheer negligence on the part of either defendant or his counsel. The plea of waiver can be sustained only on the basis of evidence, direct or circumstantial that it had been consciously given up by the defendant.[3]

Waiver is an agreement to release or not to assert a right. Waiver is contractual and may constitute a cause of action. Therefore, whenever a waiver is pleaded, it should be shown by the party pleading the same that there was an agreement between them that the person waiving a particular right should not press that right in future in consideration of some compromise from some other person.[4]

The basic essentials of waiver have been stated by George Spencer Bower in *The Law Relating to Estoppel by Representation* (1923 Ed.) at page 214—

Essentials of waiver.

> "Where *A*, dealing with *B*, is confronted with two alternatives and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and *A* therefore so conducts himself as reasonably to induce *B* to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and in such belief alters his position to his detriment, *A* is precluded, as against *B*, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting."

The principle of waiver is also expressed in the form that one cannot approbate and reprobate at the same time.

Intentional abandonment is essential for "waiver". The plea of waiver when it is pressed against the Government has an uphill journey to make for success.[5]

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1. A.I.R. 1947 P.C. 197.
2. A.I.R. 1949 Nag. 25.
3. Jatindra Kumar Bhattacharjee *v.* Government of India, A.I.R. 1971 Tripura 51 at p. 55.
4. Messrs. R.G. Thakkar *v.* Bombay Housing Board, A.I.R. 1973 Guj. 34 at p. 57.
5. Shrikrishnadas Tikara, Messrs. *v.* State of Madhya Pradesh, A.I.R. 1977 S.C. 1691 at p. 1693.

In *Raj Kumar* v. *Gurminder Singh*,[1] Pandit, C.J., has held that where the tenant did not take up the plea in his written statement that an order of ejectment would be without jurisdiction on account of want of notice terminating the tenancy, he is deemed to have waived the objection, and that he cannot be allowed to raise the objection when the decision on merits had gone against him.[2]

Participation to arbitration without an umpire — Amounts to waiver.

In *Union of India* v. *M/s. Karsandas Jethabhai and Co.*,[3] the contractor applicant took part in the proceedings by arbitrators without raising any objection to the further proceedings without the appointment of an Umpire. Subsequently he came forth with this technical grievance only after the contractor found that the award was not to his liking. It was held that the conduct on the part of the contractor, would amount to waiver of the condition and the contractor-applicant could not be permitted to raise this question for the first time in the Court.

Plea of waiver when could be raised.

The plea of waiver could only be raised by a party who has accepted the representation of another and has acted to his detriment in relying upon it. Such a plea is not available to the rival pre-emptor.[4]

When a party to an arbitration agreement not only participated in the arbitration proceedings without demur but also consented in writing for extending the period of making the award, it is estopped from challenging the jurisdiction of the arbitrator on any technical ground.[5] The law is well settled on the point that where a party by his conduct participates in arbitration proceedings without protest and fully avails of the entire arbitration proceedings and then when he found that the award has gone against him, he cannot be heard to say that the proceedings before the arbitrator were without jurisdiction or that the reference was unilateral.[6]

Death of party during pendency of proceedings against him.

In *K.B. Agarwala* v. *Smt. Chandrawati*,[7] a landlord initiated proceedings under Sec. 21 of the U.P. Act No. 13 of 1972 against one P.L. Shiv Charan Lal who was alleged to be a tenant. P.L. Shiv Charan Lal died during the pendency of proceedings against him. Though substitution application was not moved the legal representative herself chose to come on record by moving an application praying that the landlord be ordered to reply in full to certain interrogatories. It was held that a mere participation in the proceedings without any waiver of her right to contest to be brought on record cannot be construed as the consent of the legal representative to be brought on record.

From the mere circumstance that the landlord accepted the rent for April and May which was legitimately due to him on account of subsistence of the tenancy, it cannot be inferred that he waived his right to sue on the basis of the default of the tenant under Sec. 3(*a*) of the U.P. (Temporary) Control of Rent and Eviction Act, 1947.[8]

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1. (1968) 70 Punj. L.R. 672.
2. Boota Singh *v.* Roshan Lal, A.I.R. 1971 Punj. 269 at pp. 273-74.
3. A.I.R. 1977 Guj. 183 at p. 185.
4. Waryam Singh *v.* Chanan Singh, A.I.R. 1960 Punj. 308 at p. 309.
5. Mohinder Pal Mohindera *v.* Delhi Administration, A.I.R. 1989 Delhi 270 at pp. 271, 273.
6. Union of India *v.* Sohan Singh and Co., A.I.R. 1989 J. & K. 14 at p. 17.
7. A.I.R. 1976 All. 15 at pp. 15, 16.
8. Faiyaz Ahmad *v.* Brij Nandan Lal Goyal, 1969 A.W.R. (H.C.) 185 at p. 188.

The objection as to non-joinder which was not taken in the Court below, should be deemed to have been waived by the appellant.[1]

In *Dr. G. Sarana* v. *University Lucknow*,[2] a candidate knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee of a University. He voluntarily appeared before the committee and took a chance of having a favourable recommendation from it. It was held that having done so, it was not open to him to turn round and question the constitution of the Committee.

In the case reported as *M.L. Abdul Jabbar* v. *H. Venkata Sastri & Sons*,[3] respondents (simple money creditors) filed applications for an order for rateable distribution of the assets realized in execution of the decree passed in favour of the appellant in civil suit by the High Court. *Held* that the respondents could not raise this question. If the decree was invalid and the sale was illegal on this ground, the respondents could not maintain their applications for the rateable distribution of the assets. They could ask for division of the sale proceeds only on the assumption that the properties were lawfully sold.

Although the expression "waiver" is freely and frequently used in the field of law, the principle governing it is often misunderstood and many a time the term is confused with "estoppel."[4]

The primary meaning of the word "waiver" in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. This appears to accord with the dictionary meaning of the term.[5]

What constitutes "waiver"? Supreme Court view.

The generally accepted connotation is that to constitute "waiver" there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment on a known right or privilege. Waiver differs from estoppel in the sense that it is an agreement to release or not to assert a right, estoppel is a rule of evidence.[6]

Although it is well established that ignorance of law is no excuse, but this maxim cannot be carried to the extent of saying that every person must be presumed to know as to the correct interpretation of a particular law for the purpose of application of the principle of waiver, and it will be going too far to hold that every unsuspecting submission to a law, subsequently declared to be invalid, must give rise to a plea of waiver.[7]

The essence of waiver is "estoppel" and where there is no "estoppel" there can be no "waiver", the connection between "estoppel" and "waiver" being very close. But in spite of that, there is an essential and fundamental difference between the two and that is that whereas estoppel is a rule of evidence waiver is a rule of conduct. The accepted connotation of "waiver" is that to constitute waiver there

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1. Commissioner, Madras H.R. & C.E. Act *v.* Ratnavaram, (1969) 2 Mys. L.J. 23 at p. 26.
2. A.I.R.1976 S.C. 2428 at p. 2433.
3. A.I.R. 1969 S.C. 1147 at p. 1153.
4. Ganesh Ram *v.* Smt. Ramlakhan Devi, A.I.R. 1981 Pat. 36 at p. 40.
5. Banning *v.* Wright, (1972) 2 All E.R. 987 at p. 998 (H.L.).
6. *See* Dawson's Bank Ltd. *v.* Nippon Menkwa Kabushiki Kaisha, 62 I.A. 100 at p. 108 : A.I.R. 1935 P.C. 79 ; Basheshar Nath *v.* Commissioner of Income-tax Delhi, A.I.R. 1959 S.C. 149 at p. 172 ; 1959 S.C.J. 1207.
7. Ganesh Ram *v.* Smt. Ram Lakhan Devi, A.I.R. 1981 Pat. 36 at p. 40.

must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of an existing legal right and a conduct which warrants an inference of the relinquishment of known right or a privilege.[1] There is, however, a tendency to mix up "waiver" and "estoppel", as a single idea, although the one has apparently reference to a man's conduct and the other to the legal consequence of that conduct. The principle underlying both these maxims is the same, namely, that a party will not be premitted to approbate and reprobate or, in other words, to blow hot and cold, in respect of the same matter. This is the underlying principle behind the maxim "waiver".[2]

Waiver and estoppel.

Waiver and estoppel differ from each other in various respects. Waiver is created upon knowledge of all the facts by both the parties; but in case of estoppel by representation, the fact that the representee has knowledge on the facts destroys the plea of estoppel. Mere silence will not be waiver. A person may waive the provisions made for his individual benefit but he cannot be deemed to have waived in law the statutory provisions which are based on public policy.[3]

Therefore the term estoppel and waiver sometimes used interchangeably are quite distinct and different. Estoppel is a rule of evidence and is not a cause of action. On the other hand, waiver is contractual and may constitute a cause of action. In Halsbury's *Laws of England*, 3rd Ed. Vol. 14, page 637, it is stated:

> "Waiver is the abandonment of a right, and is either express or implied from conduct.....
>
> Where the right is a right of action, or an interest in property, an express waiver depends upon the same considerations as a release. If it is a mere statement of an intention not to insist upon the right, it is not effectual unless made with consideration."

An intentional act to abandon the right can be said to be a waiver.

It is not a case where the party has not taken appropriate steps challenging the order. The appellants are also not guilty of negligence and acquiscence on their part. An intentional act to abandon the right can be said to be a waiver. When a party is pursuing his remedy against the impugned judgment but his case could not be taken up by the Court for no fault on his part, it cannot be held that such party had intentionally abandoned its right against the judgment.[4]

The waiver is thus a voluntary and intentional abandonment or relinquishment of a known right. It must be supported by a valid consideration unless arises from conduct creating an estoppel. There is, at any rate, no such thing as estoppel by waiver as observed by the Privy Council.[5]

The waiver, even where both sides have agreed to waive the operations of a statutory provision, cannot extend to a case in which the effect may be either to oust the jurisdiction conferred by statute or to confer a jurisdiction which, according to the statute, is not there.[6]

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1. *See* Basheshar Nath *v.* Commissioner of Income-tax, Delhi and Rajasthan, A.I.R. 1959 S.C. 149.
2. Bibi Amna Khatun *v.* Zahir Hussain, A.I.R. 1981 Pat. 1 at p. 5.
3. Chinoy Chalani & Co. *v.* Y. Anjiah, A.I.R. 1958 A.P. 384 at p. 389 : I.L.R. (1958) A.P. 243 : (1958) 2 Andh. W.R. 69 ; *see* also M/s Inter State Transport Agency, Sitamarthi *v.* Regional Provident Fund Commissioner, Patna, 1983 Lab. I.C. 940.
4. Amar Nath Misra *v.* District Inspector of Schools, Ballia, A.I.R. 1997 All. 358 at p. 362 : 1997 All. L.J. 1844.
5. *See* Dawsons Bank Ltd. *v.* Nippon Menkwa Kabushiki Kaisha (Japan Cotton Trading Co. Ltd.), A.I.R. 1935 P.C. 79 at p. 82 ; S.C. Konda Reddy *v.* Union of India, A.I.R. 1982 Kant. 50 at p. 53.
6. Superintendent of Taxes, Dhubri *v.* Messrs. Onkarmal Nathmal Trust, A.I.R. 1975 S.C. 2065 at p. 2077.

In the case of *Shiv Ditta* v. *Kidar Nath*,[1] there was no plea of any waiver in the written statement. No issue was therefore framed on any such question in that case. An issue was no doubt framed on the defendant's plea of estoppel. The question of waiver and estoppel were dealt with by the Judge as though they were practically the same. It was held that there was no waiver so as to operate as estoppel.

Privy Council view.

In *Dawson's Bank Ltd.* v. *Nippon Menkwa Kabushiki Kaisha*,[2] Lord Russell has explained the difference between estoppel and waiver. Estoppel was not a cause of action. "On the other hand," says the learned Judge, "waiver is contractual, and may constitute a cause of action, it is an agreement to release and not to assert a right. If an agent with an authority to make such an agreement on behalf of his principal agrees to waive his principal's right then the principal will be bound by contract, not by estoppel, there is no such thing as estoppel by waiver."

The Privy Council had held in *Dawsons Bank Ltd.* v. *Nippon Menkwa Kabushiki Kaisha*[3] :

> "The question of estoppel is governed by Sec. 115, Evidence Act, which for the present purpose seems to their Lordships not to differ from the law in England in regard to estoppel *in pais*. Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact of existence of which would destroy the cause of action. It is a rule of evidence which comes into operation, if (*a*) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (*b*) with the intention that the plaintiff should act upon the faith of the statement, and (*c*) the plaintiff does act upon the faith of the statement, on the other hand, waiver is contractual, and may constitute a cause of action, it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract nor by estoppel. There is no such thing as estoppel by waiver."[4]

In Halsbury's *Laws of England*, Vol. 13, p. 207, the following passage will be found :

English law.

> "Waiver is the abandonment of right, and is either express or implied from conduct. A person who is entitled to the benefit to the stipulation in a contract or a statutory provision may waive it. Waiver of this kind depends upon consent, and the fact that the other party has acted upon it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right."

In re : M.L. Bose and Co. Pvt. Ltd.,[5] the petitioning creditor prosecuted a winding-up petition as the company failed to pay interest on fixed deposit at the

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1. A.I.R. 1972 H.P. 20 at p. 22.
2. A.I.R. 1935 P.C. 79.
3. *Ibid.*
4. Shiv Datt *v.* Kidar Nath, A.I.R. 1972 H.P. 20 at p. 23.
5. A.I.R. 1982 Cal. 71 at p. 73.

agreed rate for certain period. The company disputed the validity of the said fixed deposits. The company was directed to file a suit if deemed necessary to establish its contention. The company failed to file any such suit pursuant to the order of the Court. It was held that the question of the validity of the said fixed deposit was abandoned and could not be raised by the company. Nobody can take advantage of his own default and further one cannot raise a question indirectly which cannot be raised directly.

Abandonment.

Waiver is a question of fact which depends on the facts and circumstances of each case. In the case of waiver of any provisions of statute it is necessary to prove that there was conscious relinquishment of the advantage of such provisions of the statute. In the instant case it was necessary for the tenant-appellant to prove that the landlord had accepted the rent being fully conscious that by this act they were relinquishing the right of eviction available to them on the ground of sub-letting under Sec. 13 (1)(*a*) of the West Bengal Premises Tenancy Act.[1]

In a decision of the Supreme Court, *Sha Mulchand and Company* v. *Jawahar Mills Limited*,[2] Bose, J., says as follows :

> "The expressions, 'abandonment, waiver and so forth' when used in a case are only synonyms for estoppel....These other terms are, in my view, loose and inaccurate and tend to confuse when applied to cases. A man who has a vested interest and in whom the legal title lies does not, and cannot, lose that title by mere laches, or mere standing by or even by saying that he has abandoned his right,....unless there is an estoppel, pure and simple. It is only in such a case that the right can be lost by what is loosely called abandonment or waiver, but even then it is not the abandonment or waiver as such which deprives him of his title but the estoppel which prevents him from asserting that his interest....has not been legally extinguished..."

Supreme Court view.

In the instant case, the petitioner himself prayed before the Government for his arrear/salary and allowances from 29th April, 1960 to the date of his termination, *viz.*, 23rd September, 1964. It was held that the petitioner got the relief on the said statement and reaped the benefit of the representations made by him to the Government. Under such circumstances, the petitioner is estopped from claiming continuance of his service after 23rd September, 1964 the date of termination of his service. The said claim cannot be upheld applying the principles of waiver and estoppel.[3]

Person claiming arrears of salary and allowance is estopped from claiming continuance of service.

In an old English case, *Vyuyan* v. *Vyuyan*,[4] Sir John Romilly, M.R., says that "waiver or acquiescence like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them and chooses one benefit instead of another, either but not both, of which he might claim". The position, therefore, seems to be as follows. A right created by contract, for example, in a consent decree may be waived. This waiver can be either express or implied. In either case, however,

English law; what waiver presupposes ?

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1. Pulin Beharilal *v.* Mahadeb Dutta, 1993 (1) S.C.C. 629 at p. 635.
2. 1953 S.C.R. 351 at p. 375 : A.I.R. 1953 S.C. 98.
3. Albert Francis Lobo *v.* Chief Engineer, Flood Control and Irrigation, Assam Gauhati, (1977) 2 S.L.R. 575 at p. 587.
4. (1861) 54 E.R. 813 at p. 817.

an unilateral giving up of rights does not by itself create any right in the other party. Such a right can be created only where it is agreed between the parties that the right created by consent shall be given up and the other side as a result thereof has altered its position. Where a party has two rights, the mere exercise of one right does not amount to waiver of the other, but if there are alternative rights, the exercise of one right might imply that the party has waived the exercise of the other.[1]

Merely by submitting books for selection, a person cannot be said to have waived the objection which he may have to the constitution of the committee which selects the books. Similarly, merely because a person does not submit any book for selection, it cannot be said that he is not a person aggrieved. Today, the law with respect to *locus standi* has considerably advanced both in this country and in England and in the case of public interest litigation it is not necessary that a petitioner should himself have a personal interest in the matter.[2]

The present appellant was present before the learned Subordinate Judge, yet he did not press his point regarding the question of jurisdiction of that Court. Thereby, it may be presumed that, he had waived his right to object to the same.[3]

In *Chapala Debi, Smt.* v. *Samar Kumar Ghose*,[4] the petitioner had a right to maintain the *ex parte* decree and once they went to trial for the sake of obtaining a contested decree, then they must be deemed to have relinquished their right of maintaining the *ex parte* decree on the principle of waiver.

Withdrawal of proceedings—Whether a waiver of rights.

In *Kakubhai and Co., Messrs.* v. *Nathimal Kisanlal*,[5] the plaintiff had filed Civil Suit for recovering rent and Revenue case for getting permission under the Rent Control Order to terminate the defendant's tenancy. The said two proceedings were withdrawn. It was held that filing of fresh proceedings would not constitute waiver of estoppel which would prevent the plaintiff from contending that the lease in question was void.

In the case reported in *V. Rajagopal Naidu* v. *Smt. Muthulakshmi Ammal*,[6] there was no clinching evidence to show that the petitioner knew the true facts from which a deliberate intention on his part to waive his right to object to a mis-statement in the proclamation could be fairly, legitimately and properly inferred. *Held* that it is only such a state of affairs that could constitute waiver, as estoppel must be certain to every intent and not to be taken by argument of inference.

To the same effect are the observations of the Privy Council in *Shyam Sunder Singh* v. *Kaluram Agarwala*.[7]

Knowledge of the rights waived.

In order that there may be waiver the party waiving must have knowledge of the rights which he waives. There are numerous cases both Indian and English to support this proposition.[8]

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1. Humayun Properties Ltd. *v.* Ferrazzinis (Private) Ltd., A.I.R. 1963 Cal 473 at pp. 475-76.
2. J. Mohapatra and Company *v.* State of Orissa, A.I.R. 1984 S.C. 1572 at p. 1574.
3. Iswari Prasad Munuri *v.* Shib Narayana Banerjee, A.I.R. 1984 Cal. 213 at p. 215.
4. A.I.R. 1984 Pat. 32 at p. 34.
5. A.I.R. 1980 Bom. 25 at p. 33.
6. A.I.R.1969 Mad. 5 at p. 9.
7. (1939) 1 Mad. L.J. 147 : A.I.R. 1938 P.C. 230.
8. Nathmull Tolaram *v.* Killa & Co., A.I.R. 1961 Cal. 65 at p. 70.

Waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of the facts enabling him to take effectual action for the enforcement of such rights. Waiver is distinct from estoppel. Waiver is an agreement to release or not to assert a right whereas estoppel is a rule of evidence.[1]

Consent gives no jurisdiction.

Consent cannot give jurisdiction and, therefore, any statutory objection which goes to the jurisdiction does not admit of waiver.[2]

Lack of jurisdiction is a point of law apparent on the face of the record. Consent and conduct do not confer jurisdiction on any authority. If the petitioner did not object to the lack of jurisdiction of the appellate authority they cannot be estopped under any legal principal from raising the question.[3]

Conduct of the parties.

In *Panna Lal Mukherji* v. *Union of India*,[4] it has been observed that waiver belongs to the realm of contract and depends on the conduct of the parties.[5]

In the case of *Ram Dayal* v. *Smt. Kisturi*,[6] the judgment-debtor did not object to the jurisdiction of Munsif Court to execute the decree in the first instance when notice of application was served on them. It was only during the course of the second execution application that this objection was raised. *Held* that it would be taken that they had waived it and, therefore, it was not open to them to raise it in the second execution application.

Although a decree under execution may be a decree passed in respect of a loan, a court does not act without jurisdiction in proceeding under Order XXI, rule 66 of the Code of Civil Procedure, if the judgment-debtor does not object to the procedure adopted by the Court.

The judgment-debtors by accepting the position that no notice of valuation was required to be issued and that the valuation as given by them was also to be noted in the sale proclamation waived their right to raise this question and they cannot be allowed to re-open and re-agitate the same question.[7]

When rent is accepted by the landlord he is estopped from contending that the successor-in-interest of the lessee has no interest in the land. The only right of the landlord is to receive the rent.[8]

Similarly the payment of rent by the respondent in the earlier application clearly debars him to plead that he is not a tenant under the petitioner. In case he did not accept himself to be the tenant, the question of payment of rent did not arise. In any case, there is nothing on the record to prove that he paid the rent under protest or denied his relationship of landlord and tenant between the parties in that application. If once it is held that from the pleadings and the conduct of

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1. Munni Devi, Smt. *v.* State of Uttar Pradesh, A.I.R. 1977 All. 386 at p. 390.
2. Special Deputy Collector Land Acquisition, Anantapur *v.* K. Kodandaramacharlu, A.I.R. 1965 A.P. 25 at p. 28 : (1964) 2 Andh. W.R. 225 ; Maxwell on *Interpretation of Statutes* (11th Ed., 1962) p. 379.
3. Shah Vasanji Dhugarshi *v.* Joshi Bhara Dahya, A.I.R. 1982 Guj. 220 at p. 222.
4. A.I.R. 1957 Cal. 156.
5. Kishanlal Malhotra *v.* Union of India, A.I.R. 1961 Punj. 5 at p. 8.
6. A.I.R. 1970 Raj. 246.
7. Mahabir Dass *v.* Motibhai Narsibhai Patel, A.I.R. 1971 Pat. 27 at p. 29 : 1970 B.L.J.R. 481.
8. Narendra Bahadur Tandon *v.* Shanker Lal (since deceased), A.I.R. 1980 S.C. 575 at p. 579.

the respondent, he is the tenant under the petitioner, the respondent is liable to ejectment.[1]

Waiver is of a right. Such a right may be based either on a contract or a statute. The terms of a contract are subject purely to the agreement between the parties. Courts are, therefore inclined to uphold reasonable arrangements for the relaxation of contractual terms between the parties. The waiver of a contractual right is, therefore, closed to acquiescence by conduct.[2] Therefore, if an agreement of lease contains a term as to how the lease is to be terminated, then the parties can vary this term and the tenant can abandon his right to a notice altogether if he wishes to do so. Rights arising out of statute may be of two kinds, namely (*a*) those which are purely for the benefit of a person or a class of persons, and (*b*) those which represent some public policy or other public considerations with resultant benefit to a person or a class of persons.

The tenant has no inherent right that his tenancy should be terminated by a notice. Such a right may be given in him by his contract with the landlord. In the absence of a contract or usage, Sec. 106 of the Transfer of Property Act requires that a tenancy should be terminated by the notice. This provision is for the benefit of both the landlord and the tenant. As pointed out in *Pritam Singh* v. *Suraj Prashad*,[3] Sec. 106 itself opens with the words "in the absence of a contract or local law or usage to the contrary". These words show that the requirement of notice under Sec. 106 is not rigid. Parties may enter into contract to the contrary at the time of entering into a lease. Since the lease itself is based on a contract, the parties may agree to vary its terms by a subsequent contract. One of the parties may even agree to abandon a right given to it by Sec. 106 in the absence of a contract to the contrary. If the requirement of notice can thus be waived by an agreement between the parties it would be reasonable to think that it could also be waived by such conduct as would be the evidence of the intention of the parties. For Sec. 106 itself contemplates that the termination of a lease may come about otherwise than by the notice contemplated therein. Thus viewed, the requirement of notice under Sec. 106 is essential for the benefit of the parties. The requirement is not mandatory as Sec. 106 itself shows that the tenancy may be terminated in some other way. This is why statutory right of the tenant must be held to be capable of being waived by him. If the conduct of the tenant is not insisting upon the notice has been acted on by the landlord then the landlord would be altering his position by relying upon the conduct of the tenant and the tenant would be estopped at a later stage from resiling from his conduct and raising the objection of want of notice to the suit of the landlord.

On the contrary, certain statutory provisions give a right or an immunity or protection to certain persons as a matter of public policy. Such statutory provisions cannot be waived. This is why, for instance, prohibition against the sub-letting of the premises by a tenant was held incapable of being waived by the landlord in *Waman Sriniwas Kin* v. *Ratilal Bhagwandas and Company*.[4] Similarly, when the Court does not have inherent jurisdiction to deal with a matter, consent of parties cannot give it such jurisdiction, and, therefore, the objection to a lack of inherent jurisdiction cannot be waived as held in *K. Manakarathamma* v. *State of Andhra Pradesh*.[5] For the same reason a tenant cannot agree to waive the statutory protection given to him by the provisions of Sec. 14 of the Delhi Rent Control

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1. Jaswant Rai *v.* Nazir Singh, 1981 Cur. L.J. (Civil) 459 at pp. 462, 463.
2. *Vide* Cheshire and Fifoot on *Law of Contract*, 7th Ed., pp. 500-03.
3. 1967 Delhi L.T. 704.
4. (1959) Supp. (2) S.C.R. 217 : A.I.R. 1959 S.C. 689.
5. (1964) 6 S.C.R. 294 : A.I.R. 1965 S.C. 304.

Act, 1958, against eviction or the provisions of Secs. 9 and 12 thereof regarding the fixation of standard rent.[1] It is clear, however, that the requirement of a notice under Sec. 106 is not based on any such mandatory provisions based on a public policy. They can, therefore, be waived. Waiver of course, implies that the person waiving his right is aware of the right. If he did not know of the right at all, of course, there could be no waiver of it by him.[2]

In the instant case no doubt the State Government was made a party but no relief of claim against it nor any interest of the State was involved. The land had not even vested in the State of Uttar Pradesh or the Gaon Sabha. The State of Uttar Pradesh was properly served and it has filed written statement also and taken the plea about want of notice, but it did not press that issue nor lead any evidence in support of the plea taken. These facts make it abundantly clear that the State has chosen to waive the plea of notice.[3]

Notice cannot be waived.

A notice without the signature lacks an essential and/or an integral and/or an inseparable vital part or requirement of a notice under Sec. 34, Income-tax Act, 1922 (Sec. 148, Income-tax Act, 1961). It is an invalid notice and consequently equivalent to no notice.

Notice bearing rubber stamp signature.

In the case of *Abanindra Kumar Maity* v. *A.K. Biswas*,[4] the notice, bore a rubber stamp signature of the Certificate Officer. Their Lordships held that a signature by a rubber stamp does not fulfil the requirements of the Act and was consequently void. In a later case, *Satish Chandra Bhowmick* v. *Union of India*,[5] a Bench of the Calcutta High Court had to consider whether a signature by a rubber stamp was sufficient to fulfil the requirements of the Public Demands Recovery Act. Their Lordships held that the notice was invalid. In the case of *Chhoti Debi* v. *Union of India*,[6] their Lordships had to consider whether a facsimile signature was sufficient to fulfil the requirements of the Public Demands Recovery Act. Their Lordships came to the conclusion that a signature can be made by a rubber stamp and need not be in the handwriting of the officer issuing the notice. In this view of the matter their Lordships dissented from the view expressed in the case of *Abanindra Kumar Maity* v. *A.K. Biswas*[7] and preferred to follow the earlier case of *Hara Prasad* v. *Gopal Chandra*.[8]

Facsimile signature.

Notice requiring signature and its invalidity.

These cases clearly suggest that where a statute or rule requires that the notice in writing must bear the signature of the office its absence makes it invalid.

In the region of the provisions of a complicated statute of the type of the Land Reforms Act, and the recent nature of the amendments effected, so closely prior to the disposal by the executing Court the mere omission to urge before the executing Court to make a reference to the Land Tribunal would amount to a waiver of the right.[9]

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1. *Vide* Kaushalya Devi *v.* K.L. Bansal, 1969 Ren. C.R. 703 : A.I.R. 1970 S.C. 838.
2. Batoo Mal *v.* Rameshwar Nath, A.I.R. 1971 Delhi 98 at pp. 104-105.
3. Raj Kumari, Smt. *v.* Board of Revenue, U.P. Allahabad, 1985 All. L.J. 45 at pp. 48, 49.
4. 58 C.W.N. 573 : A.I.R. 1954 Cal. 335.
5. 65 C.W.N. 324.
6. (1964) 51 I.T.R. 473 (Cal.).
7. 58 C.W.N. 573 : A.I.R. 1954 Cal. 355.
8. 31 C.W.N. 299 : A.I.R. 1927 Cal. 315.
9. George *v.* Thakkekkara Vareed, A.I.R. 1979 Ker. 1 at p. 4.

There cannot be any question of waiver in respect of a breach of a provision under Sec. 34-A of the Income-tax Act, 1922.

Omission cannot be waived.

In the case of *Commissioner of Income-tax, Bombay* v. *Ramsukh Motilal*,[1] it was suggested that the omission cannot be waived and the point can be taken at any stage of the proceeding. The case of *Narayana Chetty*[2] makes it abundantly clear that the notice cannot be waived.[3]

Waiver involves a conscious, voluntary and intentional relinquishment or abandonment of a known, existing legal right, advantage, benefit claim or privilege, which except for such a waiver, the party would have enjoyed. The agreement between the parties in this case is such that its fulfilment depends upon the mutual performance of reciprocal promises constituting the consideration for one another and the reciprocity envisaged and engrafted is such that one party who fails to perform his own reciprocal promise cannot assert a claim for performance of the other party and go to the extent of claiming even damages for non-performance by the other party. He who seeks equity must do equity and when the condonation or acceptance of belated performance was conditional upon the future good conduct and adherence to the promises of the defaulter, the so-called waiver cannot be considered to be forever and complete in itself so as to deprive the State, in this case, of its power to legitimately repudiate and refuse to perform its part on the admitted fact that the default of the appellants continued till even the passing of the award in this case.[4]

Notice under Sec. 80, C.P.C., can be waived.

In *Vellayan Chettiar* v. *Government of the Province of Madras*,[5] it was laid down by their Lordships of the Judicial Committee that a notice under Sec. 80, C.P.C., is for the protection of the authority concerned; and, if in a particular case, he does not require that notice, he can lawfully waive his right to the notice.

This has been followed in *Secretary of State* v. *Sheoramjee*.[6] The same principle would be applicable to a notice under Sec. 48 of the C.P. and Berar Municipalities Act.[7]

In *State of Bihar* v. *Kamaksha Prasad Sharma*[8] the point decided was that it is competent for the authority for whose benefit the right to notice under Sec. 80 of the Code is provided to waive that right. It is pointed, out by Kanhaiya Singh, J., that causation of serious and irreparable damage resulting from serving a notice under Sec. 80 of the Code and waiting for a statutory interval of two months cannot be regarded as a ground for dispensing with the service of notice under Sec. 80 as held by their Lordships of the Privy Council in *Bhagchand Dagdusa Gujrathi* v. *Secretary of State for India*[9] nor that this case can be taken to be tantamount to waiver of right of getting a notice under Sec. 80 of the Code. If a statute makes it imperative to do something which creates a protection or right in favour of the authority, the mere fact of there being tremendous difficulty in compliance with

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1. I.L.R. (1955) 27 Bom. 54 : A.I.R. 1955 Bom. 227.
2. A.I.R. 1959 S.C. 213.
3. B.K. Gooyee *v.* Commissioner of Income-tax, A.I.R. 1966 Cal. 438 at pp. 444-45.
4. **Sikkim Subba Associates *v.* State of Sikkim, (2001) 5 S.C.C. 629 at pp. 646-47.**
5. A.I.R. 1947 P.C. 197.
6. I.L.R. (1949) Nag. 875 : A.I.R. 1952 Nag. 213.
7. Jugalkishore Kabra *v.* Municipal Committee, Piparia, A.I.R. 1958 M.P. 393 at p. 395 : 1958 M.P.L.J. 568 : 1958 J.L.J. 524.
8. A.I.R. 1962 Pat. 303.
9. A.I.R. 1927 P.C. 176.

that requirement even going to the extent of impossibility would not attract the principle of waiver and cannot lead to the conclusion that in such a situation the authority will be deemed to have waived its right to get the notice. It may well be that in cases of this kind the law may not be just and either may be interpreted narrowly or struck down as being invalid or may require amendment by the appropriate Legislature, but that apart, it is difficult to call out the principle of waiver from such a situation.[1]

Tenant can waive his right to notice under Sec. 106, Transfer of Property Act.

Section 106 of the Transfer of Property Act being in favour of a landlord and tenant there can be no difficulty in holding that the tenant can waive his right. This is the view that is taken by the Privy Council, in *Vellayan Chettiar* v. *Government of the Province of Madras*[2] regarding Sec. 80, C.P.C. what is applicable to Sec. 80, C.P.C. is equally applicable to Sec. 106 of the Transfer of Property Act. As observed by the Full Bench of the Punjab High Court in *Bhaiya Ram* v. *Mahavir Prasad*,[3] if notice under Sec. 80, C.P.C., does not form part of cause of action of a suit, there is nothing to show that the notice under Sec. 106 of the Transfer of Property Act is necessarily a part of a cause of action for eviction.[4]

Demand of rent in advance constitutes waiver.

Unambiguous demand for future rent in advance does in law amount to an election and does constitute a waiver if, at the time it is made, the landlord has sufficient knowledge of the facts to put him to his election. To Courts mind there is a fundamental inconsistency between contending that a lease has been determined and demanding rent on the basis of its future continuance.[5]

Withdrawal of rent deposited in Court by landlord; effect.

The mere fact that the landlord (plaintiff) withdrew a sum of Rs. 1,870 from the Court of the Munsif out of the amount deposited by the tenant on account of rent in respect of the suit premises under the provisions of the Rent Control Act after the institution of the suit does not consitute a waiver of the notice to quit.[6]

The acceptance of the rent will not operate as a waiver of notice to be given by the landlord to the tenant who has admittedly sub-let the premises without previous consent of the landlord in writing.[7]

Acceptance of money-order.

Mere acceptance of the money-order, though admittedly less than the agreed rent, cannot amount to a waiver on the part of the landlord.[8]

Insurance.

Where on the failure of the assured to pay the second instalment of premium in time the insurer not only subsequently accepted the cheque in respect of second premium with interest without any demur but also accepted as subsequent instalments, the L.I.C. would be deemed to waive its right to withhold any payment under the policy to the assured

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1. State of Bihar *v.* Jiwan Das Arya, A.I.R. 1971 Pat. 141 at p. 146.
2. A.I.R. 1947 P.C. 197.
3. A.I.R. 1969 Punj. 110 at p. 129.
4. K.N. Ramakrishnan *v.* B. Keral Chand, A.I.R. 1971 Mad. 150 at p. 154 : (1970) 2 M.L.J. 386 : 83 M.L.W. 518.
5. David Blackstone Ltd. *v.* Burnetts (West End) Ltd., (1973) 3 All E.R. 782 at p. 792.
6. Bhagat Ram *v.* Keshab Deo, A.I.R. 1965 Assam 55 at p. 58, *see* also Sheth Dahayabhai Chiman Lal *v.* Sheth Ambalal Himatlal, (1981) 3 S.C.C. 644.
7. Pulin Behari Pal *v.* Mahadeb Dutta, A.I.R. 1981 Cal 61 at p. 64.
8. Rupeswari Debi *v.* Messrs. Lokenath Hosiery Mills, A.I.R. 1962 Cal. 608 at p. 610; *see* also Roshan Islam *v.* District Judge, Bulandsahar, 1982 All. L.J. 1383.

on the ground that his policy lapsed by reason of non-payment of the second instalment of premium.[1]

Acceptance of compensation for wrongful use and occupation.

Where the rent which was accepted by the lessor under protest was really not rent but mere compensation for the wrongful use and occupation of the land, it could amount to waiver because there was no intention on the part of the lessor to treat the lease as subsisting.[2]

It would be going too far to hold that every unsuspecting submission to a law, subsequently declared to be invalid, must give rise to a plea of waiver.[3]

Withdrawal of rent by the landlord for the month of default deposited by the tenant under and express order of the Court when the earlier suit for ejectment of the tenant was pending would not amount to waiver of the cause of action in the first suit for eviction of the tenant.[4]

Plaintiff's inaction to sue; waiver.

Inaction of the plaintiff for about 12 months may amount to an abandonment of contract and waiver of his right to sue for specific performance.[5]

Waiver—Failure to object to certificate evidence.

A requirement that an analyst's certificate on which the prosecution proposes to rely should be served on the defendant not less than seven days before the hearing or trial, may be the subject of waiver and will in fact be waived if the defendant prior to the close of the prosecution's case makes no objection to the evidence to which that certificate relates. It is clear that if the defendant's complaint at the hearing is that he is ignorant of that aspect of the prosecution's case, or that he has had an insufficient opportunity to challenge the contents of the certificate, he is under an obligation to object to the admission of the contents of the certificate before it is put in evidence. If he does not do so there is no indication that he has been prejudiced by the prosecutor's failure to satisfy the requirements of the proviso to Sec. 2(2) of the Road Traffic Act, 1962.[6]

Waiver of procedure.

Order XVIII, rule 15 of the Civil Procedure Code (5 of 1908), which enabled a Judge to continue the suit at the stage left by another who was prevented by death from concluding the trial, did not apply, in the exercise of this Court's ordinary original civil jurisdiction: just the jurisdiction Mr. Justice Mukherji seized of in hearing the suit. Such statute law apart, a division Bench of this Court held "as must in *Sarba Ranjan Bysack* v. *Smt. Haripriya Dassi*.[7] So, it was for me to hear the whole suit afresh and to enter into evidence over again. And certainly I would have done just that, but for the joint submission made by Mr. Sinha and Mr. Sen, the learned counsel for the plaintiffs and the contesting defendant, respectively, that I should treat the evidence had before late Mr. Justice Law as evidence in the trial before me. This is a feature which is conspicuous by its absence in *Sarba Ranjan Bysack* v. *Smt. Haripriya Dassi*.[8] And a case is an authority for the proposition it actually

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1. Life Insurance Corporation India *v.* O.P. Bhallah, A.I.R. 1989 Pat. 269 at p. 271.
2. Basant Lal *v.* State of Uttar Pradesh, A.I.R. 1981 S.C. 170 at p. 171.
3. Basheshar Nath *v.* Commissioner of Income-tax, Delhi, A.I.R. 1959 S.C. 149 at p. 172 : 1959 S.C.J. 1207.
4. Ganesh Lal Sonar *v.* Mohammad Ismail, A.I.R. 1976 Pat. 223 at p. 226.
5. Rameshwar Prasad Sahi *v.* Mst. Anandi Devi, A.I.R. 1960 Pat. 109 at p. 110 : 1959 B.L.J. 808 : I.L.R. (1960) Pat. 79.
6. R. *v.* Banks, (1972) 1 All E.R. 1041 at p. 1046 (C.A.).
7. (1949) 53 C.W.N. 569.
8. *Ibid.*

decides.[1] So, the *Sarba Ranjan's* case,[2] can neither rule nor govern here. What really rules and governs here is another class of case, the leading amongst which is the Full Bench decision of the Madras High Court in *Jainab Bibi Saheba* v. *Hyderally Saheb*,[3] the law laid down therein may be put thus—

> "The consent of parties may make admissible the evidence given in a previous judicial proceeding between them in a case in which the conditions prescribed by Sec. 33 (the benefit of which can be waived) do not exist."

Right to arrears would be lost by waiver, abandonment.

In *Chunduru Venkanna* v. *Chunduru Satyanarayana*,[4] a Bench of the Andhra Pradesh High Court observed that the Court had a discretion to award arrears of maintenance at a lower rate than future maintenance. It may, therefore, be said that it is in the Court's discretion to award arrears at a lesser rate.[5]

The plea of waiver or acquiescence cannot stand before the mandate of the statute.[6]

Defect in procedure can be waived.

Defect in or lack of or basic incompetence in jurisdiction can never be waived. Defect in procedure only can be waived.[7] In the decision of *Rekhabdas Baheti* v. *Banwarilal Garodia*, cited in the above case, S.R. Das Gupta, J., said—

> "The arbitrators not having jurisdiction to make the award, the award must be held to be nullity and no question of waiver can cure the defect."

An arbitration agreement must be one as defined in Sec. 2(*a*) of the Arbitration Act and hence must be in writing. If that *sine qua* non is absent, the result would be that the initial lack of jurisdiction on the part of the arbitrator cannot be cured by oral acquiescence on the part of the party and any admission of liability by such party before the arbitrator can avail the other side nothing as it is made before an authority, who, for want of an arbitration agreement as defined in Sec. 2(*a*), initially has no jurisdiction to act as arbitrator and is therefore incompetent to make an award. Lack of jurisdiction goes to the root of the matter; it is not merely an irregularity which can be cured by oral acquiescence. In *Kishindas Pursumal* v. *Menghraj Khaildas*,[8] it was held that appearing without protest before an arbitrator devoid of jurisdiction, did not amount to waiver of the right to question the arbitrator's jurisdiction. In *Khardah Co.* v. *Raymon & Co.*,[9] it was held by the Supreme Court that a party applying under Sec. 33 of the Arbitration Act is not estopped by its conduct in appearing before the arbitrators and in taking part in the proceedings before them, from questioning the validity of the award; what confers jurisdiction on the arbitrator to hear and decide a dispute is an arbitration agreement as defined in Sec. 2(a) and where there is no such agreement there is an initial want of jurisdiction which cannot be cured by acquiescence.[10]

Admission before such arbitrator can avail nothing.

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1. Brindaban Chandra Shaha *v.* Sureshwarsaha Parmanik, (1909) 10 C.L.J. 263.
2. 53 C.W.N. 569.
3. I.L.R. 43 Mad. 609 : A.I.R. 1920 Mad. 547.
4. (1966) 2 Andh. W.R. 694 at p. 698.
5. Madamanchi Govindayya *v.* Madamanchi Chimpiramma, (1966) 1 Andh. W.R. 227 at p. 230.
6. Harbans Singh *v.* State of Punjab, A.I.R. 1982 Punj. 402 at p. 406.
7. Ramlal Roshanlal & Co. *v.* B.C. Paul & Sons (P) Ltd., A.I.R. 1960 Cal. 547 at p. 548.
8. A.I.R. 1925 Sind 144.
9. A.I.R. 1962 S.C. 1810 at p. 1811.
10. Gangaram Ratanlal *v.* Messrs. Simplex Mills Co. Ltd., A.I.R. 1982 Bom. 72 at p. 73.

Therefore when decision of the Tribunal has been given by an authority suffering from inherent lack of jurisdiction, the decision cannot be sustained merely by the doctrine of *res judicata* as estoppel.[1]

Questions of pure law cannot be waived.

Where issues such as jurisdiction and limitation—as questions of pure law,—are involved the right to raise an issue cannot be treated to have been waived.[2]

The protection given to the agriculturist of his residential house is based upon high public policy of the State, as any interruption of agricultural operations is against the national interests and it may lead to a fall in agricultural production. Such policy of the State cannot be defeated and any waiver of such a right is opposed to public policy. Hence the protection under Sec. 60(1) proviso (*c*) of the Civil Procedure Code cannot be waived.[3]

Pre-emption suit and plea of waiver.

To support the plea of waiver in a pre-emption suit it is incumbent on the vendor and vendee to establish that they had concluded an agreement of sale and the plaintiff was approached and asked to purchase the house for Rs. 951, the consideration for which vendee was going to purchase the house.[4]

In *Malati Bala Deb Gupta* v. *Narendra Chandra Bhattacharjee*,[5] B.K. Mukherjee, J. (as his Lordship then was) has held that when a purchaser purchased a property which is specifically described as an occupancy holding and gives notice to the co-sharer tenants under Sec. 26-C of the Bengal Tenancy Act and on the faith of the representation contained in the notice that the property purchased is an occupancy holding the co-sharer-tenants apply for pre-emption under Sec. 26-F and deposit money which is required to be deposited under that section, a plea of estoppel may be legitimately taken by the pre-emptor against the purchaser and unless it is shown that the applicant for pre-emption had previous knowledge as to the real character of the tenancy, the purchaser would be precluded from alleging or proving that the tenancy was of a nature different from what it was represented to be. The same view has been expressed by Chakravarti, J. (as his Lordship then was) in the Bench decision in *Nural Hussain Mallick* v. *Mihi Lal Sheikh*.[6]

In an earlier Bench decision in *Surendra Narayan* v. *Notan Behari*,[7] the principle of estoppel was applied in such a case. In a subsequent Bench decision in *Sankaracharya Mullick* v. *Sk. Sademani*,[8] Mukherjee, J., reiterated the same principles as laid down in *Malati Bal Deb Gupta* v. *Narendra Chandra Bhattacharjee*.[9]

Case-law.

Assuming that the petitioner had been waiving the remuneration every year prior to July, 1958, it does not necessarily follow from it that he waived for the subsequent year from July, 1958.[10]

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1. Chief Justice of Andhra Pradesh *v.* L.V.A. Dikshitulu, A.I.R. 1979 S.C. 193 at p. 195.
2. Sheikh Makbul *v.* Union of India, A.I.R. 1960 Orissa 146 at p. 149.
3. Duggirala Balarama Krishnayya *v.* Arokapudi Jagannadha Rao, A.I.R. 1983 A.P. 136 at p. 139.
4. Mishrilal Haisarilal *v.* Laxminarayan Kishanlal, A.I.R. 1958 M.P. 412 at p. 413 : 1959 M.P.L.J. 174.
5. A.I.R. 1944 Cal. 253.
6. A.I.R. 1944 Cal. 144.
7. 53 Cal. L.J. 414 : A.I.R. 1931 Cal. 483.
8. A.I.R. 1945 Cal. 474.
9. A.I.R. 1944 Cal. 253 ; Chitanya Charan Nayak *v.* Manik Chandra Nandy, A.I.R. 1972 Cal. 520 at p. 523.
10. A.C.K. Krishnaswami *v.* Messrs. Stressed Concrete Constructions Pvt. Ltd., A.I.R. 1964 Mad. 191 at p. 191 : (1964) 1 M.L.J. 18.

In order to obtain an adjournment of the sale, the judgment-debtor consented to waive the issue of a fresh publication of the proclamation. The effect of this is necessarily a waiver of objection as to any of the defects apparent on the proclamation.[1]

Unilateral waiver.

The vendees can unilaterally waive the condition precedent specified in the agreement which is inserted therein for the exclusive benefit of the vendees and not for the benefit of the vendor as well as the vendees.[2]

The right to challenge a decree can be waived even by conduct after the passing of the decree.[3]

Any objection to the place of assessment has to be made by the assessee to the Income-tax Officer. Hence, the absence of any objection at any time before the institution of these suits amounts to waiver to the place of assessment.[4]

Waiver is not a question of fact. It is a question of law and in this connexion reference may be made to the Privy Council decision in *Beni Ram* v. *Kundan Lal*.[5] Moreover, intention or waiver has to be inferred from admitted and proved facts. Intention is a purely subjective matter and, therefore, it is the surrounding circumstances and the proved facts from which the courts gather the intention of a party. Whether certain proved and admitted facts in law amount to waiver or not has necessarily to be held to be a question of law. Intention has to be assumed for the purpose of waiver from the conduct of the parties.[6]

Supreme Court—Waiver is mixed question of law and fact.

Waiver is not a pure question of law but it is a mixed question of law and fact.[7]

Case of waiver and implied agreement involves questions of law and fact and in the absence of specific pleading and specific issue such pleas cannot be allowed to be raised.[8]

In *Ashutosh Das* v. *State of West Bengal*,[9] it was held that in a departmental enquiry the enquiry officer cannot rely on his own evidence. But when this objection is not taken by the petitioner before the enquiry officer, he must be held to have waived it, as laid down in *Manaklal* v. *Dr. Prem Chand Singhvi*.[10]

In *State of Madras* v. *Messrs. A. Habibur Rehman & Sons*,[11] the appellant did not raise any objection before the Madras High Court when it entertained affidavits filed by the respondent while exercising its revisional powers. Against

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1. His Holiness Digyadassan Rajendra Ramdasjee *v.* Board of Trustees, Tirumalai, Tirupathi Devasthanams, A.I.R. 1965 A.P. 334 at p. 336 : (1965) 1 Andh. W.R. 194 : (1965) 1 Andh. L.T. 175.
2. Dr. Jiwan Lal *v.* Brij Mohan Mehra, A.I.R. 1973 S.C. 559 at pp. 561, 562.
3. Ram Chander *v.* Jamna Shankar, A.I.R. 1962 Raj. 12 at p. 19.
4. Raja Bahadur Kamakhya Narain Singh *v.* Union of India, A.I.R. 1966 Pat. 305 at p. 311.
5. I.L.R. 21 All. 496.
6. Salig Ram *v.* Shiv Shankar, A.I.R. 1971 Punj. 437 at p. 440.
7. Waman Sriniwas Kini *v.* Ratilal Bhagwandas & Co. A.I.R. 1959 S.C. 689 at p. 693 : (1959) 2 S.C.R. Sup. 217 : 1959 S.C.J. 635 : 61 Bom. L.R. 1011.
8. *See* Florrie Edridge *v.* Rustomji Danjibhoy, 60 I.A. 368 at p. 375 : A.I.R. 1933 P.C. 233; Payyavula Vengamma *v.* Payyavula Kesanna, A.I.R. 1953 S.C. 21 at p. 26 : (1952) 15 S.C.J. 630 : S. Mohd. Naim Mohd. Alam *v.* Rouraffic and Far Eastern Ltd., A.I.R. 1960 Cal. 146 at p. 150.
9. A.I.R. 1959 Cal. 278.
10. A.I.R. 1957 S.C. 425 ; Satkhosei Thangeo *v.* President, Dist. Soldiers, Sailors and Airmen's Board, Manipur, A.I.R. 1968 Manipur 68 at p. 70.
11. A.I.R. 1968 S.C. 339 at p. 345.

the order of the High Court, the appellant filed an appeal in the Supreme Court. *Held* that having preferred no objection before the High Court, it was not open to the appellant to say that the High Court acted illegally in taking these affidavits in evidence.

The withdrawal of the deposited rent by the landlord in due course has no consequence in affecting the question whether the tenant has already incurred default or not. The question of default has to be judged from the tenant's action and does not depend upon the landlord's exercise of his right to withdraw from Court the amount. The landlord, however, may waive his right to evict by acceptance of delayed payment or by withdrawal of the deposited amount. The tenant does not cease to be a defaulter under the law but the landlord's action may be barred by the principles of waiver.[1]

As pointed out, by the Supreme Court the object of Sec. 80, C.P.C., is only to give the Government notice of the suit proposed to be brought against it so that it may decide for itself whether the claim of the plaintiff should be accepted or resisted.[2] The benefit of the Sec. 80 cannot then be availed of by a private party who is made a defendant to the suit alongwith the State.[3]

In *Hirachand Himatlal Marwari* v. *Kashinath Thakurji Jadhav*,[4] Macklin, J., with concurrence of Broomfield, J., has observed :—

> "It is open to the party protected by Sec. 80 to waive his rights, and his waiver binds the rest of the parties. But only he can waive notice...."

This decision has been cited with approval in *Gaja* v. *Dasa Koeri*,[5] as holding "a party who has himself no right to notice cannot challenge a suit on the ground of want of notice."

In *Raghubans Sahai* v. *Ful Kumari*,[6] the first contention of the appellant was "that the Secretary of State is necessary party to the suit and as the notice mentioned in Sec. 424 of the Civil Procedure Code was not served upon him in time, the suit has been improperly instituted and ought to be dismissed." Mr. Justice Asutosh Mookerjee, with concurrence of Mr. Justice Harington observed :

> "As regards the first contention advanced on behalf of the appellant, reliance is placed upon the decision of this Court in the case of *Gobinda Chandra Saha* v. *Hemanta Kumari Devi*,[7] which appears to me to be clearly distinguishable...In the case before me, the Secretary of State was joined as a party; the only objection is that the notice require by Sec. 424 of the Civil Procedure Code, was not served upon him two months before the institution of the suit. This objection in my opinion, ought not to prevail for two reasons. In the first place, this objection can be taken only by the Secretary of State for whose benefit the notice is intended....In the second place, there is no substance in this objection. Section 424 of the Civil Procedure Code requires that the notice must state the cause of action and the relief, claimed by the plaintiff. In the present case, however, no relief is claimed by the plaintiff on the ground of fraud against the Secretary of

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1. Kali Kumar Sen *v.* Makhan Lal Biswas, A.I.R. 1969 Assam 66 at pp. 74-75.
2. State of Madras *v.* C.P. Agencies, A.I.R. 1960 S.C. 1309.
3. Kanakku Karthiayani Pillai Narayani Pillai *v.* Neelacanta Pillai Raman Pillai, A.I.R. 1969 Ker. 280 at p. 284.
4. A.I.R. 1942 Bom. 339.
5. A.I.R. 1964 All. 471.
6. I.L.R. (1905) 32 Cal. 1130.
7. I.L.R. (1904) 31 Cal. 159.

State, no fraud is charged against him, and consequently there can be no cause of action against him based on the ground of fraud. Under these circumstances it would be impossible to serve a notice ful filling the requirements of Sec. 424. This view receives some support from the case of *Sahabzadee Shahunshah Begum* v. *Fergusson.*[1] ....This is also in accordance with the decision of the Allahabad High Court in the case of *Muhammad Saddiq Ahmad* v. *Pannalal.....*[2]"

In *Bhola Nath Roy* v. *Secretary of State for India*,[3] a Bench of the Calcutta High Court presided by Sir Asutosh Mookerjee and Beachcroft, JJ., held :

"......although, in the first paragraph of the written statement of the Secretary of State for India-in-Council, an objection was taken to the validity of the notice, no issue was raised upon the point. ....No objection, however, was taken by him at any stage of the trial in the Court of the first instance. It was the second defendant who prayed. just before the trial began, that an additional issue might be raised upon the question of the validity of the notice. But it was clearly incompetent to the second defendant to raise the question. As was pointed out by this Court in *Mahindra Chandra Nandi* v. *Secretary of State for India*[4] it is competent for the Secretary of State to waive the notice, and he may be estopped by his conduct from pleading the want of notice at a late stage of the trial. In the events which have happened, we are clearly of opinion that in this case notice was waived on behalf of the Secretary of State, and that the question could not have been raised by the 2nd defendant. The second ground, therefore, must prevail."

In the case reported as *Kanakku Karthiayanai Pillai Narayani Pillai* v. *Neelacanta Pillai Raman Pillai*,[5] the State had taken exception to the maintainability of the suit for want of two months" notice under Sec. 80, C.P.C., but the Additional District Judge had overruled it. Although the State was a party to said appeal it did not object to that finding. *Held* that the State must be deemed to have waived its objection to the maintainability of the suit for insufficiency of Sec. 80 notice. It was not open to the appellant (private party) to take the string and urge the contention as the benefit of the section was available only to the Stage and its officers and to none other.

Waiver of a right cannot lightly be inferred and at any rate something more than mere inaction is necessary to establish waiver.[6]

As per term of the agreement executed in Delhi a contractor agreed to erect a building at Patiala for the employer. The agreement specifically provided that Courts at Delhi alone will have jurisdiction to determine all disputes and differences between the parties. It was held that mere filing of two writ suits by contractor at Patiala in disregard of the agreement did not operate to amount to waiver to estop a contractor from moving Court at Delhi when it was not denied that the employer contested both the suits and the same are no longer pending.[7]

57. Application of the principle of waiver.—The provision of sub-section (2) of Sec. 8, Arbitration Act, 1940 indicates that the Legislature contemplated a valid

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1. I.L.R. (1881) 7 Cal. 499.
2. I.L.R. (1904) 26 All. 220.
3. I.L.R. (1913) 40 Cal. 503.
4. (1907) 5 Cal. L.J. 148.
5. A.I.R. 1969 Ker. 280 at pp. 285-86.
6. Ram Raksh Pal *v.* Brij Nandan Swarup, A.I.R. 1967 All. 325 at p. 326.
7. Maltex Malsters (P) Ltd., Messrs *v.* Messrs, Allied Engineers, A.I.R. 1975 Delhi 123 at p. 125..

appointment of an umpire being made by the arbitrators after the lapse of the period of one month mentioned in Cl. 2 of the First Schedule.

There is a decision of the Calcutta High Court in *United Printing and Building Works* v. *Kishori Lal*,[1] which is in conformity with the view that the Cl. 2 of the First Schedule is not a mandatory provision. The learned Judge held that non-compliance with Cl. 2 of the First Schedule did not vitiate the award.

Decisions in conformity with the above view are also found in *Louis Dreyfus and Co.* v. *Hemands Hatchand*,[2] *Sheoramprasad Ram Narayanlal Bania* v. *Gopalprasad Parmeshwardayal Shuklao*,[3] *Chacko* v. *Chacko*[4] and *Ratnawa* v. *Gurushiddappa Gurushantappa Magavi and Co.*[5] Thus the bulk of judicial opinion favours the conclusion that the provision contained in Cl. 2 of the First Schedule is directory and not mandatory.

Supposing however that Cl. 2 of the First Schedule is mandatory, its breach does not invalidate the award where the plaintiffs have by their conduct waived the non-compliance with that provision.[6]

In some of the cases cited above, it was assumed that a directory provision is capable of being waived but not a mandatory provision. With respect it does not appear that the principle of waiver is applicable to directory provisons only and that it cannot extend to mandatory provisions. There are two well-recognised limitations to the application of the principle of waiver. In the first place a party cannot waive a statutory requirement which has been inserted by the Legislature in the public interest as distinguished from the interest of the parties to an action. Secondly, the parties cannot by waiver invest a tribunal with a jurisdiction which it does not have. In Craise on *Statute Law*,[7] the learned author has observed (6th Edition, page 269)—

> "...As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to give the Court jurisdiction. But if it appears that the statutory conditions were inserted by the Legislature simply for the security or benefit of the parties to the action themselves and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the Court.."

The requirement contained in Cl. 2 of the First Schedule regarding the appointment of an umpire by the arbitrators is for the benefit of the parties to a reference and does not involve the public interest. It is also clear that the appointment of an umpire is not a condition which determines the jurisdiction of the arbitrators to decide the dispute referred to them. It must follow that the requirement of Cl. 2 of the First Schedule is capable of being waived.

As an instance of a mandatory provision which was held to have been waived by a party it would be useful to refer to the decision of the Division Bench of the Bombay High Court in *Bandu Hari Kamble* v. *Bhagya Laxman*.[8] The Court observed that the provision contained in Order XXI, rule 22 of the Civil Procedure

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1. A.I.R. 1956 Cal. 593.
2. A.I.R. 1940 Sind 37.
3. A.I.R. 1959 M.P. 102.
4. A.I.R. 1959 Ker. 149.
5. A.I.R. 1962 Mys. 135.
6. Messrs. Modern Builders *v.* Hukmatrai N. Vadirani A.I.R. 1967 Bom. 373 at p. 377.
7. 55 Bom. L.R. 753 : A.I.R. 1954 Bom. 114.
8. 55 Bom. L.R. 753 : A.I.R. 1954 Bom. 114.

Code, regarding the issue of a notice to the judgment-debtor was mandatory but that the provision was enacted for the benefit and protection of the judgment-debtors and can be waived by them.

Waiver and estoppel distinguished.

Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estoppel. An estoppel may result though the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question.[1]

No estoppel by waiver.

There is no estoppel by waiver. Waiver is distinct and different from estoppel, waiver is contractual whereas estoppel is governed by Sec. 115 of the Evidence Act. Estoppel is not a cause of action whereas waiver may constitute a cause of action. Waiver is an agreement to release or not to assert a right whereas estoppel is a rule of evidence which comes into operation if a statement as to the existence of a fact has been made by a party or his authorised agent to another party of some one on his behalf, with the object or intention, that the other party should act upon the faith of the statement and the other party does act upon the faith of the statement. Where an agent with authority to make an agreement on behalf of the principal agree to waive his principal's right, the principal will be bound.[2]

58. Waiver of fundamental rights.—The fundamental right cannot be said to have been waived by its non-assertion by the minority in that they submitted to the enforcement of certain rules 6, 7 and 8 of Chapter XXV of the Kerala Education Rules (violation of its fundamental right under Art. 30) in the past without protest.[3]

There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainly and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Art. 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democractic Republic. It is in order

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1. Provash Chandra Dalui *v.* Biswanath Banerjee, A.I.R. 1989 S.C. 1834 at pp. 1840, 1841.
2. Metal Press Works Ltd., Calcutta *v.* Guntur Merchants Cotton Press Co. Ltd., A.I.R. 1976 A.P. 205 at p. 221.
3. K.O. Varkey *v.* State of Kerala, A.I.R. 1969 Ker. 191 at p. 195.

to fulfil the promise of the preamble that fundamental rights are conferred by the Constitution, some of citizens like those guaranteed by Arts. 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Arts. 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceedings.[1]

Diverse views have been expressed by the learned Judges who participated in the decision of case reported in *Basheswar Nath* v. *I. T. Commissioner, Delhi and Rajasthan*.[2] The majority view is that the right conferred by Art. 14 of the Constitution cannot be waived by a person as the Article is said to be an admonition to the State and enacted as a matter of public policy although the ultimate beneficiaries are persons. The view of S. K. Das, J., and Subba Rao, J., is that no fundamental right can be waived. Mr. H. M. Seervai in his *Constitutional Law of India* has elaborately dealt with the question at page 173 and summarises his view as follows :

> "....It is obvious that there is no obligation laid on a person to assert his fundamental rights against their violation by the State, and equally obvious that no authority has been appointed to vindicate those rights on his behalf. If so, it is submitted, adapting the language of the U.S. Supreme Court, that public policy is not so inconsistent as to leave it open to a person not to assert his fundamental rights at all and yet prevent him from securing such mitigation of the violation as he considers satisfactory. Again, if the law can interpose public policy between a person and the waiver by him of his fundamental rights it must have effective power to do so if he decides not to assert them at all. But we know that there is not such interposition in the last-mentioned case ; therefore, there should be no such interposition in the case of waiver."[3]

It is doubtful whether any generalization upon a matter like this would be wise. Take for instance, the fundamental right guaranteed under Art. 23 of the Constitution of India. It is a paradox that a freeman is not allowed to be a slave. *Ex-hypothesi* freedom implies the freedom to barter it away. Although that is logical, no free society proceeds on that basis. A contract by a freeman to become a salve is against public policy and will not be enforced. If an agreement cannot be valid, as it will be against public policy, how can there be a waiver ?

Waiver of fundamental right of parties.

There can be no waiver of fundamental rights by a party and mere laches will not deprive him of that right.[4]

There cannot be an estoppel against exercise of fundamental rights on the same principles as are applicable in the case of waiver thereof. State cannot arrogate to itself a right to commit breach of the fundamental rights of any person by resorting to principles of waiver or estoppel or other similar principles.[5]

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1. Olga Tellis *v.* Bombay Municipal Corporation, 1985 (3) S.C.C. 545 at pp. 569, 570 (S.C.) : A.I.R. 1986 S.C. 180.
2. A.I.R. 1959 S.C. 149.
3. *See* page, 183 of *Constitutional Law of India* by H.M. Seervai.
4. Ramrachhapal *v.* Union of India, A.I.R. 1960 Punj. 439 at p. 444 ; Bhagwat Dayal *v.* Union of India, (1959) 61 Punj. L.R. 609 : A.I.R. 1959 Punj. 544.
5. Yousuf Ali Abdulla Fazalbhoy *v.* M.S. Kasbekar, A.I.R. 1982 Bom. 135 at p. 143.

The case reported in *Basheshar Nath* v. *Commissioner of Income-tax, Delhi and Rajasthan,*[1] has dealt with the subject of waiver of a fundamental right.

Supreme Court view on waiver of fundamental right of parties.

In the above case, the question arose in relation to the right under Art. 14 of the Constitution. The learned Chief Justice of India and Kapur, J., were of the opinion, that "whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right" under Art. 14.

Bhagwati and Subba Rao, JJ., held that it is not open to a citizen to waive any of his fundamental rights conferred on him by Part III of the Constitution, but S.K. Das, J., dissented from this view and held that where the right or privilege guaranteed is primarily intended for the benefit of the individual, it can be waived by him. There is thus no conclusive opinion in the above case regarding the waiver of a fundamental right under Art. 19(1)(*g*).[2]

Chief Justice Hughes said for the Court in *A. Bailey* v. *State of Alabama,*[3] that involuntary servitude can stem from a contract.[4]

The fundamental right under Art. 30 is that of a plurality of persons as a unit or of a community of persons necessarily fluctuating and waiver means the voluntary relinquishment of a known right. It may be difficult to infer a waiver from the conduct of the members of a fluctuating body. In order that a plea of waiver may succeed, it must be proved that the person or persons was or were aware of the right waived and then deliberately abandoned it. It is not sufficient to show that he or they failed to exercise the right. The Supreme Court *in re Kerala Education Bill,* 1975,[5] said that "there can be no question of the loss of a fundamental right merely by the non-exercise of it.".[6]

It is not correct to say that even the factual requirements of a waiver against assertion of a fundamental right to equality before the law and equal protection of laws can be held to be satisfied merely because of citizen obtains a benefit under a statute. By obtaining a benefit under one provision of a statute, he does not necessarily agree not to claim the benefit of the Constitution is assailing another provision of the statute. A person can question the validity of a statutory provision if the provision conflict with a constitutional provision even if such a person has benefited from other provisions of the statute.[7]

Merely the signing of the form by the petitioner would not confer upon the State a power to discriminate in violation of the constitutional injunction. No question of estoppel or waiver arises where the State lacks the constitutional power to enforce a rule which is unconstitutional and thus *ultra vires.*[8]

When infraction of Art. 14 of the Constitution is pleaded, estoppel is not an answer. Article 14 holds out a mandate to the State for regulating its conduct and while the State's conduct is under review with reference to the equality clause, estoppel based upon the performance of a citizen is not the answer to negative such a plea.[9]

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1. A.I.R. 1956 S.C. 149.
2. Aziz Rawther *v.* Kanjirapally Panchayat, A.I.R. 1961 Ker. 289 at pp. 289-90.
3. (1910) 219 U.S. 219 : 55 Law Ed. 191 at p. 202.
4. *See* also the decision in Kedar *v.* Muthukoya, A.I.R. 1962 Kerala 138.
5. 1958 Ker. L.T. 465 at p. 501 : A.I.R. 1958 S.C. 956.
6. K.O Varkey *v.* State of Kerala, A.I.R. 1969 Ker. 191 at pp. 195, 196.
7. Ram Gopal Gupta *v.* Assistant Housing Commissioner, A.I.R. 1969 All. 278 at p. 289.
8. Pradip Tandon *v.* State of Uttar Pradesh, A.I.R. 1975 All. 1 at p. 9 ; *see* also Rampal *v.* Manager, Sasta Sahitya Press Ltd., A.I.R. 1974 Raj. 43; Samarthmal *v.* Jugaldas, A.I.R. 1974 Raj. 104.
9. Sidhartha Das, Dr. *v.* State of Orissa, A.I.R. 1981 Orissa 97 at p. 101.

No estoppel against exercise of fundamental rights.

In *Yusuf Ali Abdulla Fazalbhoy* v. *M.S. Kasbakar*,[1] the counsel for the petitioner relied on *Basheshar Nath* v. *Income-tax Commissioner*,[2] in support of his contention that there cannot be waiver of fundamental rights. After quoting observations of their Lordships in the High Court of Bombay held as under :

> "In my view, therefore, there cannot be an estoppel against exercise of fundamental rights on the same principles as are applicable in the case of waiver thereof. State cannot arrogate to itself a rights to commit breach of the fundamental rights of any person by resorting to principles of waiver of estoppel or other similar principles. If there is any continuing action which is violative of fundamental rights of any person that must come to an end. No law or legal principle can prevent a court from giving remedy for violation of fundamental rights once it is found to exist."[3]

The right not to be discriminated against as enshrined in Art. 14 of the Constitution of India, is one of the fundamental rights. These fundamental rights have been embodied in our Constitution not merely for the benefit of a particular individual, though individuals are naturally benefited. Those have been enshrined as a matter of constitutional policy and for public good, and the doctrine of waiver or acquiescence cannot be applied thereto. A citizen cannot voluntarily get discrimination or waive his fundamental right against discrimination. A citizen cannot give up or waive the benefits of his fundamental right which is indirectly conferred on him by the mandate directed to the State.[4]

59. Waiver of privilege conferred by Sec. 51, C.P.C.—It is well settled that every one has the right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with, without infringing any public right or public policy.[5] In the case of *Bashesar Nath* v. *Commissioner of Income-tax, Delhi and Rajasthan*, [6] it was held that, where a right or privilege guaranteed by law rests in the individual and is primarily intended for his benefit and does not infringe on the right of others, it can be waived, provided such waiver is not forbidden by law and does not contravene public police of public morale. It is apparent that waiver of the privilege conferred by the proviso to Sec. 51 of the Code does infringe the public policy, because by inserting this privilege for the judgment-debtor in Sec. 51 of the Act of 1908, the Legislature was guided by public policy, namely that a debtor should not be put in the prison, when he is unable to pay his debt for reasons beyond his control. Irrespective of the fact whether the judgment-debtor appears or not, the Court has to satisfy itself, before issuing any warrant of arrest against the judgment-debtor, whether the materials on the record bring the case within any of the clauses of the proviso to Sec. 51 of the Code. Proviso to Sec. 60 of the Code, however, shows that it is for the judgment-debtor to place materials before the Court to bring his case within the relevant clauses. The distinction between the two, therefore, is obvious.[7]

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1. A.I.R. 1982 Bom. 134.
2. A.I.R. 1959 S.C. 149.
3. Yousuf Ali Abdulla Fazalbhoy *v.* M.S. Kasbekar, A.I.R. 1982 Bom. 135 at p. 143.
4. Messrs, Omega Advertising Agency *v.* State Electricity Board, A.I.R. 1982 Gau. 37 at p. 42.
5. *See* Maxwell on *Interpretation of Statutes*, 11th Ed., p. 376.
6. A.I.R. 1959 S.C. 149.
7. Jogendra Missir *v.* Ramnandan Singh, A.I.R. 1968 Pat. 218 at pp. 221, 222.

Protection given to agriculturist under Sec. 60, C.P.C —Doctrine of waiver or estoppel not applicable.

The protection given under Sec. 60, C.P.C., is based on public policy and is not intended to confer any personal benefit. Hence, the doctrine of waiver or estoppel cannot bar the plea which can be taken by an agriculturist when the house in his occupation is sought to be sold in execution of a decree against him. It is the intention of the legislature to afford this protection to agriculturists in order that agricultural operations may be continued to be carried on by them at the place where they reside and it cannot be denied that interruption of agricultural operations against the national interest since it may lead to fall in agricultural production.[1]

60. Waiver and acquiescence.—In Art. 1175 at page 637 of Halsbury's *Laws of England*, 3rd Edition, Vol. 14, it is stated—

> "Waiver is the abandonment of a right, and is express or implied from conduct. A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it...."[2]

In order to constitute abandonment or waiver, it must be a voluntary act on the part of the person possessing the rights. If a person by force of circumstances is compelled to adopt one of the two courses, it cannot be said that he had two courses open to him and that he adopted one and abandoned the other.[3]

Two aspects of acquiescence.

Acquiescence or standing by when there is a duty to speak or assert a right creates an estoppel but in such cases knowledge of thing done must be brought home to the acquiescing party.[4] So there is a distinction between a case when the acquiescence alleged occurs while the act acquiesced in is in progress and another where the acquiescence takes place after the act has been completed. In the former case the acquiescence is quiescence under such circumstances as that assent may reasonably be inferred from it, in the latter case when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined on very different legal consideration. A right of action is thus vested in him and mere delay to take legal proceedings to redress the injury cannot by itself constitute a bar to such proceedings unless the delay on his part after he has acquired full knowledge, has affected or altered the position of his opponent.[5] Acquiescence does not mean simply an intelligent consent but may be implied if a person is content not to oppose irregular acts which he knows, are being done.[6] Where a municipality having under an expectation created and encouraged by the Government that a certain interest would be granted took possession of the land with consent of the Government and upon the promise of such faith or expectation and with the knowledge of and without objection by the Government laid out money upon the land, it had an equitable right to have such expectation realised and such equity differ essentially from the doctrine embodied under Sec. 115 of the Evidence Act.[7] In *Beni Ram* v. *Kundan Lal*,[8] the Judicial

Acquiescence meaning of.

1. Gowranna *v.* Basavana Gowd, A.I.R. 1975 Kant. 84 at p. 86.
2. Messrs. Bokaro and Ramgur Ltd. *v.* Dr. Prasun Kumar Banerjee, A.I.R. 1968 Pat. 150 at p. 157.
3. Azra Abdulla, Smt. *v.* Messrs. Silton Hotel Bangalore, A.I.R. 1975 Kant. 225 at p. 236.
4. Ransden *v.* Dyson, L.R. 1 H.L. 129 ; *see* also Abdul Samed *v.* Maha. Islam, 1982 All. L.J. 1119.
5. Shyama Charan *v.* Profulla Sundari, 21 C.L.J. 557, referring to Duke of Leeds *v.* Amherst, (1846) 2 Phillips 117 ; Shyamlal *v.* Rameswari, 23 C.L.J. 82.
6. Annada Chandra Sen *v.* Parbaty Nath Sen, 4 C.L.J. 198 ; Jaharaddy *v.* Debnath, 20 C.W.N. 657.
7. Municipal Corporation of the City of Bombay *v.* Secretary of State, I.L.R. 29 Bom. 580.
8. I.L.R. 21 All. 496 (P.C.).

Committee held that a lessor is not restrained by any rule of equity from bringing a suit to evict a tenant, the term of whose lease has expired, merely by reason of that tenants, having erected permanent structures on the land leased, such building having been within the knowledge of the lessor and there not having been interference on his part to prevent it. In order that the tenant might avail himself of the plea of estoppel or acquiescence against the landlord it is necessary for the tenant to show that in spending money for the erection of buildings of a permanent character he was acting in an honest belief that he had a permanent right in the land and that the landlord knowing that he was acting in that belief stood by and allowed him to go on with the construction; mere knowledge of the landlord or his agent is not enough.[1] If a party having an interest to prevent an act being done has full notice of its being done and acquiescences in it so as to induce a reasonable belief that he consents to it; and the position of the other is altered by their giving credit to his sincerity he has no more right to challenge the act to their prejudice, but mere quiescence or absence of interference is not sufficient to create an estoppel.[2] Where acquiescence proceeds from a *bona fide* mistake, it does not create estoppel.[3] Where his defendant was fully aware that the land upon which he expended his money was the property of plaintiff the latter would not be estopped from asserting his legal rights.[4]

In the instant case the plaintiff contended that the defendant had committed a breach of the terms of tenancy by changing the user of the premises from a tailoring shop to a cycle shop. The premises were being used for cycle repairs since almost the inception of the tenancy. *Held* that the conclusion reached by the learned Assistant Judge that the landlord had waived the infraction of such terms and has acquiesced in the user of the premises for cycle repair work cannot be assailed.[5]

What Sec. 13 (1)(*b*) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, says is that if a permanent structure is put up without the written consent of the landlord, that gives a right to the landlord to file a suit against the tenant. It is open to the landlord to avail of that right or not to avail of that right. He can always waive that right. In the present case, the conduct is so clear that at no point of time the landlord had ever objected to the construction. It was all done with the knowledge of the then landlord. He himself was supervising some of the repairs and alterations. Certainly in such a case it is not open to the landlord, that too after allowing the defendant to make all such repairs and alterations and after incurring sufficient expenditure in that behalf, that he should vacate on the ground that he had carried out the repairs. The conduct of the landlord clearly indicates that whatever right he had, he had not availed of it at all. The learned Appellate Judge misdirected himself clearly, as far as this part of the law is concerned. He ought to have held that the landlord had waived his right to file a suit under Sec. 13(1)(b) of the Rent Act, by his conduct. Any other view of the matter would be patent injustice.[6]

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1. Syed Ali Kazemani *v.* Manik Chandra, 27 C.W.N. 969 ; *see* also Hemangini Devi *v.* Raja Bejoy Singh Dhudharia, 73 I.C. 223 (Cal.) ; Ralli *v.* Fobes, 67 I.C. 744 (Pat.).
2. Cairncross *v.* Lorimer, 3 Macq. H.L. 827, referred to in Baneswar *v.* Amulya, 82 I.C. 309 (Cal.), where the cases on this point are cited; *see* also Mahanth Zorawar Singh Shastri *v.* Manohar Das, 1981 All. L.J. 1345.
3. *See* Goura Chandra Gajapati *v.* Secretary of State, I.L.R. 28 Mad. 130 (P.C.) : 9 C.W.N. 553.
4. Dharma Das Kundu *v.* Amulyadhan Kundu, I.L.R. 33 Cal. 1119.
5. Abdulkadar Ahmed Turava *v.* Lalla Abdulrashid, A.I.R. 1982 Guj. 1 at pp. 2, 4.
6. Ramchandra Dattatraya Gandhi *v.* Pushpabai Manohar Sheth, A.I.R. 1990 Bom. 182 p. 186.

Waiver and admission; distinction between.

There is a distinction in law between waiver and admission, in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on, the party making it cannot plead ignorance unless it is induced by the other party.[1]

Where the judgment-debtor consented in consideration of the sale being adjourned to have the sale conducted on the adjourned date without a fresh proclamation, he cannot set up the want of attachment.[2]

Express waiver by judgment-debtor.

Where there was an express waiver by the judgment-debtors of all objections about under valuation. *Held* that he was estopped from raising objection regarding under valuation in proceedings to set aside the sale.[3]

In *Arunachalam* v. *Arunachalam*,[4] their Lordships say—

Privy Council view.

"It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by allow the sale to proceed and then come forward and say the whole proceedings were vitiated. That in their Lordships' opinion cannot be allowed."

When the judgment-debtors have got an adjournment of the sale by giving up their objections to the sale proclamation, they are estopped from raising those objections again.[5]

Acquiescence and constitutionality of rules.

Where the appellant acquiesced to the Rules by applying for the post of the village accountant, appearing before the Recruitment Committee for interview and taking a chance of being selected, he cannot question the constitutionally of rules.[6]

61. Agreement to waive an illegality.—In the case reported in *Smt. Thakurain Dulaiya* v. *Shivanath Punjabi*,[7] the landlady gave her oral consent to tenant to sublet the premises to defendant 2. This was prohibited by Cl. 12-A, of the C.P. and Berar Letting of Houses and Rent Control Order, 1949. *Held* that the landlady was not estopped from urging that the sub-tenancy was unlawful, though she had given her consent orally for such sub-letting.

In *Waman Shriniwas* v. *R.B. & Co.*,[8] their Lordships of the Supreme Court, *held* that the provision prohibiting, sub-letting of premises was in furtherance of public policy. Any contract of sub-letting was, therefore, hit by Sec. 23 of the Contract Act, and in such a case the plea of waiver as against the landlord was not available to the tenant or the sub-tenant. Their Lordships held—

"....But an agreement to waive an illegality is void on grounds of public policy and would be unenforceable."

62. The principle of estoppel arises only when a lawful promise is made.—The principle of estoppel arises only when a lawful promise was made and acted upon to his detriment; the party making promise is estopped resile from the

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1. Raja Shyam Sunder Singh *v.* Kaluram Agarwala, A.I.R. 1938 A.W.R. (P.C.) 186 : 68 C.L.J. 145 : 42 C.W.N. 1041 : (1939) 1 M.L.J. 147 : 48 L.W. 199.
2. (Badam) Seshayya *v.* (Grandhi) Sattiraju, A.I.R. 1930 Mad. 414 at p. 416 : 120 I.C. 863.
3. Nageshwar Prasad Misra *v.* Ambika Prasad Upadhya, A.I.R. 1935 Pat. 483 at p. 484.
4. I.L.R. (1889) 12 Mad. 19 : 15 I.A. 171 : 5 Sar. 265 (P.C.).
5. Potta Reddi *v.* Karuppa Goundan, A.I.R. 1935 Mad. 150 at pp. 150-51 : 41 M.L.W. 121 : 68 M.L.J. 48 : 1935 M.W.N. 125 : 155 I.C. 1013.
6. I.L. Honnegouda *v.* State of Karnataka, A.I.R. 1978 S.C. 28 at p. 29.
7. A.I.R. 1969 M.P. 130 at p. 134.
8. A.I.R. 1959 S.C. 689.

promise. In this case, the principle of estoppel is inapplicable because there is no promise made by the State that the State would protect perpetration of fraud defeating the Constitutional objective; no promise was made that his false certificate will be respected and accepted by the State. On the other hand, he is liable for prosecution. The Courts would not lend assistance to perpetrate fraud on the Constitution and he cannot be allowed to get the benefit of the fraudulent certificate obtained from the authorities.[1]

In the instant case, it is submitted that benefits enjoyed for a long time should not be withdrawn. It has to be noted that by getting the benefits, appellants have denied those to persons genuinely belonging to Scheduled Tribe. When a person belonging to Scheduled Tribe competes with others on merits and gets selected on merits, the posts reserved for Scheduled Tribe does not get exhausted. That is because the intention is to give benefit to one who is deficient and may not be able to complete on merits. Therefore, one cannot usurp the benefit meant for another, who is under-privileged. In *State of T.N.* v. *A. Guruswamy*[2] it was held that principle of promissory estoppel is inapplicable. On cancellation of a wrong SC/ST certificate, the person concerned is not entitled to plead estoppel merely on the ground of having enjoyed the status under such a certificate for a long period. That would amount to protection of the fraud perpetrated and thereby defeat the Constitutional objective. In such cases, consequences have to follow. It is for the authorities to determine in what manner it shall be done.[3]

There are many aspects of "Promissory Estoppel", but in the instant case it was concerned only with one aspect which is to the effect that if any "promise" has been made contrary to law, can it still be enforced by invoking this rule.

Promise contrary to law—No promissory estoppel.

The basis principle is that the plea of estoppel cannot be raised to defeat the provisions of a statute.[4] This principle was reiterated in *Union of India* v. *R.C.D'Souza*,[5] where a retired army officer was recruited as Assistant Commandant on temporary basis and was called upon to exercise his option for regularisation contrary to the statutory rules. It was held that it would not amount to estoppel against the Department.

Whether a promissory estoppel, which is based on a "promise" contrary to law can be invoked has already been considered by Apex Court in *Kasinka Trading* v. *Union of India*,[6] as also in *Shabi Construction Co. Ltd.* v. *City & Industrial Development Corporation*,[7] wherein it is laid down that the Rule of "promissory estoppel" cannot be invoked for the enforcement of a "promise" or a "declaration" which is contrary to law or outside the authority or power of the Government or the person making the promise.

Applying the above principles to the instant case, even if it is accepted that the State Government or the Director, Medical Education and training, assured the appellant or any of his colleagues that they would be promoted to the posts of Lecturer, such a 'promise' cannot be enforced against the respondents as the

1. State of Tamil Nadu *v.* A. Gurusamy, A.I.R. 1997 S.C. 1199 at p. 1200 : (1997) 3 S.C.C. 542; *see* also State of U.P. *v.* Girish Bihari, A.I.R. 1997 S.C. 1354.
2. A.I.R. 1997 S.C. 1199.
3. **K.S. Vijayalaksmi *v.* Tahsildar, Palakkad, A.I.R. 2000 Ker. 262 at p. 268.**
4. *See* G.H.C. Ariff *v.* Jadunath Majumdar Bahadur, A.I.R. 1931 P.C. 79 ; M/s. Mathra Parshad & Sons *v.* State of Punjab, A.I.R. 1962 S.C. 745 : Rishabh Kumar *v.* State of U.P., A.I.R. 1987 S.C. 1576 : 1987 (Supp) S.C.C. 306.
5. A.I.R. 1987 S.C. 1172 : (1987) 2 S.C.C. 211.
6. (1995) 1 S.C.C. 274 : 1995 A.I.R. S.C.W. 680.
7. (1995) 4 S.C.C. 301.

avenue of promotion for Demonstrators to the post of Lecturers was not provided either under the Statute or any executive instruction. Moreover, if the post of Lecturer was filled up by promotion of Demonstrator, it would defeat the existing mode of recruitment, namely, that it can be filled up by direct recruitment, only and not by promotion. It may also be stated that the appellant did not make any clear, sound and positive averment as to which officer of the Government, when and in what manner gave the assurance to the appellant or any of his colleagues that they would be promoted as Lecturers. It was also not stated that the appellant had, at any time, acting upon the promise, altered his position, in any manner, specially to his detriment. Bald pleading cannot be made the foundation for invoking the Doctrine of Promissory Estoppel.[1]

In the present case the Court concluded that *Robertson* v. *Minister of Pensions*,[2] which has been rejected in England does not lay down the correct law. Its assumption that an unauthorised promise creates estoppel is contrary to the fundamental principle of adminsitrative law that estoppel cannot be invoked to legitimise *ultra vires* actions. Again the proposition that a citizen is not expected to know the limits of the authority of an officer to make the promise tends to legitimise unauthorised promises. To hold that a citizen acting on an unauthorized promise without enquiring into the limits of such authority, can bind a public authority, is to create a power which does not exist.[3]

In the instant case, the appellant was directly appointed. In such a case, the qualification must be either, A graduate/Intermediate second class or, Matric first class. Admittedly, the appellant did not possess this qualification. That being so, the appointment is bad. The Commission recommended to the Government for relaxation of the qualification under Regulation 7 of the Regulations. The Government rejected that recommendation. Where, therefore, the appointment was clearly against Regulation 7, it was liable to be set aside. That being so, no question of estoppel would ever arise.[4]

63. Estoppel by conduct.—When the plaintiff-company by its conduct enabled Jethmal to encash the cheque and reliase the proceeds thereof, the plaintiff is estopped from challenging the amount, Jethmal to endorse the cheque and realise the proceeds.[5] In *P. Venkata Subba Rao* v. *Jagannadha Rao*,[6] their Lordships of the Supreme Court held that a decree based on a compromise creates estoppel by conduct. In this connection their Lordships observed as follows :

> "The decree might have created an estoppel by conduct between the parties."

Their Lordships of the Supreme Court in that case pointed out that even though the principle of *res judicata* could not be attracted because the law was amended after the previous order, yet their Lordships recognized that a decree might create an estoppel by conduct between the parties. Once the agreement merged into the order of the Court it was not an agreement *simpliciter*, but an agreement to which was super-added the command of the Court. Thus it was not a case where the parties by a bilateral agreement sought to contract out of the

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1. Ashok Kumar Maheshwari *v.* State of U.P., A.I.R. 1998 S.C. 966 at pp. 969-70 : (1998) 2 S.C.C. 502 : 1998 All. L.J. 504.
2. (1949) 1 K.B. 227.
3. P.V. Balakrishnan Nair *v.* State of Kerala, A.I.R. 1994 Ker. 6 at pp. 10-11 ; *see* also State of Maharashtra *v.* Jethmal Himatmal Jain, 1994 Cr. L.J. 2613 (Bom.).
4. Ravinder Sharma *v.* State of Punjab, (1995) 1 S.C.C. 138 at p. 141.
5. Bhutoria Trading Co. Ltd. *v.* Allahabad Bank Ltd., A.I.R. 1977 Cal. 363 at p. 370.
6. A.I.R. 1967 S.C. 591.

statutory provisions of the Act as happened in *Waman Shriniwas* v. *Ratilal Bhagwandas Co.*[1] In that case it appears that under the agreement of lease the landlord had permitted the tenant to sublet the premises but the statute, namely, the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (57 of 1947), expressly prohibited any sub-letting by the tenant. Their Lordships held that in view of the express prohibition the agreement stood overruled and it was not open to the tenant to sublet the premises.

In *Popatlal* v. *Kalidas*,[2] fixation of fair rent by consent of the parties was upheld.

In *Ambu Nair* v. *Kelu Nair*,[3] their Lordships of the Privy Council observed as follows :

> "It is a well accepted principle that a party cannot both approbate and reprobate. He cannot use the words of Honeyman, J., in *Smith* v. *Baker*,[4] 'at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage.'"

In *Vas Dev Sharma* v. *Milkhi Ram*,[5] Grover, J., took almost the same view in similar circumstances and held that where in a decree for ejectment the tenant agreed to vacate and admitted the fact that the landlord was entitled to possession, a consent decree could be validly passed even if there was no evidence to show the existence of personal necessity. The same view has been taken by Bhat, J., in *Abdul Gani Mallik* v. *Mala Habib*.[6] In that case Bhat, J., pointed out that where the tenant agrees to vacate to premises the Court had no option but to pass a decree for eviction. In such a case it cannot be argued with any show of force that a decree should not be passed unless the statutory provisions of personal necessity are satisfied. A compromise decree can always be passed, because the provision is purely for the benefit of the tenant and if the tenant is ready to waive the benefit there can be no objection to the Court in passing a compromise decree. The same view was taken in a later decision of the Jammu and Kashmir High Court in *Prabh Dayal* v. *Mohan Lal*.[7]

In *Daulat Ram* v. *Triloki Nath*,[8] their Lordships observed as follows :

> "We have examined the language of Sec. 7 of the U.P. (Temporary) Control of Rent and Eviction Act and we have found in it no prohibition to an agreement for fixation of rent between landlord and a person who may later become a tenant under the provisions of that section, being arrived at prior to the order of allotment."

As against these authorities, the only case taking a contrary view is that of a Single Judge of the Punjab High Court in *Niranjan Singh* v. *Shri Bhagwan Ram*.[9]

Thus after a careful consideration of the authorities the following propositions emerge : In cases where there is a statutory provision for the benefit of a party, the same can be waived and the parties can contract out of the statute by entering into a compromise only in the following circumstances :

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1. A.I.R. 1959 S.C. 689.
2. A.I.R. 1958 Bom. 1.
3. A.I.R. 1933 P.C. 167 at p. 169.
4. 9 C.P. 350.
5. A.I.R. 1960 Punj. 514.
6. 1963 Kash. L.J. 133 : A.I.R. 1963 J. & K. 59.
7. 1964 Kash. L.J. 176 : A.I.R. 1966 J. & K. 22.
8. A.I.R. 1962 All. 147 at p. 149.
9. A.I.R. 1956 Punj. 95.

(1) Where there is no express prohibition or clear inhibition forbidding the contract so that a breach of the statutory provisions may amount to a patent illegality. In such cases no amount of agreement can be used to neutralize the effect of an express provision engrafted by the statute.

(2) Where the statutory provision is purely personal to the party concerned and meant for his benefit and is not a public interest it follows that where there is a statutory provision which is not for the personal benefit or protection of a party alone but is also in public interest, the parties cannot be allowed to contravene such a statutory provision. This view is fortified by the observations made in Volume 92 of *Corpus Juris Secundum* at pp. 1066-68.[1]

Suit for ejectment on ground of illegal sub-letting.

When the landlord waited four years before filing the suit for ejectment of illegal sub-letting the Court may infer that the sub-tenants were in occupation with the consent of landlord. Landlord is barred by the principle of acquiescence.[2]

There is no doubt that estoppel by conduct is of the very essence of the rules of estoppel embodied in Secs. 115, 116 and 117 of the Evidence Act, but the acts of the parties which come in for consideration, in a litigation must necessarily be acts performed prior to the commencement of the litigation, so that the conduct of a party in the course of the litigation while it may affect the question of costs, should be wholly irrelevant for judging those acts.[3]

Essential elements of estoppel by conduct.

It is one of the essential elements of estoppel by conduct that the party against whom it is pleaded should have made some representation intended to induce a course of conduct by the party to whom it was made.[4]

In *Nehru Motor Transport Co-operative Society Ltd. Messrs, Jodhpur* v. *Deputy Registrar, Co-operative Societies, Jodhpur*,[5] the Deputy Registrar, while appointing the arbitrator, had directed him to make an award within a period of three months. After the expiry of the stipulated period, the petitioner without any objection continued to participate in the proceedings before the arbitrator. It was held that it must be presumed that the petitioner by his conduct acquiesced in the proceedings before the arbitrator. It must be presumed to have consented to an extension of time. The petitioner by his conduct precluded himself from questioning the validity of award on the ground that it was made beyond the period of limitation.

A trustee after a lapse of time cannot turn round and say that there was no valid trust.[6]

Representation to attract rule of estoppel.

A representation in order to attract the rule of estoppel need not always be a representation of a physical fact, but may as well be the representation of an attitude or a state of mind.[7]

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1. Autar Singh *v.* Sohan Lal, A.I.R. 1970 J. & K. 26 at pp. 29, 30, 31.
2. Shyam Kumari Gupta, Smt. *v.* Sharkar Sahai, 1982 All. L.J. 916 at p. 917.
3. Abdul Shakur *v.* Kotwaleshwar Prasad, A.I.R. 1958 All. 54 at p. 58.
4. P.K. A.B. Co-operative Society *v.* Government of Palaestine, A.I.R. 1948 P.C. 207 at p. 209 : 76 I.A. 17 : I.L.R. (1949) All. 531 ; *see* also Dr. Anil Kumar Chakravarty *v.* State of West Bengal, 1983 Lab. I.C. 806.
5. A.I.R. 1977 Raj. 233 at p. 236.
6. Ganganapalli Moorthanna *v.* Ganganapalli Chinna Ankiah, A.I.R. 1975 A.P. 97 at p. 102.
7. Union of India *v.* K.P. Mandal, A.I.R. 1958 Cal. 415 at pp. 419, 420.

Where no plea of want of notice was raised by the appellant during the entire course of proceedings and he had kept quiet about the service of the said notice for about four years it was contended that the appellant must be deemed to have waived the said plea and that the said objection was not open to him, it was held that the appellant having allowed the time to pass and contested the petition for four years is estopped at a late stage from resiling from his conduct by raising the objection that notice under Sec. 106 of the Transfer of Property Act had not been served.[1]

In the instant case the owner of a motor vehicle was aware of the fact that the said car was seized by the customs authorities and adjudication proceedings in respect thereof were pending under the provisions of the Customs Act, 1962. In spite of said facts, the petitioner neither claimed ownership of the car before the customs authorities nor appeared in the said adjudication proceedings. It was contended that he is estopped from claiming ownership of the said car or to challenge the said adjudication proceedings or the order made therein on the basis thereof. *Held* that the owner has not by any declaration, act or omission intentionally caused or permitted the customs authorities to proceed with the adjudication proceedings and impose penalty of confiscation without giving an opportunity of defending itself. So the petitioner by his conduct is not estopped from challenging the validity of the adjudication proceeding and the resultant order of confiscation and penalty imposed by the customs authorities.[2]

The facts in the case of *Cairncross* v. *Lorimer*[3] were that, for many years, there had been a dissenting congregation called "the United Original Seceders." Some of the members of the congregation acquired as trustees and managers a piece of ground upon which they built a chapel and certian other buildings. The congregation continued to use the chapel for a number of years when a large majority of the members, including the minister, resolved to join another dissenting body, called "the Free Church", which was considered to hold substantially the same doctrine. The minister was then admitted as a member of the Free Church and the congregation was declared to belong to that body of dissenters. Some time later, the minister died and a successor to him was appointed. Thereafter, certain persons who were members of the original congregation instituted a suit for a declaration that the chapel and the ground belonged to them and such other persons as adhered to the original doctrine, for recovery of the properties and also, it would appear, for a declaration that the minister had no right to hold the office. It was found that the plaintiffs and others had for many years acquiesced in the possession of the chapel and the ground by the persons who had seceded from the seceders and also acquiesced in the appointment of the minister and on that finding it was held that the plaintiffs were estopped from claiming any of the reliefs wanted by them.

It is not open to the petitioner, after the whole enquiry is over and after the Enquiry Officer has found against him, to turn round and contend that the officer was not competent to hold the enquiry.[4] The Supreme Court, in *Pannalal Binjraj* v. *Union of India*,[5] has stated as follows :

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1. Ram Pratap *v.* Messrs. Birla Cotton Spinning and Weaving Mills Ltd., A.I.R. 1973 Delhi 124 at pp. 125, 126, 127, 128.
2. Pradeep and Company *v.* Collector of Customs, A.I.R. 1973 Cal. 131 at pp. 132, 133, 134.
3. (1860) 3 Macq. 827 : 7 Jur. N.S. 149.
4. Syed Hassan Ali *v.* State of Mysore, A.I.R. 1965 Mys. 283 at p. 285.
5. 1957 S.C.A. 660 : 1957 S.C.R. 233 : A.I.R. 1957 S.C. 397.

Supreme Court on estoppel by conduct.

"If they (petitioners) acquiesced in the jurisdiction of the Income-tax Officers to whom their cases were transfered,....such conduct of the petitioners would desentitle them to any relief at the hands of this Court."

In another case the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee.[1]

Mysore High Court view.

A Division Bench of the Mysore High Court in *C.R. Gowda* v. *Mysore Revenue Appellate Tribunal*,[2] has also held that where the petitioner who must have been aware of the defect in the constitution of the Tribunal did not raise any objection on that score...he is precluded by his own conduct from putting forward the contention that the Tribunal had not been properly constituted.

Failure to question jurisdiction : Effect.

In *Mannarghat Union Motor Services Ltd.* v. *Regional Transport Authority, Malabar*,[3] Subba Rao, J., has stated that failure to object to jurisdiction before the Lower Court is a bar to obtaining a writ of certiorari. Their Lordships are of opinion that the observations made by Chagla, C.J., in *G.M.T. Society* v. *Bombay State*,[4] apply with full force to the facts of this case.

Where as a result of proceedings under the Land Acquisition Act, the Government did take possession of a land and paid compensation for it they are estopped from asserting that the land was their land.[5]

A mortgagee agreed to a sale of a part of mortgaged property. The land was sold free of encumbrance for prices which represented the full value of the lands. All the sale proceeds were paid to him and were appropriated by him to discharge of unserved debts due by mortgagors to him. *Held* that he was estopped from assenting that land purchased by vendee is still part of the security to the mortgage debt.[6] In the *Kobala* by which the plaintiff purchased the lands in suit, there was no mention of fixity of rent. *Held* that the plaintiff was not estopped from bringing a suit for declaration that he was a tenant at fixed rate of rent.[7]

Partition.

Where a party has acted upon a deed of partition for a long time he cannot be heard to say that he is entitled to the entire property according to the rule of primogeniture.[8]

Where by a partition decree lands belonging to the family were allotted to defendant and such lands were purchased by the plaintiff at the revenue sale, the plaintiff is not estopped from enforcing against the defendant any title which he acquired to them as purchaser of the estate at a revenue sale.[9]

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1. Dr. G. Sarana *v.* University of Lucknow, A.I.R. 1976 S.C. 2428 at p. 2433.
2. (1964) 1 Mys. L.J. 318 : A.I.R. 1965 Mys. 41.
3. A.I.R. 1953 Mad. 59.
4. A.I.R. 1954 Bom. 202.
5. Secretary of State *v.* Tatyasaheb Yashwant Rao Holkar, A.I.R. 1932 Bom. 386 at p. 389 : 34 Bom. L.R. 791 : I.L.R. 56 Bom. 501.
6. R.M.P.A.L. Chettiar Firm *v.* Ko Maung Gale, A.I.R. 1935 Rang. 191 at pp. 191-92.
7. Ferdinand Perier *v.* Krishna Nandy Choudhury, A.I.R. 1936 Cal. 582 at p. 583.
8. Narendra Narain Choudhuri *v.* Nagendra Narain Choudhuri, A.I.R. 1929 Cal. 577 at p. 584 : 50 C.L.J. 267 : 118 I.C. 342.
9. Smt. Krishna Promada Dasi *v.* Dhirendra Nath Ghosh, A.I.R. 1929 P.C. 50 at pp. 51-53 : 49 C.L.J. 112 : 33 C.W.N. 289 : 56 I.A. 74 : I.L.R. 56 Cal. 813.

Compromise decree might create an estoppel by conduct between the parties.[1]

In the case reported as the *Management of M/s. Natarajan Engineering Works, Madras* v. *Govindaswami Naicker*,[2] the firm permitted the Works Manager to appear on its behalf, and to take part in the conciliation proceedings. He held out that he was entitled to represent the firm for all purposes, and he signed the agreement as representing the firm. The opposite party (the workman) consented to the agreement altering his position in respect of defences or contentions open to him. *Held* that the firm cannot now be permitted to resile from the representation. This is a clear case of estoppel, and it amounts also to estoppel because of conduct altering the situation and rights of parties. Further it amounts to acquiescence, since the firm took no steps whatever to repudiate the agreement or the agency, till the worker sought to implement the agreement two years later.

Where a person as *mutawalli* executes the *supurdanama* transferring possession of property he is estopped from denying the vaidity of *supurdanama*.[3] Persons who have acted on the general award and have accepted benefits under it are precluded from challenging the award of interest on the ground that the question of interest was a matter beyond the scope of reference.[4]

When the sole arbitrator makes the award on the basis of the consent of the appellant and the Board, by acquiescence the Board is precluded from challenging the jurisdiction of the umpire.[5]

In the present case, right from initial stage when the applicant wanted to invoke the jurisdiction of an arbitrator to decide the dispute, the Board objected and denied the existence of any such agreement. It went before the arbitrators and filed the reply and a counter-claim but at the same time it continued agitating that there was no arbitration agreement and, therefore, the arbitrators have no jurisdiction to adjudicate the dispute. The participation was without prejudice to the rights of the non-applicant to object to the jurisdiction of the arbitrators. Therefore, the non-applicant Board cannot be estopped from denying the existence of any arbitration agreement and, consequently from questioning the arbitrator's jurisdiction to decide the dispute. Thus, the conduct of the non-applicant Board in the present case discloses that right from the time the applicant proposed to refer the dispute to arbitration, the Board denied any agreement and questioned any proposed reference as entirely illegal and without authority.[6]

When the name of an arbitrator is sought to be substituted by that of another by the plaintiff and the defendants adduce their evidence and act as if that gentleman has been legally appointed and object to the award after it has gone against them they are estopped from questioning the validity of the appointment.[7]

Once objection has not been taken to the assessment within the time prescribed in notice the assessment becomes final. It is obviously not proper for assessees to plead, when prosecuted in criminal courts, that the assessment is not correct.[8]

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1. Pulavarthi Venkata Subba Rao *v.* Valluri Jagannadha Rao, A.I.R. 1967 S.C. 591 at p. 595.
2. (1969) 2 M.L.J. 211 at p. 213.
3. S. Afzal Hussain *v.* Chedi Lal, A.I.R. 1935 All. 792 at p. 798 : 1935 A.L.J. 217 : 57 All. 727.
4. Khubchand Bhikchand *v.* Jethanand Santdas, A.I.R. 1929 Sind 168 at p. 170.
5. Chellappan, N. *v.* Secretary, Kerala State Electricity Board, A.I.R. 1975 S.C. 230 at p. 233.
6. Chitram Company Private Ltd., Madras *v.* Madhya Pradesh Electricity Board, Jabalpur, 1984 J.L.J. 310 at p. 316.
7. Gajadhar *v.* Chunni Lal, A.I.R. 1929 All. 559 at p. 560 : 1929 A.L.J. 868 : 117 I.C. 644.
8. C. Jayaram Naidu *v.* Emperor, A.I.R. 1932 Mad. 564 at p. 565 : 1932 M.W.N. 1220.

Election to call no evidence.

Ever since *Alexander* v. *Rayson*[1] it has been recognized that one who elects to call no evidence at trial is not going to succeed in obtaining a new trial from the Court of Appeal. The position was succinctly put by Lord Greene, M.R., in *Laurie* v. *Raglan Building Co.*[2] Dealing with the possibility of a new trial, Lord Greene, M.R., said :

> "At the trial in the present case, the counsel who appeared at the trial for the plaintiff said that he assumed that counsel for the defendants was not going to call any evidence. Counsel for the defendants (who was, of course, a very experienced counsel in that class of work) was silent with regard to that challenge and proceeded with his argument. Before us, he admitted that, if the judge had put to him the question which he ought to have put, he would have said that he did not intended to call any evidence. That being so, it is clear to my mind that there can be no question of a new trial..."

There is no doubt that there is the practice of the Court of Appeal. It is, however, not a rule of law; it is a discretionary rule, and it is a rule from which, if the circumstances be sufficiently unusual, the Court can authorize a departure.[3]

Conduct of the decree-holder.

A plaintiff having by his conduct induced the defendant to make an immediate payment of the decretal amount and having entered into an engagement with her which made it impossible for her to question the decree of the Trial Court is estopped from acting contrary to his undertaking.[4]

Contract and arbitration clause.

Where in contract voidable at the option of the respondent there is an arbitration clause and the respondent treats the contract as valid and appoints an arbitrator he is estopped from alleging that the award was improperly procured.[5] In *Tilak Rai* v. *Pargash Rai*,[6] it was found that Bigu had assured the defendants that he would not take his share in the lands left by Bhagelu and acting on this representation the defendants carried on the litigation and secured the property for themselves. *Held* that heir of Bigu was estopped from claiming the property after death of Bigu. In the case in *Subramania Aiyar* v. *United India Life Insurance Co. Ltd.*,[7] the venue of the meeting of the company had to be changed from its registered office to the Mahajana Sabha Hall on account of the failure of the company to give those facilities which had been promised by defendant 7 on behalf of the company. What happened was that after defendant had said that the company would give all facilities for the meeting, as a matter of fact the company proceeded to appoint its own directors in haste. Having done so as the learned Judge observes :

Case-law on estoppel by conduct.

Patna High Court.

Madras High Court.

> "....It was the deliberate act of the defendants that caused this change of venue. It seems to me that it would be a travesty of the law if a person who has deliberately brought about a state of affairs should be allowed to take exception to that state of affairs and use that changed state for his own advantage."

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1. (1936) 1 K.B. 169 : (1935) All E.R. 185.
2. (1941) 3 All E.R. 332 : (1942) 1 K.B. 152.
3. Portland Managements Ltd. *v.* Harte, (1976) 1 All. E.R. 225 at p. 231.
4. Bhirgunath Prasad Singh *v.* Mst. Annapurna Dai Sijuarin, A.I.R. 1934 Pat. 644 at pp. 645-46 ; Pratap Chandra Das *v.* Arathoon, I.L.R. 8 Cal. 455 : 10 C.L.R. 443.
5. Ramdas Topandas & Sons *v.* Kodanmal, A.I.R. 1933 Sind 207 at p. 210.
6. A.I.R. 1935 Pat. 21 at p. 22.
7. A.I.R. 1928 Mad. 1215 at pp. 1227 : 55 M.L.J. 385.

There is no reason why this principle should not be actually held applicable to the case when the meeting could not be held at the premises of the registered office at the time fixed because the premises were locked.

Where the plea is one of estoppel it must be substantiated clearly.[1]

View of the Allahabad High Court.

It has been held in *Sundar Das* v. *Dhanput Rai*[2] and *Iftikhar Ali* v. *Thakar Singh*[3] that the fact of the withdrawal by the vendee of the money paid in the Lower Court under its decree by the pre-emptor does not debar the vendee from appealing against that decree. The same view has been taken by the Allahabad High Court in *Qurat-un-nissa Bibi* v. *Abdul Rashid*.[4] Where before purchase and issue of notice the vendee asked the pre-emptor whether he would object to his buying the land in dispute to which pre-emptor replied that he had no objection and that the vendee was at liberty to make the purchase. *Held* that the single reply did not constitute estoppel.[5] In *Sukhdeo Singh* v. *Mathura Singh*,[6] one of the issues before the Subordinate Judge was "are the plaintiffs estopped from urging that Mst. Ganga was the Karewa wife of Shaloo Singh". The finding was "Yes". The learned Subordinate Judge based his finding on the fact that the defendants had been treated as or admitted to be members of the family on various occasions. *Held* that such treatment and admission were not representations on which estoppel could be based. Where a person having right either to object under rule 58 or rule 100, Order XXI, C.P.C., chooses the latter course there is no question of estoppel.[7] If the owner of the railway allows the railway to deal with third persons as a legal entity and to enter into a contract on that footing, he cannot, when a suit is brought on such contract, assert his position as the proper party nor can the railway administration repudiate its liability to be sued.[8] In *Kishorilal* v. *Mst. Chaltibai*,[9] their Lordships held that the correct rule of estoppel applicable in the case of an adoption is that it does not confer any status. It only shuts out the mouth of certain persons if they try to deny the adoption, but where both parties are equally conversant with true state of facts, the doctrine has no application.[10] In *Dhanrai* v. *Sonibai*,[11] the plaintiff had brought the appellant from his village, and been a witness to the deed of adoption. The adopted son was allowed to perform the cremation ceremony of the adoptive father, and at the time of the marriage he was represented to be the adopted son of the deceased. The Privy Council held that these facts did not create an estoppel.

Lahore High Court.

Allahabad High Court's view.

Supreme Court's view; Adoption rule of estoppel applicable.

Privy Council on estoppel by conduct.

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1. Abbas Khan *v.* Mohammad Ali, A.I.R. 1934 All. 300 at p. 309 : 1934 A.L.J. 92 : 151 I.C. 793.
2. 16 P.R. 1907 : 127 P.W.R. 1907 : 104 P.L.R. 1901.
3. 83 P.R. 1912 : 15 I.C. 347 : 170 P.W.R. 1912.
4. A.I.R. 1926 All. 661 : I.L.R. 48 All. 616 ; Mehdi *v.* Mst. Nadran, A.I.R. 1929 Lah. 137 at p. 138 : 111 I.C. 814.
5. Bhagat Singh *v.* Hukam Singh, A.I.R. 1947 Lah. 299 at p. 300.
6. A.I.R. 1933 Lah. 412 at p. 414.
7. Mohammad Hayat *v.* Ghulam Nabi, A.I.R. 1931 Lah. 598 at p. 598 : 32 P.L.R. 390 : 132 I.C. 201.
8. Gaekwar Baroda State Ry. *v.* Sheikh Habib Ullah, A.I.R. 1934 All. 740 at pp. 746-47 : 1934 A.L.J. 1093 : I.L.R. 56 All. 828.
9. A.I.R. 1959 S.C. 504.
10. Gundicha Rautho *v.* Eswara Rautho, A.I.R. 1965 Orissa 96 at p. 97 : 31 Cut. L.T. 272.
11. 52 I. App. 231 : A.I.R. 1935 P.C. 118 ; Jamnadas *v.* Mst. Radhabai, A.I.R. 1963 M.P. 348 at pp. 350-51 : 1963 J.L.J. 817.

Sarat Chunder Dey v. *Gopal Chunder Laha.*

The law of estoppel by conduct has been expounded by the Privy Council in the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*.[1] In this case one Ahmed Hossein sued for the recovery of his share in the property of his father Umed Ali Shah. The defendants pleaded that the property had been mortgaged to their predecessors-in-title by Arju Bibi, the wife of Umed Ali Shah, who was the true owner of the property. Further, they pleaded that the plaintiff, Ahmed Hossein, having represented his mother, Arju Bibi, in the mortgage transaction, was thereby estopped from claiming the property as his own. Their Lordships of the Privy Council held that Ahmed Hossein was estopped from recovering his share of the property.

"Their Lordships are very clearly of opinion", it was said, "that these actings on the part of Ahmed create an estoppel against him, or any claiming in his right, from disputing the title of Arju Bibi to grant the mortgage to Kalimuddin. They amounted to a distinct declaration by him to the lender that the *hiba* in favour of Arju Bibi was a valid deed, or in any view, that if the document was open to legal objections, Ahmed as the person entitled to challenge the deed, waived his right to do so and consented for his interest to represent and to hold the *hiba* as valid and consequently as giving a legal right to Arju Bibi as the proprietor, to grant the mortgage. There was a distinct representation by Ahmed professing to act as his mother's attorney, that she was owner in possession, having a good title to create a valid mortgage affecting the lands. It is, in their Lordships' opinion, impossible to take any other view of the effect of Ahmed's conduct in the whole transaction, and particularly his signing the mortgage and taking payment of the money : and it is equally clear that the transaction was concluded on the footing of that representation, and that the creditor was thus induced to lend the money on the security of the mortgage.

Applicability of Sec. 115, Evidence Act.

"In this stage of the facts the terms of Sec. 115 of the Evidence Act directly apply to the case, for Ahmed, having by his acts and the declaration which his acts involved, intentionally caused the lender to believe that Arju Bibi, as proprietor under the *hiba*, was entitled to grant the mortgage, neither he, or his representative, the plaintiff, can be allowed to deny the truth of what was thereby represented, believed, and acted on.

Estoppel under Evidence Act.

The section of the Evidence Act by which the question must be determined does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension... What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*. It may in the result be unfortunate for

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1. L.R. 19 I.A. 203 : I.L.R. 20 (1892) Cal. 296 (P.C.).

him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as was intended he should do. The general principle is thus stated by the Lord Chancellor (Compbell), with the full concurrence of Lord Kingsdown, in the case of *Cairncross* v. *Lorimer*[1] : "The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct...

Cairncross v. *Lorimer*

There is no ground for the suggestion that the person making the presentation which induces another to act must be influenced by a fraudulent intention, to be found either in the case just referred to, or in the leading authorities of *Pickard* v. *Seors*,[2] *Freeman* v. *Cooke*[3] and *Cornish* v. *Abington*.[4] In the more recent case of *Carr* v. *London and North-Western Railway Company*,[5] in the Appellate Court of the Common Pleas, the Master of the Rolls (Lord Esher) pointed out that no doubt in certain cases where estoppel is successfully pleaded against a party seeking to act at variance with his previous conduct or declarations on the faith of which another has acted, the original statement may have been made fraudulently, but as his Lordship explained, a fraudulent intention is by no means necessary to create an estoppel, and accordingly he mentions other cases or classes of cases in which the determining elements is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the representation as having caused another to act on the faith of it. This case was approved of in the much later case of *Seton Laing & Co.* v. *Lafone*.[6]

Representation of a person.

Estoppel against party seeking to at variance.

Seton Laing & Co. v. *Lafone.*

Reference has already been made to the cases of *Ganga Sahai* v. *Hira Singh* (1880), in the High Court of Judicature at Allahabad,[7] and *Vishnu* v. *Krishnan* (1883), in the High Court at Madras.[8] In the former of these cases it was laid down by a majority of the Judges that if the element of fraud be wanting there is no estoppel. It was expressely said : "There must be deception, and change of conduct in consequence." The latter case was one in which as adoption having taken place, the alleged adopted son claimed to set aside a deed of gift of certain property by his adoptive father, granted by him late in life in favour of a stranger. The deed was liable to be set aside as *ultra vires* if the adoption was valid; but it was maintained separately that in any view the defendant was estopped from maintaining the invalidity of the adoption by a series of acts on the part of the

Some Indian cases referred by the Privy Council.

1. (1860) III Macqueen's House of Lords cases, p. 829.
2. 6 A. & E. 469.
3. 2 Ex. 654.
4. 4 H. & N. 549.
5. (1875) L.R. 10 C.P. 316.
6. (1887) L.R. 19 Q.B.D. 68.
7. I.L.R. 2 All. 809.
8. I.L.R. 7 Mad. 3.

adopting father. In the end the adoption, which was that of a sister's son, was held, after a proof of the customary law of Malabar, to have been valid; but before allowing the proof the Court decided that the case of estoppel failed.

Luchman Chunder v. *Kalli Churn*

It would be most difficult to reconcile this decision with that of the case of *Luchman Chunder* v. *Kalli Churn*.[1] But apart from this, the Court seems to have taken the view that in order to create estoppel, the representations founded on must have been made with an intention to deceive and an opinion was indicated that the law of estoppel under the Indian Evidence Act in some respects differed from the law of England. It was there said (I.L.R. 7 Mad. 3) : "The term 'intentionally' was, no doubt adopted advisedly. By the substitution of it for the term 'wilfully' in the rule stated in *Pickard* v. *Sears*,[2] and explained in *Freeman* v. *Cooke*,[3] and *Cornish* v. *Abington*,[4] it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it has been stated by the English Courts." Their Lordships are unable to agree in this view. Baron Parke, in the case of *Freeman* v. *Cooke*,[5] in effect stated that the term "wilfully" used in the previous case of *Pickard*[6] was really equivalent to "intentionally". A person who, by his declaration, act or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so "intentionally" within the meaning of the statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. And to this view effect was given in the case of *Cornish* v. *Abington*[7] and the later cases.

Difference between Indian Evidence Act and law of England.

"Wilfully" and "intentionally"; meaning of.

Their Lordships have already said enough to make it clear that they differ from the views to that effect expressed in that case and in the case of *Ganga Sahai* v. *Hira Singh*.[8]

Intention.

As already stated, the plaintiff further maintained that the appellants could not avail themselves of the plea of estoppel against him because before their predecessors made the purchase under the mortgage sale they were aware that it had been held by the High Court in another suit that the *hiba* which was the foundation of the title under which they purchased was invalid; but as already explained their Lordships have no difficulty in repelling this contention. In any question with Ahmed or his representative Kalimuddin had obtained a valid mortgage and as he had himself a valid title so he could give a good title to a purchaser under a mortgage sale, whatever might be the state of knowledge of the person purchasing. Their Lordships therefore are clearly of opinion that the appellants are not precluded from maintaining, as they do successfully, that the plea of estoppel is good against Ahmed, and consequently good against the plaintiff, in so far as regards the share of the property which Ahmed might have claimed as succession.

Plea of estoppel not maintained.

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1. 19 W.R. 292.
2. 6 A. & E. 469.
3. 2 Ex. 654.
4. 4 H. & N. 549.
5. 2 Ex. 654.
6. 6 A. & E. 469.
7. 4 H. & N. 549.
8. I.L.R. 2 All. 809.

Conduct

As to estoppel by conduct, *see* also the follwing cases : *Hardeo Baksh* v. *Jawahir Singh*[1] (Oudh *talukdar* held to have consented by his acts and declarations to hold the estate in trust for the joint family), *Ram Dial* v. *Mahtab Singh*,[2] *Seva Ram* v. *Ali Baksh*[3] (Privy-in-title), *Parmanundass Jibandas* v. *Venayekrao Wassudeo*,[4] *Sarkies* v. *Prasannomayi Dasi*[5] (recital in deed as against purchaser). As to a mortgagee, who has brought the mortgage property to sale in execution of a decree made upon his mortgage, being estopped from saying that his own interest therein as well as that of the mortgagor did not pass by the sale, so as to enable the purchaser to take free of encumbrance, see *Khevraj Jasrup* v. *Lingaya*,[6] *Sheshagiri Shanbhog* v. *Salavdor Vas*,[7] *Abdula Saiva* v. *Abdula*,[8] *Narsidas Jitram* v. *Joglekar*,[9] *Mumtazuddin Mahomed* v. *Rajkumar Das*,[10] *Bhagabati Dasi* v. *Shamacharan Basu*,[11] *Ramu Naikan* v. *Subbaraya Mudali*,[12] *Ramanath Das* v. *Baloram Phukan*,[13] *Agrawal Singh* v. *Faujdar Singh*[14] (conduct, though not amounting to an estoppel, held sufficient to throw the burden of proof on the other side), *Mukundi Kuar* v. *Balkishen Das*[15] (on account stated balance found due to plaintiff, consisting of original debt and interest at 6 per cent. per annum and defendants, therefore, held estopped from disputing plaintiff's demand for interest at that rate, *Bishen Chand* v. *Rajendra Kishore Singh*,[16] utterers of a forged *hundi*, knowing it to be forged, estopped from setting up the forgery of the *hundi* as a bar to suit).

Originally the bar council by its notification dated 29th August, 1973 required that nomination papers were to be filed between 17th and 30th September, 1973 and polling was fixed for 5th and 6th November, 1973. But before the expiry of the period fixed for filing nomination paper the Bar Council altered dates thereafter nomination papers could be filed upto 31st October, 1973, as the date of polling was fixed for 7th and 8th January, 1974. Petitioners themselves filed nomination papers after 30th September, 1973 and contested the election held on 15th and 16th April, 1974. After context they were unsuccessful. It was held that they cannot turn round and contend that those who filed nomination papers after 30th September, 1973 had no right to contest the election.[17]

A's wife by a *kobala* sold a portion of certain property to *B*, and agreed if she sold the rest to sell it to *B*. *A* consented to and was a witness of *kobala*. After the death of his wife, *A* sold the rest of the property to another person. It was held that *A* was bound by the agreement contained in the *kobala*.[18]

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1. L.R. 61 A. 161.
2. I.L.R. 3 All. 701.
3. I.L.R. 3 All. 805.
4. 12 C.L.R. 92.
5. I.L.R. 6 Cal. 794.
6. I.L.R. 5 Bom. 3.
7. I.L.R. 5 Bom. 5.
8. I.L.R. 5 Bom. 8.
9. I.L.R. 4 Bom. 57.
10. 14 B.L.R. 408 : 23 W.R. 187.
11. I.L.R. 1 Cal. 337.
12. 7 M.H.C.R. 229.
13. I.L.R. 7 Cal. 677 : 9 C.L.R. 233.
14. 8 C.L.R. 346 (P.C.).
15. I.L.R. 3 All. 328.
16. I.L.R. 5 All. 302.
17. Ravi Kiran Jain *v.* Bar Council of U.P., A.I.R. 1975 All. 190 at pp. 194, 195.
18. Kalinath Rai *v.* Bhubanesari Dasi, Sev. Rep. July-Dec. 1864, p. 207.

Conduct of trustee.

No person who has acquired property as a trustee can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust[1] affirming on appeal the decision of the High Court in *Srinivasa Moorthi* v. *Venkata Varada Ayyangar*.[2] A person who accepts a position conferred on him by a will cannot at the same time repudiate so much of the will as conveys an interest to another person.[3] *A*, who had purchased from *X*, brought a suit against *B* for ejectment alleging that *B* was in wrongful possession of his land. *B* alleged that she purchased the property from *X* previously ignorant of the fact that she had no title and that in reality *P* was the true owner. Subsequently *B* purchased from *P*. *A* contended that even if *X* had no title, *B* by reason of having obtained possession from *X* was estopped from alleging that *A* had no title. *Held* that *X* having no title the conveyance to *A* was invalid, and the rule of estoppel only existed so long as the grantee claimed under the title of the grantor.[4] Where the plaintiff as the result of an arbitration received his full half of the property belonging to his father upon the footing of the exclusion of the mother; *held* that he was estopped from claiming his share therein through his mother.[5]

In *B.P. Sinha* v. *Som Nath*,[6] the appellant vacated the accommodation which was earlier in his tenancy at the request of the landlord. It was unequivocally provided in the landlord's letter that the appellant could live in the new premises as long as he desired. The accommodation which was formerly in the tenancy of the appellant was governed by the U.P. Rent Control Act whereas the accomodation to which he shifted on the landlord's request was built in 1951 and as therefore exempt from the operation of the Rent Control Act.

Held that having on the request of the landlord altered his position and vacted the portion in his tenancy and shifted to the one in dispute, the landlord was estopped in law from taking advantage of this unfortunate position and thereby seek to eject the appellant.

Conduct formed on a mistake of fact; effect.

No person can be estopped either by attornment, pleading or other conduct where the conduct constituting the estoppel was formed on a mistake of facts.[7]

Representation by a party as to existence of facts or position in law, on which jurisdiction of Court is dependent, does not estop Court from determining question of jurisdiction.

In *Rukmini Debi, Smt.* v. *Smt. Mihir Bala Sarkar*,[8] after citing *Sales Tax Officer, Banaras* v. *Kanhaiya Lal*,[9] *Mahabir Singh* v. *Narain Tewari*[10] the High Court observed :

"On a review of the decisions cited above it appears that—

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1. Srinivas Morthey *v.* Venkata Varada Iyengar, 15 C.W.N. 741 (P.C.).
2. I.L.R. 29 Mad. 239.
3. Durga Das Khan *v.* Ishan Chandra Dey, I.L.R. 44 Cal. 145.
4. Rup Chand Ghose *v.* Sarveswar Chandra, I.L.R. 33 Cal. 915.
5. Mohammad Wali Khan *v.* Mohammad Mohiuddin Khan, 24 C.W.N. 321 (P.C.).
6. A.I.R. 1971 All. 297.
7. Sukumar Chatterjee *v.* Kiran Chandra Mitter, A.I.R. 1964 Cal. 439 at p. 442.
8. A.I.R. 1977 Cal. 161.
9. A.I.R. 1959 S.C. 83.
10. A.I.R. 1931 All. 490.

(*a*) Estoppel arises when a party by act and conduct makes a representation to the other party of certain state of facts which is acted upon by such party to his detriment.

(*b*) Estoppel may even be available when there is a representation by one party in regard to a position in law which is accepted and acted upon by the other to his detriment.

(*c*) When however the jurisdiction of a court or tribunal by statute is dependent on the existence of a certain state of facts or position in law a representation by one party to the other about the existence of a certain state of facts or position in law by themselves will not confer jurisdiction on the Court or the Tribunal to adjudicate upon the controversy involved.

(*d*) The Court or the Tribunal in such circumstances will have to determine on materials before it whether it has the jurisdiction to determine the controversy and there can be no estoppel on Court or Tribunal by conduct or act of parties. In course of such adjudication the parties will be required to produce evidence relevant to the question of jurisdiction whereon the Court or Tribunal will decide if it has the jurisdiction to adjudicate the matters in controversy."

In the context of the aforesaid propositions it cannot be said that the petitioner is barred by the doctrine of estoppel to produce before the Court, as in the instant case, relevant evidence which may have a bearing on the question of its jurisdiction on the application for pre-emption.[1]

Allotment of land with the consent of the Gaon Sabha Pradhan—Whether Gaon Sabha could be said to be estopped from challenging the allotment order ?

Where it was not the case of the petitioner that the Pradhan of Gaon Sabha was authorised by the Land Management Committee of the Gaon Sabha to make statement that the land of Gaon Sabha could be allotted before the consolidation authorities nor requisite sanction was obtained of the Sub-Divisional Officer for making that statement with regard to the allotment of land in question which belonged to the Gaon Sabha to the opposite party, it was held that being so the Gaon Sabha could not be said to be estopped from challenging the allotment order which was *per se* illegal and without jurisdiction.[2]

The conduct by itself is no proof of the fact, unless the conduct amounted to a waiver or acquiescence.[3]

64. Estoppel by deed and conduct.—The plaintiff filed the suit in 1955, against the first defendant as trustee of the estate was estopped by the deed and conduct of his father from claiming the suit properties.

Held that the plaintiff's father had settled the disputes and got his share of the sale proceed in the form of immovable properties worth Rs. 15,000. The plaintiff could not, therefore, charge the first defendant for committing the breach of trust, nor follow the alleged trust properties in the hands of the purchasers.[4]

If the drawee accepts the documents and signs acceptance on the bill, as in the present case, the drawee clearly makes the representation of acceptance not only by signing the bill but also by his conduct in accepting the documents and

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1. Rukmini Debi, Smt. *v.* Smt. Mihir Bala Sarkar, A.I.R. 1977 Cal. 161 at p. 164.
2. Chandra Bhan *v.* Gaon Sabha Aghiana Pargana and Tahsil Nakur District Saharanpur, 1984 All. L.J. 66 at p. 67.
3. Bihar State Board of Religious Trust *v.* Acharya Mahanth Amrit Das, A.I.R. 1974 Pat.. 95 at p. 101.
4. Joseph Carlos Xavier Louis Anthony Benedict Aldo Costa *v.* Stanislaus Costa, A.I.R. 1968 Mad. 161 at p. 168.

taking delivery of the goods and would, therefore, be estopped from denying the acceptance after having taken advantage of the documents. In such a case, there would be acceptance by conduct by virtue of estoppel and this conduct is in addition to the signature on the face of the bill.[1]

Payment of the mortgage money to some of the several co-mortgagees without the consent of the other co-mortgagees is not a complete discharge of the mortgage debt binding on all the mortgagees. Co-mortgagees receiving the money are not estopped by their act and conduct from pleading that the redemption was erroneous.[2]

65. *Benami*—Real and ostensible owner.—When the real owner of immovable property allowed another person (the *benami* purchaser) to hold himself out to the world as the actual proprietor and so to induce parties ignorant of the real state of things to lend money on the security of the property, he was not permitted, on showing the actual state of the case, to recover the sale-proceeds of the property (when sold for arrears of revenue), which, in execution of a decree against the *benami* holder, the creditor had taken out of the Collector's Treasury.[3] Certain landed property was attached in execution as belonging to *A*, upon which *B*, his mother, *C*, his brother's widow, came forward and claimed the property as their own, in consequence of which it was released from attachment. *B* and *C* were afterwards allowed to hold themselves out to the world as the real owners of the property, and they disposed of it by sale and otherwise, with objection from *A*, to persons who transferred to *D*. It was held that *D*, as a vendee for valuable consideration deriving title from the ostensible owners of the property was entitled to protection from the subsequent acts of the real owner and his heirs.[4] *A* was the real owner of certain property, but suffered *B* to hold *benami* and to appear to the world as the real owner. *B* stood by, while *C* acting as owner made a mortgage of the property. *B* also became a witness to the mortgage-deed. *A* afterwards sued to recover the property. He was held bound by *B*'s conduct as he had allowed *B* to be the ostensible owner.[5] Where property has been transferred or otherwise disposed of *benami* in fraud of creditors, the real owner of his representatives will not be permitted to succeed in having the transfer or other disposition of the property set aside.[6] But in *Mohadaji Gopal Baklekar* v. *Vothal Ballal*,[7] where the transferees had accepted repayment of Rs. 750 as mortgages, *B*, a *darpatnidar*, defeated a suit for rent brought by *A*, his *patnidar* by pleading that he had transferred in *darpatni* interest to his wife and son. *A* then sued the wife and son, obtained a decree, brought the *darpatni* interest to sale in execution, and purchased it himself. He then as *darpatnidar* sued the tenant under him for rent, whereupon *C* intervened, claiming title to the *darpatni* under a mortgage from *B* made after the dismissal of *A*'s suit against *B*, alleging that *B*'s wife

Case law.

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1. Union Bank of India *v.* Swastika Motors, A.I.R. 1983 Delhi 240 at p. 246 ; *see* also Manoj Kumar Gupta *v.* Co-ordinator, Admission Committee Motilal Nehru Regional Engineering College, Allahabad, A.I.R. 1985 All. 257 at p. 258.
2. Ambe Lal *v.* Phina, A.I.R. 1974 H.P. 11 at pp. 11-12.
3. Nanda Lal *v.* Taylor, 1 Jur. N.S. 55; Bama Sundari Debya *v.* Rashmani Debya, 4 W.R. 36.
4. Rennie *v.* Ganga Narain Chowdhri, 3 W.R. 10.
5. Brajonath Ghosh *v.* Kailsh Chandra Banerji, 9 W.R. 593 ; *see* also Nidhi Singh *v.* Bissonath Das, 24 W.R. 79 and Surab Narain Chaudhri *v.* Sheo Gobind Pandey, 11 B.L.R. App. 29.
6. Lakhi Narain Chakravartti *v.* Taramani Dasi, 3 W.R. 92 (suit to be aside a *mukarrari* lease created *benami* in fraud of creditors); Parikhit Sahu *v.* Radha Kissen Sahu, 3 W.R. 221 (*benami* conveyance with same object); Bhawani Persad *v.* Ahidan, 5 W.R. 177 *benami* transfer to wife) ; Raushan Bibi *v.* Karim Baksh, 4 W.R. 12 (suit by heirs to obtain property transferred to wife for fraudulent purpose) ; Rattan Day *v.* Rai Gauri Shankar, 4 W.R. 72.
7. I.L.R. 7 Bom. 78.

and son were mere *benamidars*, and further stating that he had completed his title by a purchase in execution of a decree obtained on his mortgage. It was held that *C*, who would admittedly have been estopped as mortgagee by the plea of his mortgagor was in no better position by reason of his purchase in execution.[1] *A*, a trustee of land alleging it to be his own property, mortgaged it to a person. The mortgagee subsequently brought the land to sale in execution of decree obtained on the mortgage; and it was purchased by *B*. *A* thereupon sued *B* to recover the land on the ground that it was trust-property and he had no power to transfer it. It was held that *A* was estopped from recovering possession of the land.[2] In *Ram Pershad* v. *Shiva Prasad*[3] fictitious sale of certain property had been executed in favour of persons residing in foreign territory in order to evade process for the recovery of arrears of revenue. The revenue authorities assumed the management of the property farmed it, paid off all arrears and restored possession to the real owners. In a suit by the vendee under the fictitious sale to recover possession, it was held that the maxim in *pari delicto est conditio possidentis et defendentis* applied, although the real owner after passing the property by a fictitious sale, could not come into Court to recover it; and that the case was also within the rule that relief will be granted where public policy will be promoted, the public policy here being the policy which Government through the revenue authorities had decided to be best for the estate. Where land or other immovable property has been sold in execution of a decree or for arrears of Government revenue the law will not allow a stranger to claim the property on the ground that the certified purchaser merely purchased *benami* on his account; and any suit brought on such an allegation must be dismissed with cost. When a husband during his life time always represented that certain immovable property was his wife's, the purchasers from her could not after his death be equitably turned out of the property in favour of his heirs. The heirs would be bound by the father's misrepresentations.[4]

The following cases afforded other instances of estoppel by conduct; *Bhagwan Das* v. *Apuch Singh*[5] (Real owner, placing indicia of ownership in the hands of another, bound by alienation made by the latter, unless he can show that alienation was made without his acquiescence and that alienee took with notice of such fact) ; *Boileau* v. *Miller*[6] (True owner leaving his goods in the possesion, order or disposition of another person under circumstances enabling the latter by means of them to obtain false credit).[7] In *Ram Kumar Kundu* v. *McQueen*,[8] Privy Council said : "where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct or constructive notice of the real title, or that there existed circumstances which ought to have put him upon an

Cases and instances of estoppel by conduct.

Privy Council's view.

Suit by one of other's benefit.

1. Poreshnath Mukerji *v.* Anathanath Deb, L.R 9 I.A. 147 : I.L.R. 4 Cal. 783 ; Ananth Nath Deb *v.* Bishtu Chunder Ray, I.L.R. 9 Cal. 265.
2. Gulzar Ali *v.* Fida Ali, I.L.R. 6 All. 24.
3. 1 N.W.P. Rep. 71.
4. Lachman Chandra Gir Gossain *v.* Kali Charan Singh, 19 W.R. 292. This case was followed in Chandra Kumar *v.* Harbans Sahai, I.L.R. 16 Cal. 137, in which the facts were similar.
5. 10 W.R. 185.
6. 10 C.L.R. 591.
7. Beni Persad *v.* Man Singh, 8 W.R. 67.
8. 11 B.L.R. 53.

inquiry that, if prosecuted, would have led to a discovery of it."[1] Where a suit is prosecuted by one person for the benefit of another who is the real party in interest, the latter is bound by the judgment and it makes no difference that there are nominal parties on the record or that the action is prosecuted or defended by a nominal party.[2] *See* however, *Mohunt Das* v. *Nilkomul Dewan*,[3] in which a son against whom a suit ought to have been instituted conducted on behalf of his mother a suit wrongly brought against her, it was held that the decree in that suit was not binding on the son, and did not estop him, in a subsequent suit against him, from contesting the validity of the decree. *A* having fabricated a deed of sale to himself of certain property to his brother, was thereby enabled to appear as owner of the property and deceive *B* to whom he conveyed it for full consideration. The deed of sale to *A* was set aside as fraudulent. *A* on the death of his brother succeeded to his rights by inheritance. *A*'s heirs subsequently sued to recover the property conveyed to *B*, but it was held that *A* claiming as heir to his brother could not set up his own fraud and forgery against *B*, whom he had deceived thereby.[4]

66. Adoption.—The doctrine of estoppel can be invoked to prevent a challenge to the adoption by one who had induced the adopted boy to change his position so irrevocably as to render it impossible for him to revert to his original position in his natural family.[5]

The doctrine was given effect to in *Gopalayyan* v. *Raghupatiayyan*[6] where the adoption had been recognized for more than 40 years and in *Santappayya* v. *Rangappayya*[7] where the adoption was accepted and acted upon for a quarter of a century.

A mere acquiescence in an adoption or a mere presence at an adoption does not create an estoppel.[8]

Case law on adoption and applicability of doctrine of estoppel.

An adopted son sued his adoptive father's brother for partition of the family property, the latter disputed the adoption, but it was decided that he was estopped from doing so, as he had actively participated in the adoption, had by many acts signified his complete acquiescence therein, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption.[9] The case of *Dharm Kunwar* v. *Balwant Singh*[10] went up the Judicial Committee[11] and their Lordships held that the estoppel did not bind any one claiming by an independent title. The fact that the respondent had on the death of his alleged adoptive mother claimed to succeed her as the adopted son of her deceased husband, and so secured the succession to which the

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1. *See* also Mohammed Mozuffer Hossein *v.* Kishori Mohan Roy, I.L.R. 22 Cal. 909 (P.C.).
2. Ram Behari Sarkar *v.* Surendra Nath Ghose, 19 C.L.J. 34.
3. 4 C.W.N. 283.
4. Amir Ali *v.* Syef Ali, 5 W.R. 289 ; *see* also Radhakissen *v.* Sharifunnissa, (1864) W.R. 11.
5. Laxman Gandiji Mali *v.* Mst. Bayabai, A.I.R. 1955 Nag. 241 at p. 243 : I.L.R. (1955) Nag. 656 : 1955 N.L.J. 785.
6. 7 M.H.C.R. 250.
7. I.L.R. 18 Mad. 397.
8. Ramachandra Narayan Badle *v.* Murlidhar Yeshwant Khambekar, A.I.R. 1938 Bom. 20 at p. 23 : 39 Bom. L.R. 599.
9. Sadashiv M. Ghate *v.* Hari M. Ghate, 11 Bom. H.C.R. 190 ; *see* also Dharam Kunwar *v.* Balwant Singh, I.L.R. 30 All. 549 and the cases referred to in this case ; Sunderbai *v.* Devaji Shankar, A.I.R. 1954 S.C. 82 ; Permanand *v.* Laxminarain, A.I.R. 1955 M.B. 129 at p. 133 ; Dhanraj Joharmal *v.* Soni Bai, A.I.R. 1925 P.C. 118 : 23 A.L.J. 273 : 27 Bom. L.R. 837 : 52 I.A. 231 : 49 M.L.J. 173 : 1925 M.W.N. 692 : 30 C.W.N. 601.
10. I.L.R. 30 All. 549.
11. Dharm Kunwar *v.* Balwant Singh, I.L.R. 34 All. 398 (P.C.).

predecessor in title of the appellant, was then entitled, though he did not oppose the respondent's claim did not estop the apellant from denying the alleged adoption in this suit.[1]

A Hindu father adopted, a son, and afterwards, adopted a second son, such second adoption being, however, invalid by Hindu law. There, first adopted son, after he came of age, acquiesced in a division of the property made by the father between his two adopted sons. It was held that, although such first adopted son was bound by this acquiescence with regard to the property of which the father had the power of disposing by an act *inter vivos* without his consent, he was not bound thereby as to the disposition of the ancestral property.[2]

H, a Hindu died leaving a minor son *A*, three daughters, *B*, *C* and *D*, and a widow *E*. After his death and that of *A*, the widow adopted a son under an alleged power conferred by will. *B* subsequently bore a son, and brought a suit to establish this son's rights as heir to the property and to set aside the adoption. It was contended that she had assented to the adoption. It was held that, even if it were so, her conduct in this respect could not prejudice the rights of her son, who was at the time unborn.[3]

A adopted *B* in the belief that the adoption was valid in law. In consequence of the adoption and the subsequent conduct of *A*, *B* was induced to abstain from claiming a share in the heritance of his natural family. *A* was not estopped from impugning the validity of the adoption.[4] The observation of Turner, C.J., in the above-mentioned case as to the object of the use of the word "intentionally" in Sec. 115 have been dissented from by the Privy Council in *Sarat Chunder Deb* v. *Gopal Chunder Laha*.[5]

Suit to establish validity of adoption.

When it was shown that the defendant had taken the palintiff in adoption, brought him up and married him as the adopted son of her husband, and had put herself forward as his mother, it was held that she was estopped from denying the validity of the adoption.[6] One *D* was adopted by a widow. A suit questioning the adoption was filed by a reversioner *P* after more than 15 years. *P* never accepted the adoption of *D*. *Held* that *P* was not concluded by any rule of law from questioning the adoption of *D*.[7]

Presence or subsequent acquiescence; adoption.

P's presence at the adoption or his subsequent acquiescence in the adoption cannot estop him from challenging its validity.[8] As held by the Privy Council in *Dhanraj Joharmal* v. *Soni Bai*,[9] even if it be assumed that *P* represented that *D* could be validly given in adoption there is no representation of a fact to constitute an estoppel under Sec. 115, Evidence Act, 1872. Similarly his subsequent conduct in recognizing *D* as *S*'s adopted son for a number of years, though giving rise to an inference that

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1. Hari Shankar *v.* Lal Raghuraj Singh, I.L.R. 29 All. 519.
2. Rangama *v.* Atchama, 4 M.I.A. 1.
3. Tarini Charan Chaudhri *v.* Saroda Sundari Dasi, 3 B.L.R. (A.C.) 145.
4. Ernajoli Illath Vishnu Nambudri *v.* Eranjoli Illath Krishna Numbudri, I.L.R. 7 Mad. 3 (F.B.).
5. L.R. 19 I.A. 203 : I.L.R. 20 Cal. 296.
6. Rajvji Venayyakrav Jagannath Shankar Sett *v.* Lakshmibai, I.L.R. 11 Bom. 381 ; *see* also Kannamal *v.* Virasami, I.L.R. 15 Mad. 486.
7. Dwarka Nath *v.* Lalchand, A.I.R. 1965 S.C. 1549 at p. 1553 : 1966 A.L.J. 129.
8. Ram Chandra *v.* Murlidhar, A.I.R. 1938 Bom. 20 : 173 I.C. 36 : 39 Bom. L.R. 599.
9. A.I.R. 1925 P.C. 118 : 87 I.C. 357 : 52 I.A. 231 : I.L.R. 52 Cal. 482 : 21 N.L.R. 50 (P.C.).

the conditions necessary for an adoption are duly fulfilled, does not operate as an estoppel. He cannot on that account dispute the fact of the adoption, but its legality cannot be established by mere estoppel.[1]

67. Conduct by signing a document as a witness.—The attention of a deed proves no more than that the signature of an executing party had been attached to a document in the presence of a witness.[2] As observed by the Lordships of the Privy Council, it—

> "does not involve the witness in any knowledge of the contents of the deed, nor fix him with notice of its provisions."[3]

Mere attestation whether consent.

Mere attestation of a deed does not necessarily import consent.[4] But it is possible that an attestation may take place in circumstances which would show that the witnesses did in fact know of the contents of the document.[5]

Attestation and knowledge of contents of the deed.

Attestation of a deed does not by itself estop a person attesting from denying that he knew of its contents or that he consented to the transaction which it effects.[6] The question whether an attestation would be held to imply an assent is a question of fact and must be determined with reference to the circumstances of each case.[7]

Where the plaintiffs have not been able to prove positively that the defendant who signed the document as a witness knew the contents of the sale-deed when signing it, there is no estoppel against the defendant.[8]

A Hindu widow sold a portion of the property by an instrument which recited that the sale was made for necessary purposes. This instrument was witnessed by the next (reversionary) heir to the property, and who afterwards died. In a suit to set aside the sale brought by the heir next after him it was held that the assent of the first heir, signified by his witnessing the conveyance, was not in law conclusive on the question of necessity though was strong evidence of good faith.[9]

When it is held that the deed is void the party affected will not be precluded from recovering the property, merely by attesting the deed.[10]

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1. Trikangauda Mallangauda Kashigaudar *v.* Shivappa Patil, A.I.R. 1944 Bom. 40 at p. 45 : 45 Bom. L.R. 992 : I.L.R. (1943) Bom. 706.
2. Fazal Hussain *v.* Jiwan Shah, A.I.R. 1933 Lah. 551 at p. 553.
3. Banga Chandradhur *v.* Jagat Kishore, A.I.R. 1916 P.C. 110 : 36 I.C. 420 : 43 I.A. 249 : I.L.R. 44 Cal. 186 (P.C.) and Pandurang Krishnaji *v.* Markandeya Tukaram, A.I.R. 1922 P.C. 20 : 65 I.C. 954 : 49 I.A. 16 : I.L.R. 49 Cal. 434 : 18 N.L.R. 1 (P.C.).
4. Hari Kishan *v.* Kashi Prasad, A.I.R. 1914 P.C. 90 : 27 I.C. 674 : 42 I.A. 64 : I.L.R. 42 Cal. 986 (P.C.) ; Banga Chandradhur *v.* Jagat Kishore, *supra* ; Pandurang Krishnaji *v.* Merkandeya Tukaram, *supra*.
5. Chandra Nath *v.* Dasrath, A.I.R. 1935 Oudh 257 at p. 260.
6. Pandurang Krishanji *v.* Markandeya Tukaram, *supra* ; Banga Chandradhur *v.* Jagat Kishore, 21 C.W.N. 225 (P.C.).
7. Lakhpati *v.* Ramabodh Singh, I.L.R. 37 All. 350 : Chandra Dutt Missir *v.* Bhagwant Narain, 3 C.W.N. 207, referring to Rajlukhe *v.* Gakool, 12 W.R. 47 (P.C.) ; Mataden *v.* Mussoodun, 10 W.R. 293 ; Ram Chunder *v.* Haridas I.L.R. 9 Cal. 463 ; Imam Ali *v.* Baijnath, I.L.R. 33 Cal. 613 : 10 C.W.N. 551.
8. Haveli Shah *v.* Kalian Singh, A.I.R. 1933 Lah. 703 at p. 705.
9. Madhab Chandra Hajra *v.* Govind Chandra Banarji, 9 W.R. 350.
10. Rangaswami Gounder *v.* Marappa Gounder, A.I.R. 1953 Mad. 230 at p. 234 : (1950) 2 M.L.J. 506 : 65 L.W. 919 : 1952 M.W.N. 733.

Where the person attesting asserts the facts that are stated in the documents which he attested, it cannot be said he had no knowledge of the contents of the deed.[1]

When attestation operates as an estoppel against the attesting

As to the circumstances in which attestation of a document may operate as an estoppel against the person attesting, *see* the decision of the Privy Council in *Sarat Chundra Deb* v. *Gopal Chunder Laha*[2] and *Bhagwan Singh* v. *Ujagar Singh*[3] and the decision of the Patna High Court in *Janki Ram Sital Ram* v. *Chota Nagpur Banking Association Ltd.*[4]

It is clear that attestation in certain circumstances estop the person attesting from denying the authority of the executant to operate the document. This principle, however, has no application in a case where the executant himself could not be estopped from urging that the real nature of the transaction was that of a mortgage.[5]

In *Pandurang Krishanji* v. *Markandeya Tukaram*,[6] the Judicial Committee have observed that :

Privy Council view.

"....Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication any knowlege of the contents of the document...."

Attestion coupled with evidence of consent and acquiescence.

Of course, there may be cases in which attestation is made in circumstances when coupled with other evidence of consent and acquiescence in the execution of a document, it is relevant to the question whether the attesting witness had knowledge of the contents agreed to them. For instance, in *Bhagwan Singh* v. *Ujagar Singh*[7], their Lordships found that besides the fact of his attestation of the deed there was abundant evidence to prove *aliunde* that Bhagwan Singh had consented to and acquiesced in the execution of it. That was evidence to show that he not only consented to the transaction but took an active part in the consultations which resulted in the mortgage.[8]

Where a wife refused to execute the mortgage-deed but said that she would sign the bond as an attesting witness. *Held* she did not sign the deed in token of her agreement with the mortgage but as a witness.[9]

68. Consent of reversioner.—The consent of the reversioners must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interest.[10] To create an estoppel by reason of attestation, knowledge of the contents of the deed is essential.[11]

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1. Bhamba Ram Girdhari Lal *v.* Ram Puara Mal, A.I.R. 1930 Lah. 217 at pp. 217-18 : 116 I.C. 716.
2. I.L.R. 20 Cal. 296.
3. A.I.R. 1928 P.C. 20.
4. A.I.R. 1937 Pat. 169.
5. Jaggarnath Singh *v.* Butto Krishto Ray, A.I.R. 1947 Pat. 345 at p. 347 : 25 Pat. 666.
6. A.I.R. 1922 P.C. 20 : 65 I.C. 954 : 49 I.A. 16 : I.L.R. 49 Cal. 334 (P.C).
7. A.I.R. 1928 P.C. 20 : 107 I.D. 20 : 32 C.W.N. 538 (P.C.).
8. Mst. Jasodar Dusadhin *v.* Mst. Sukurmani Mehtrani, A.I.R. 1937 Pat. 353 at p. 356 : 170 I.C. 1005.
9. M.R.M. Firm *v.* Ma.E. Nyo, A.I.R. 1937 Rang. 293 at p. 298.
10. Hari Krishan Bhagat *v.* Kashi Pershad Singh, I.L.R. 42 Cal. 876 (P.C.) : 19 C.W.N. 370.
11. Kandasami *v.* Naglinga, I.L.R. 36 Mad. 564; Kanhulal *v.* Palusahu, 57 I.C. 353 (P.).

Case law.

The widow and mother of an adopted son divided the property of the adopted son between themselves and it was agreed betwen them that after their deaths both the shares would devolve by inheritance in the sons of the mother who were the natural brothers of the adopted son; the plaintiff's father was the only reversioner at the time of this deed and signed it signifying his concurrence : *held* that the division of the widow's life interest with the mother was an act which did not need the assent of the plaintiff's father and that therefore there was no estoppel on the reversioner and consequently none on his sons. In the same case the plaintiff's father signed another deed signifying his consent thereto in which it was stated that the collateral heirs of the original owner would not object to the transfer and it was held that the assent by the father as the collateral heir of the original owner would not estop the plaintiffs.[1] There were two sales by a widow; the first assented to by the daughters and attested by the next male reversioner, and the second was acquiesced in by the daughters and subsequently ratified by the then presumptive male reversioners; *held* that the plaintiff was estopped from questioning the sales as the reversioner.[2] The consent given by a reversioner *bona fide* and for good consideration is binding on persons claiming through him.[3]

Privy Council.

Madras.

Persons who claim under one who has obtained possession of property from a *mutwalli* cannot be permitted to deny that the *mutwalli* had a title to such possession when it was handed over.[4]

Bombay.

In the case of *Ramesh Chunder Chakravarti* v. *Sashi Bhushan Upadhya*,[5] the following propositions were laid down : "Where the alienation is made with the concurrence of or jointly with the then next reversioner, a presumption arises in favour of the validity of the transaction. The exact nature of this presumption is described in the case of *Devi Prasad* v. *Gola Bhagwat*.[6] The consent of persons who are the guardians of the widow..... indicates the propriety of the transaction....but the presumption is rebuttable. This follows from....*Bijoy Gopal* v. *Girinder Nath*[7] and *Rangaswami* v. *Nachiappa*[8]....The circumstances under which the consent was given must be carefully scrutinised, and if it transpires that the transaction was in essence a device to divide the estate with the reversioner, his consent must manifestly lose its probative force....The plaintiffs do not claim through their father but directly as reversioners to the estate of their uncle. The contrary view indicated in *Rangappa* v. *Kanti*,[9] *Muthuveera* v. *Vythinlinga*[10] and *Vinayak* v. *Gobind*,[11] possibly received some colour of support from the dicta in *Rupnarain* v. *Gopal*[12] and *Bajrangi* v. *Manokarnikar*,[13] but was contrary to the principle enunciated in *Bahadur* v. *Mohar*,[14]

Calcutta.

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1. Lala Rupnarain *v.* Gopal Devi, I.L.R. 36 Cal. 780 (P.C.).
2. Narayana *v.* Rama I.L.R. 38 Mad. 396 ; *see* the judgment of Sadasiva Ayar, J., where he considered the effect of attestation by a reversioner to a female's alienation.
3. Muthuveera *v.* Vaithilinga, I.L.R. 32 Mad. 206.
4. Mahomed Ibrahim *v.* Abdul Latiff, I.L.R. 37 Bom. 447.
5. 23 C.W.N. 1025.
6. I.L.R. 40 Cal. 721 (F.B.).
7. I.L.R. 41 Cal. 793 (P.C.).
8. 46 I.A. 72 : 23 C.W.N. 777.
9. I.L.R. 31 Mad. 366.
10. I.L.R. 32 Mad. 206.
11. I.L.R. 25 Bom. 129.
12. 36 I.A. 103 : I.L.R. 36 Cal. 780.
13. 35 I.A. 1 : I.L.R. 30 All. 1.
14. 29 I.A. 1 I.L.R. 24 All. 94.

and has now been definitely negatived by the Judicial Commitee in *Rangaswami* v. *Nachiappa*.[1] The plaintiffs are consequently not precluded by a rule of estoppel from disputing the validity of the alienation...."

Reversioner's suit.

While it is true that a reversioner's suit is a representative suit and after the reversion has opened all the reversioners are entitled to shares in accordance with law, no reversioner can be deemed to represent another person who disclaims to be a reversioner and positively contends that neither the plaintiff nor he is a reversioner to the estate of someone else. A representative suit of a reversioner cannot be extended to such an extent as to represent a person putting forth a claim adverse to the plaintiff-reversioner. In any case, the court cannot countenance such a reversioner's claim who takes such inconsistent positons and allows the parties to agitate their rights and arrive at a compromise on the basis of that representation. Having represented that he was not interested in claiming a share in any of the plaint schedule properties, it is not open to him to turn round and claim a share on the strength of the decree made at the instance of the plaintiff.[2]

Presumptive proof of necessity.

Attestation by the reversioner cannot be taken to be presumptive proof of necessity if the document contains no recital of the purpose for which the money was required.[3]

Where a widow demised her husband's property during her life time to her daughter and her husband the daughter's acquiescence for less than 12 years since the death of a widow, in the position that her husband was co-owner of the property does not deprive her of the reversionary rights.[4]

Consent of female reversioner.

Consent of a female reversioner is sufficient to preclude her from questioning the validity of alienation by widow.[5]

Where a reversioner for good consideration agrees not to lay claim to a property he must in equity be held bound by that agreement.[6]

In *Seetharamayya* v. *Chandrayya*,[7] it was observed as follows :

Lifetime of widow; presumptive reversioner has a *spes successions*.

"During the lifetime of the widow, a presumptive reversioner has only a *spes successionis* in the estate of the last male holder and he cannot, therefore, purport to convey the said interest or otherwise deal with it. But after succession opens or even during the widow's life time he may elect to stand by the transaction entered into by the widow or otherwise ratify it, in which case he would be precluded from questioning the transaction...A presumptive reversioner,....is precluded from questioning the transaction when succession opens and when he becomes the actual reversioner."[8]

This view was supported in principle by the decision of the Privy Council in *Kanhaiya Lal* v. *Brij Lal*,[9] which has been followed by the Allahabad High Court in *Moti Shah* v. *Gandharap Singh*.[10]

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1. 46 I.A. 72 : 23 C.W.N. 777.
2. Penumarthi Venkatrayudu *v.* Penumarthi, A.I.R. 1973 A.P. 96 at p. 98.
3. Satyanarayana *v.* Sajja Venkanna, A.I.R. 1933 Mad. 637 at p. 638.
4. Pappammal *v.* Alamelu Ammal, A.I.R. 1929 Mad. 467 at pp. 468-69 : 119 I.C. 152.
5. Tangeva Venkappa *v.* Govindappa Ayappa, A.I.R. 1928 Bom. 495 at p. 496 : 32 C.W.N. 699.
6. Raghubir Datt Pande *v.* Narain Datt Pande, A.I.R. 1930 All. 498 (2) at p. 502 : 1930 A.L.J. 1541.
7. (1954) 2 M.L.J. (Andh.) 162 at p. 167 : A.I.R. 1955 A.P. 68.
8. *See* also Dodda Subba Reddi *v.* Gunturu Govinda Reddi, A.I.R. 1961 A.P. 430 at p. 431.
9. A.I.R. 1918 P.C. 70 : I.L.R. 40 All. 487 : 45 I.A. 118 (P.C.).
10. A.I.R. 1926 All. 715 : I.L.R. 48 All. 637.

Where the next reversioner for a consideration relinquished his rights he cannot be permitted to go back upon his relinquishment.[1]

In *Dhyan Singh* v. *Jugal Kishore*,[2] the Supreme Court ruled that even if an award made is invalid, the persons who were parties to that award are estopped from challenging the validity of the award or from going behind the award in a subsequent litigation. In *T.V.R. Subbu Chetty's Family Charities* v. *M. Raghava Mudaliar*,[3] the Supreme Court ruled that if a possible reversioner enters into a transaction which settles his claim as well as the claim of the opponent at the relevent time, he cannot be permitted to go back on that arrangement when reversion actually opens.[4]

Widow's alienation.

In *Jagarlapudi Seetharamayya* v. *Sarvachandrayya*,[5] the Andhra Pradesh High Court was called upon to consider a claim somewhat similar to that made by plaintiffs 1 and 2. Therein the Court ruled that during the lifetime of the widow a presumptive reversioner has only a *spes secessionis* in the estate of the last male-holder and he cannot, therefore, purport to convey the said interest or otherwise deal with it. His rights in the property would be crystallized only after succession opens. But after succession opens or even during the widow's lifetime he may elect to stand by the transaction entered into by the widow or otherwise ratify it, in which case he would be precluded from questioning the transaction. Proceeding further, the Court enumerated the three classes of estoppels that may arise for consideration in dealing with reversioner's challenge to a widow's alienation. They are : (1) that which is embodied in Sec. 115 of the Evidence Act (2) election in the strict sense of the term whereby the person electing takes a benefit under the transaction and (3) ratification i.e. agreeing to abide by the transaction. A presumptive reversioner coming under any one of the aforesaid categories is precluded from questioning the transaction, when succession opens and when he becomes the acutal reversioner. But if the presumptive reversioner is a minor at the time he has taken a benefit under the transaction, the principle of estoppel will be controlled by another rule governing the law of minors. A minor obviously cannot be compelled to take the benefit ot a transaction which will have the effect of depriving him of his legal rights when the succession opens. But a minor can certainly after attaining majority ratify the transaction entered into on his behalf by his guardian. If he so ratifies the transaction entered into by his guardian and accepts the benefit thereunder, there cannot be any difference in the application of the principle of election. The effect would be the same. It is as if he was a major at the time the transaction was effected and the benefit was conferred on him. What he could not do at the time of the transaction must be deemed to have been done by him by his act of ratification. It may be that on attaining majority he has the option to disown the transaction and disgorge the benefit or to accept it and adopt it as his own. Whether after attaining majority the *quandam* minor accepted the benefit or disowned it, is a question to be decided on the facts of each case.[6]

69. Mutuality essential.—An estoppel must be mutual.[7] Every estoppel ought to be reciprocal, and this is the reason that a stranger shall neither take advantage of , nor be bound by, the estoppel.[8]

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1. Beni Madho *v.* Shambhu Nath, A.I.R. 1929 All. 196 at p. 198 : 114 I.C. 908.
2. 1952 S.C.R. 478 : A.I.R. 1952 S.C. 145.
3. (1961) 3 S.C.R. 624 : A.I.R. 1961 S.C. 797.
4. Krishna Beharilal *v.* Gulabchand, A.I.R. 1971 S.C. 1041 at p. 1044.
5. (1954) 2 M.L.J. 162.
6. S. Shanmugam Pillai *v.* K. Shanmugam, Pillai, A.I.R. 1972 S.C. 2069 at p. 2074.
7. 6 C.L.J. 621 at p. 627.
8. *Ibid.*, citing Ld. Coke, Concha *v.* Concha, 11 App. Cas. 541; Wood *v.* Davis 7 Cranch 271 (Amer.) ; Hughes *v.* Clarksville, 6 Peter 369 (Amer.) ; Goodman *v.* Niblack, 102 U.S. 556 at p. 562. (Amer.).

Estoppels operate equally and reciprocally.[1] The judgment and decree in a suit for partition, to which a prior mortgagee is not made a party, are not binding on the mortgagee. The mortgagee, in such in case, cannot take advantage of any finding in the said judgment. The estoppel must be mutual.[2]

70. Estoppels must be clear, precise, certain, free and without artifice.—Estoppels must be made out clearly.[3] An estoppel must be clear and non-ambiguous.[4] When an estoppel is pleaded against a party the facts relied upon, as leading to it, should be precise and unambiguous.[5] To create an estoppel against a party, his declaration, act or omission must be of an unequivocal and unambiguous character.[6] Those who rely upon a document as an estoppel must clearly establish its meaning ; if there is any ambiguity, the construction may be aided by looking at the surrounding circumstances.[7] It is not sufficient for an estoppel to say that it may well be doubted whether the plaintiff would have acted in the way he did, but for the way in which the defendant had acted. It must be found as a fact that the plaintiff would not have acted as he did.[8] The representation, to justify a prudent man in acting upon it must be plain, not doubtful, or matter of questionable inference. Certainty is essential to an estoppel.[9] An estoppel must also be free, voluntary and without artifice.[10] In a suit for pre-emption the defendant, in order to establish a plea of estoppel, has to prove that the property was offered to the plaintiff at a certain price and that he expressly consented to the purchase of the property by the defendant vendee.[11] Mere willingness to acquiesce in a sale unaccompanied by any waiver or any conduct which would operate as an estoppel, does not bar a claim to pre-emption.[12]

71. Form of representation.—The form of the representation may be oral or written (e.g. railway receipts).[13]

72. Representation.—Under Sec. 115 of the Evidence Act the representation which estops a person making it from acting contrary to it is one on the belief of which the other person acts in a manner he would not have done but for it and on believing it to be true.[14] The contention that the principle of estoppel has no application to a representation made under mistake has no substance. Similarly, a fraudulent intention is also not essential to create an estoppel.[15] As was pointed

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1. Wenman *v.* Mackenzie, 5 E. & B. 447 ; Petric *v.* Nuttal, 11 Exch. 569 and Gardner *v.* Sharp, 9 Fed. Cases 1196 ; *see* 6 C.L.J. 621 at p. 627.
2. 8 C.L.J. 478 : 13 C.W.N. 287 : *see* also 150 P.R. 1908.
3. J. Tweedie *v.* Poorno Chunder Gangooly, 8 W.R. 125.
4. Low *v.* Bouverie, 3 Ch. 105 at p. 113 ; *see* Mowji Shamji *v.* National Bank of India, I.L.R. 25 Bom. 499 at p. 516.
5. 3 Bom. L.R. 832 at p. 833.
6. 6 Bom. L.R. 864 at p. 867 : L.R. I.A. 157 at p. 161 ; and George White-church, Ld. *v.* Gavanagh and R., (1902) A.C. 117 at p. 145.
7. 13 B.L.R. 312.
8. Narsingdas Tulsiram *v.* Rahimanbai, I.L.R. 28 Bom. 440 at p. 446 ; 6 Bom. L.R. 440.
9. *Per* Russel, J., L.W. Rivett Carnac *v.* New Mofussil Company, I.L.R. 26 Bom. 54 at p. 75 : 3 Bom. L.R. 846 at p. 856.
10. Mowji Shamji *v.* National Bank of India, 2 Bom. L.R. 1041 at p. 1502 : I.L.R. 25 Bom. 499 at p. 516, citing Bigelow.
11. 10 O.C. 257.
12. 42 P.R. 1878.
13. *See* Great Indian Peninsula Railway Co, *v.* Hanmandas Ramkison, I.L.R. 14 Bom. 57.
14. Bennett Coleman & Co. Pvt. Ltd. *v.* Punya Priya Das Gupta, A.I.R. 1970 S.C. 426 at p. 434.
15. Smt. Geeta Mishra *v.* Utkal University, A.I.R. 1971 Orissa 276 at p. 280.

out by Garth, C.J., in *Ganges Manufacturing Co.* v. *Surujmull*,[1] the provisions of Sec. 115 of the Evidence Act are in one sense a rule of evidence and are founded upon the well-known doctrine laid down in *Pickard* v. *Sears*.[2]

Supreme Court.

Where one person makes a misrepresentation to the other about a fact he would not be shut out by the rule of estoppel if that other person knew the true state of facts and must consequently not have been misled by the misrepresentation.[3]

Plan of a residential colony.

In the case of *Nirmal Kumar Maulik* v. *Smt. Champabala Roy*,[4] the plaintiff was the owner of certain lands. She planned a residential colony on her lands and in the plans prepared by her for the purpose she described the suit land as a park. The defendants were in demand to purchase or take on lease the plots on the basis of the plan of the colony. In the above noted case, the defendants were induced to purchase or take on lease the plots on the basis of the plan of the colony and if the colony showed a park it is also obvious that the defendants must have considered before taking a plot the amenities that would be available in the colony. It is not necessary that there must be recital about user of the park in the *kobalas* or in the various settlement deeds of the defendants. There were even no provision for user of the roads by the people of the locality, but even so, the user of such roads cannot be disputed or obstructed by the plaintiff as she cannot do so. Therefore, mere absence of recital in the *kobalas* about user of the park, does not indicate that it was never meant to be a park, though it was shown as such by the plaintiff in the plan. The plaintiff is barred by estoppel from having a declaration from the Court that the suit land was her private property and she could do whatever she likes in respect of the land and prevent other people from entering into the said land, if such estoppel is not otherwise barred by any other law.

There is undoubtedly a clear distinction between a representation of an existing fact and a representation that something will be done in future. The former may, raise an estoppel, if another person alters his position relying upon that representation. A representation that someting will be done in future may involve an existing intention to act in future in the manner represented. If the representation is acted upon by another person it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law.

Distinction between a representation of an existing fact and a representation that something will be done in future.

Public bodies are much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced *ex contractu* by a person who acts upon the promise : when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation if the contract be not in that form may be enforced against in appropriate cases in equity.[5]

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1. I.L.R. 5 Cal. 669.
2. (1837) 6 Ad. & El. 469.
3. R.S. Maddanappa *v.* Chandramma, A.I.R. 1965 S.C. 1812 at p. 1815.
4. A.I.R. 1971 Cal. 407 at pp. 409, 410.
5. Century Spinning and Manufacturing Co. Ltd. *v.* Ullhasnagar Municipal Council, A.I.R. 1971 S.C. 1021 at p. 1024.

A student intending to get admission in Medical Colleges or in Engineering Colleges or Technological Colleges has no other alternative but to appear in the examination held by the West Bengal Board of Examination for admission of students in those colleges. If the student who is desirous of prosecuting studies in engineering or in medical stream does not choose to appear in the said admission test, has got no other avenue open before him for getting admission in the medical and/or engineering and/or technological colleges and his long cherished hope will never be fulfilled. In such circumstances, there is no question that the petitioner having been fully aware of the declaration contained in the rules framed by the Board for holding the examination for admission in medical and/or engineering and/or technological colleges and after appearing in the said examination are estopped from assailing the rules and also these rules cannot be, under any circumstances, treated as declaration or representation as provided in Sec. 115 of the Evidence Act and any student appearing in the said examination is not estopped from challenging the arbitrary and capricious manner in which answer scripts were examined and evalued and assessed, the tabulation works made and results were published. The doctrine of estoppel in the facts and circumstances of this case does not apply and application cannot be dismissed on this ground. The question of promissory estoppel also cannot arise.[1]

The Supreme Court held that the following observations made by Denning, J., in *Robertson* v. *Minister of Pensions*[2] applied in India—

> "The Crown cannot escape by saying that estoppels do not bind the Crown for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity..."

The Court was not concerned to deal with the question whether Denning, L.J., was right in extending the rule to a different class of cases as in *Falmouth Boat Construction Co. Ltd.* v. *Howell*.[3]

A public body is not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice.[4]

Representation by conduct.

Where a man is under a duty—that is, a legal duty—to disclose some fact to another and he does not do so, the other is entitled to assume the non-existence of the fact. In such circumstances the conduct of the first man amounts to a representation by conduct to the second that the fact does not exist. In *Bell* v. *Marsh*[5] Henn-Collins, M.R. put the point in this way :

> "He (the plaintiff) is entitled to say that the representation was made, not merely by language used, but by conduct, and conduct may include negligence. A man may act so negligently that he must be deemed to have made a representation, which in fact he did not make, but because he has acted negligently is deemed to have made it."[6]

Rules not extending to the publishers any kind of representation or assurance—No justification for estoppel.

There is no warrant for concluding that the Madras Education Rules and the Text Book Committee Rules hold out any representation or even an assurance to the publishers that the books once prescribed will not be changed nor is there any justification for the assumption that these rules envisage the participation

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1. Jitendra Nath Banerjee *v.* West Bengal Board of Examination, A.I.R. 1983 Cal. 275 at pp. 287-288.
2. (1949) 1 K.B. 227.
3. (1950 1 All E.R. 538.
4. Century Spinning and Manufacturing Co. Ltd. *v.* Ullhasnagar Municipal Council, A.I.R. 1971 S.C. 1021 at pp. 1024-25.
5. (1903) 1 Ch. 528 at p. 541.
6. Spiro *v.* Lintern, (1973) 3 All E.R. 319 at p. 326.

of the publishers in the scheme and as such the Government will be estopped from resiling from the representation that the period will not be altered. The Madras Education Rules though called rules are administrative instructions for the guidance of the department. Rule 58 which deals with the text books, states that a consolidated list of text books authorised by the Government to be used under the several subjects is published annually in the Fort St. George Gazette; that managers of schools are at liberty to select from the latest list such books as they may deem most suitable provided that the text book so selected shall not be changed within three years of their introduction in any of the schools except with the previous approval of the District Education Officer the case of boy's schools and the Inspectress in the case of girl's schools. It further states that no books (other than books for religious instruction) not authorized by the Government shall be used in any recognized school. The Government however, reserve to itself the right to forbid or to prescribe the use of any book or books in the recognized school. The rules relating to Madras Text Books Committee which were issued on 26th November, 1965, set out the objects of the committee, its constitution, the general grounds on which the books may be described as unsuitable, expression, printing and get up, registration of publishers, rules relating to recognised schools, fees for scrutiny of books submitted for approval of the Text Book Committee etc. In rule 27, it is provided that any book approved for use in recognized schools as text book shall retain its approval for five years and in rule 30 it is provided that all text books used in recognized schools shall be selected only from the approved list of text-books issued during the year excepting books published by or on behalf of the Government. It is also provided in rule 32 that under the powers delegated to him by the Government, the Director retains on behalf of the Government the right to prescribe text books in a particular subject for use in recognized schools, even though such books have not been approved by the Text Book Committee. A perusal of these rule show that they are in the nature of departmental instruction and do not confer any right on the publishers. Nor are they designed to safeguard the interests of the publishers but are conceived in public interest. The Government is at liberty to change those text-books or to delete from or add to the list or even prescribe books which are not in the list. When once it is accepted that those instructions do not confer any right on nor create an interest in the publishers but are conceived in the public interest and the Government has full liberty in the matter of approval as well as the power of control over the kind of books that should be prescribed in the schools the publishers cannot say that once they are prescribed they cannot be changed within the period for which they are stated to be current. The period during which text book once prescribed is to continue is more an injunction to the managers of the schools than an assurance to the publisher that they will not be changed because that power even if it is conferred by administrative rules made under Art. 162, which empowered the managers subject to the approval of the authority concerned to change them within the period specified therein or the Government to forbid or prescribe the use of any book or books in the recognized schools. The selection of any text books by the Committee does not confer any rights on the publishers that their text book will be prescribed. All that the selection implies is that the books have been approved as fit and of the standard which can be prescribed for respective classes in the schools by their managers. There is no undertaking that they will be prescribed. If any of the schools prescribed the books in the approved list for their classes there is no assurance or a holding out by them that a particular number of books will be required. If the books that are printed are not sold the risk is that of the publisher. Nor can the schools which have prescribed the bookhold the publishers responsible if they cannot at any time supply sufficient number of books to cope with the needs of the school. All that the instruction that a book prescribed should not be changed for three years imply, is to avoid any hardship to the students.

Students may fail and have to repeat the course the next year, or those who are promoted may not afford new books but might go in for second hand books used in the previous years. These are some of the hardships that may be sought to be avoided by requiring the books prescribed to be current for three school years.[1]

In Halsbury's *Laws of England*, Vol. 15, 3rd Ed., it is stated that—

> "A party cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating. Thus, a corporate or statutory body cannot be estopped from denying that it has entered into a contract which it was *ultra vires* for it to make."

Punjab High Court.

This doctrine cannot, however, apply when the transfer of shares *per se* is not prohibited by the Articles of Association. It is only the manner of transfer which is prescribed.[2]

In proceeding under the Mysore House Rent and Accommodation Control Act, the mortgagee sought a decree for eviction, and in his application he asserted that what was payable under the lease deed was really rent. Mortgagor's assertion was to the effect that there was no independent lease and that the lease was a concomitant part of the mortgage transaction for assuring to the mortgagee the payment of the interest to which he would reasonably be entitled during the period he was out of possession of the mortgaged property. The decision in that proceeding was that there was no lease and that what was payable was only interest. So, an order for eviction was refused.

It is surely not possible for the mortgagor to change her front and contend in the subsequent suit instituted by the mortgagees legal representatives that they should institute a separate suit for the recovery of rent and that they could not claim interest on the principal sum due under the mortgage. They cannot be allowed to approbate and reprobate in that way. They could not turn round in the suit by the plaintiffs and put forward a contention at variance with that which earned for them an order in their favour under the House Rent and Accommodation Control Act.[3]

Doctrine of estoppel by representation.

To found an estoppel it is not necessary that the representation relied on should be false to the knowledge of the representor, provided that the representor acts in such a way that a reasonable man would take the representation to be true and believe that he was intended to act on it.[4]

Broadly stated the doctrine of estoppel by representation is : where one person has made a representation to another person in words or by acts or conduct, or with the intention, and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making or attempting to establish by evidence, any averment substantially at variance with his former representation.[5]

In the under-noted case it was held that accepting the respondent's father as attorney of the respondent-landlady the appellant took the advantage of having

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1. State of Tamil Nadu *v.* S.K. Krishnamurthy, A.I.R. 1972 S.C. 1126 at pp. 1128, 1129.
2. Iron Traders (Private) Ltd. *v.* Hiralal Mittal, A.I.R. 1962 Punj. 277 at p. 279.
3. Puttanangamma *v.* P.M. Channabasavanna, A.I.R. 1967 Mys. 41 at p. 43.
4. Spiro *v.* Lintern, (1973) 3 All E.R. 319 at p. 328.
5. Gujarat State Financial Corporation, Ahmedabad *v.* Messrs. Lotus Hotels Pvt. Ltd., Baroda, A.I.R. 1982 Guj. 198 at p. 209.

the premises on lease and the appellant should be deemed to be estopped from taking the plea that the respondent's father is not the duly constituted attorney of the respondent.[1]

In the Consolidation of Holdings proceedings, *B* did not take the inferior and *cho*-ridden land although in the ordinary *kanals* the area was larger. After the inferior land had been improved by *S* after considerable expense and labour during the period of three years, *B* felt tempted to go back on an arrangement allowed at his own request. *Held* that *B* was estopped from agitating this subsequently after lapse of such a long time.[2]

Admission to post graduate medical course.

In *Dr. Anand Kumar Mishra* v. *State of Bihar*,[3] the petitioners and all others had applied for admission to the post graduate medical course on the basis of the representation contained in the notice and the prospectus that selection of candidates will be done by the Selection Board on the basis of merit determined by the marks obtained by them at the competitive test. No reservation had been made for the Scheduled Castes, Scheduled Tribes at that time. When the final selection was to be made, the Government by the order contained in Annexure 4 purported to change the basis of selection. It was held that this was not permissible as it violated Arts. 14 and 15(1) of the Constitution. The claim of the petitioners was founded upon equity which arose in their favour as a result of the representations made in the notice and the prospectus as also the action taken by the petitioners acting upon the said representations under the belief that the authorities would carry out the representations made by them or on their behalf. The principle of legal or equitable estoppel was applicable in the circumstances of the case and the authorities concerned were estopped from issuing such orders. The Government was not exempt from the liability to carry out the representations in the notice and the prospectus as to the basis of merit on the marks obtained at the competitive test for selection. The impugned Government order contained in Annexure 4 to the extent it made reservation for the Scheduled Castes and Scheduled Tribes for admission to all the post-graduate Degree and Diploma courses, must, therefore be held to be invalid as it violates the provisions of the Constitution and is otherwise illegal.

In *Management Committee T.K. Ghosh's Academy* v. *T.C. Palit*,[4] the appellant Managing Committee T.K. Ghosh's Academy had been receiving deficit grants from the Government on basis of statement showing house rent payable by it for school building to Rs. 250/- plus Rs. 37/- per month. It was held that in view of the fact that the school received grant from the Government on the representation that an amount of Rs. 287.50 had to be paid on account of house rent, it hardly lies in the mouth of the appellants to assert that there is no liability for the payment of rent for the school building.

Whether estoppel creates interest in property which is subject-matter of representation.

Estoppel is but a rule of evidence and except in cases like those under Sec. 43 of the Transfer of Property Act, when a grant is fed by estoppel, the rule does not operate to create interest in property regarding which the representation is made.[5]

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1. Rajesh Wadhwa *v.* Dr. (Mrs.) Sushma Govil, A.I.R. 1989 Delhi 144 at pp. 148, 149.
2. S. Gurdial Singh *v.* State of Punjab, A.I.R. 1968 Punj. 267 at p. 272.
3. A.I.R.1981 Pat. 164 at p. 168.
4. A.I.R. 1974 S.C. 1495 at p. 1501.
5. Banwari Lal *v.* Sukhdarshan Dayal, A.I.R. 1973 S.C. 814 at p. 816.

73. The principle of promissory estoppel is akin to the principle of legitimate expectation.—The principle of promissory estoppel is akin to the principle of legitimate expectation. Unless there is overriding reason of public policy or other compelling or overriding consideration of public interest or other extenuating circumstances, proved in the case as laid down by the decisions of Courts.[1]

A writ of *mandamus* will not issue to enforce a contract against the Government, which has not been made in exercise of statutory power. But a writ may issue to enforce the promise made by the State relying on which the petitioners have altered their position to their prejudice. In such case the rule of promissory estoppel may apply. Appropriate relief can be granted in a proper case under Art. 226 of the Constitution of India. Even so, is it open to the Court to issue a writ of *mandamus* (solely) for disbursal of the amounts, said to be due either as per the contract or by application of the principle of promissory estoppel ? Is the proceeding under Art. 226 of the Constitution a substitute for the normal remedy available by way of a civil suit ? *Held*, such a relief cannot be granted in a proceeding under Art. 226 of the Constitution of India.[2]

There is no scope to invoke the doctrine of promissory estoppel or of legitimate expectation, *de hors* the terms of the contract.[3]

In case of a concluded commercial contract between the private party on the one hand and the State on the other hand, the principles of promissory estoppel which are in the domain of legitimate expectation have no application. Here nothing is left to imagination or expectation. Everything is reduced to writing and a breach of the clause may give rise to a cause of action. But that has to be thrashed out in a different forum.[4]

74. Government not exempt from liability to carry out the representation made by it.—In *Municipal Corporation of the City of Bombay* v. *Secretary of State*,[5] it was held by the Bombay High Court that even though there is no formal contract as required by the statute, the Government may be bound by a representation made by it. Jenkins, C.J., delivering the judgment of the Court observed :

> "The doctrine involved in this phase of the case is often treated as one of estoppel, but I doubt whether this is a correct, though it may be a convenient name to apply.
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> "It differs essentially from the doctrine embodied in Sec. 115 of the Evidence Act, which is not a rule of equity but is a rule of evidence that was formulated and applied in courts of law; while the doctrine with which I am now dealing, takes its origin from the jurisdiction assumed by Courts of Equity to intervene in the case of, or to prevent fraud."

After referring to *Ramsden* v. *Dyson*[6] the learned Chief Justice observed that the Crown comes within the range of equity and proceeded to examine whether the facts of the case invited the application of that principle.

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1. Shakti Tubes Ltd., M/s. *v.* State of Bihar (FB), A.I.R. 1994 Pat. 162 at pp. 165-66.
2. *Ibid*; *See* also Ude Ram *v.* State of Rajasthan, A.I.R. 1994 P. & H. 175.
3. Nagappa *v.* State, A.I.R. 1994 Kant. 77 at p. 94.
4. Trident Tubes Ltd., M/s. *v.* Government of Bihar, A.I.R. 1995 Pat. 50 at p. 53.
5. I.L.R. (1904) 29 Bom. 580 ; contra *see* Ch. Nagi Reddy *v.* Government of Andhra Pradesh, 1982 Lab. I.C. 979; State of Maharashtra *v.* Madhukar Anant Walavalkar, 1983 Mah. L.R. 500 (Bom.).
6. (1866) L.R. 1 H.L. 129 at p. 170.

This case is a clear authority that even though the case does not fall within the terms of Sec. 115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out of the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution.[1]

In *Ahmad Yar Khan* v. *Secretary of State*,[2] the plaintiffs claimed title to a canal supplied with water from the Sutlej having been constructed at great expense by their predecessors for purposes of irrigation with the sanction and encouragement of the Government. It was held that the plaintiffs became proprietors of the canal and entitled to have the waters of the Sutlej admitted into it so long as it was used for the purpose for which it was originally designed. Similary in *Ganges Manufacturing Co.* v. *Sourujmull*,[3] Garth, C.J., observed that a man may be estopped not only from giving particular evidence, but from doing any act or relying upon any particular argument or contention, which the rules of equity and good conscience prevent him from using as against his opponent.

Under our jurisprudene, the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it.[4]

75. Various grounds of estoppel.—One ground of estoppel is where a man makes a fraudulent misrepresentation another man acts upon it to his detriment.[5] Another ground may be where a man makes a false statement negligently, though without fraud, and another acts upon it.[6] And there may be circumstances, under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel.[7] Also, there may be statements made and which have induced another party to do that from which otherwise he would have abstained, which cannot properly be characterised as misrepresentation.[8]

76. Foundation for estoppel to be laid in the pleading.—No party can envoke estoppel against another party unless a plea in that behalf has been taken thereby giving that party an opportunity to join issue on the point. The bar of estoppel is the utlimate legal consequence resulting from proof of a set of material facts and circumstances. Necessarily, in every case such facts and circumstances as are material must be pleaded and proved. Where no foundation was laid in his plaint by the appellant nor was there any issue in regard to estoppel he is not entitled to canvass in second appeal that the respondent was or is estopped from denying that the shop was under erection on 1st January, 1951 and asserting, that the U.P. (Temporary Control of Rent and Eviction) Act, applied to it.[9]

77. Estoppel applied to all cases.—Estoppel is a general principle of law and applies equally to all classes of cases.[10]

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1. Union of India *v.* Messrs. Anglo-Afghan Agencies, A.I.R. 1968 S.C. 718 at pp. 726-727.
2. (1901) 28 I.A. 211 (P.C.).
3. (1880) L.R. 5 Cal. 669.
4. Union of India *v.* Messrs Anglo-Afghan Agencies, A.I.R. 1968 S.C. 718 at p. 728.
5. Seton Laing & Co. *v.* Lafore, 19 Q.B.D. 68 ; *see* Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 (P.C.).
6. *Ibid.*
7. *Ibid.*
8. Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 at pp. 312-13 (P.C.).
9. Anant Lal Goel *v.* Dr. Prem Shanker Agarwal, A.I.R. 1973 All. 89 at p. 92.
10. 7 C.P.L.R. 32 at p. 34.

78. Estoppel is purely personal.—Estoppel is purely a personal bar operating against the person whose conduct constitutes it and against his privies and representatives.[1] The service of notice of foreclosure on the occupant of the mortgaged property does not estop the mortgagee from disputing the occupant's title to redeem mortgaged premises.[2]

Privy Council.

79. Estoppel binds person claiming under party estopped.—Where a person, by his own solemn and deliberate act, wilfully indcues another to believe the existence of a state of things and to deal with him on the faith of it, he, and, as a general rule, his heirs, or those who claim under him, are conclusively bound by the representation so made and will never be allowed to contract it to the prejudice of the other.[3] A party cannot plead his own fraud. Nor can his representatives, or private purchasers from him, do so, unless they are themselves the defrauded parties and seek relief from the fraud.[4] Where a person has altered his position by placing reliance on the statement of another, the latter or his heirs will be estopped from saying subsequently that statement is untrue.[5] When a state of facts is accepted as the basis of a compromise those, who were parties to it, and their privies should not afterwards be heard to say, for the purpose of reviving the controversy, that the real state of things was otherwise.[6]

80. But heir may show real nature of transaction pleaded as estoppel.— A party claiming under another, who has made admissions as to a transaction is at liberty to prove that the admissions were made with a fraudulent purpose and were not true and to show the real nature of transaction.[7]

81. Claimant suing not as representative of person making representation.— The doctrine of estoppel cannot apply, when the person making the representation was not the person, as whose representative the plaintiff claims the property in dispute.[8]

82. Estoppel against estoppel sets matter at large.—It is a well established principle of law that an estoppel against estoppel sets the matter at large as observed in paragraph 394 of Halsbury's *Laws of England*.[9]

As will appear from *Civa Rau Hanaji* v. *Jevana Rai*,[10] the principle has been applied in this country also. There is no reason why it should not apply equally in the case of admissions, so that an admission against admission should also put the matter at large.[11]

A brought a pauper suit and virtually denied possession of certain property. *B* petitioned to dispauper *A*, alleging that *A* was possessed of such property. The Court decided that *A* was in possession and rejected her prayer to be allowed to sue as a pauper. *Held*, in a subsequent suit by *A*'s representative against *B*'s

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1. Lala Prabhu Lal *v.* J. Mylne, I.L.R. 14 Cal. 401 at p. 413.
2. 7 M.I.A. 323.
3. Monshee Syed Ameer Ali *v.* Syed Ali, 5 W.R. 289.
4. Luckhee Narain Chuckerbutty *v.* Taramonee Dossee, 3 W.R. 92.
5. 9 C.W.N. 208.
6. 13 M.I.A. 497; *see* also Cherukunneth Manukel Nilakandhen Nambudirapad *v.* Vengunat Sivapathil Padmanabha Revi Varma Valia Nambidi, I.L.R. 18 Mad. 1 (P.C.).
7. Sreenath Roy *v.* Bindoo Bashinee Debia, 20 W.R. 112.
8. Ranga Rau *v.* Bhavayammi, I.L.R. 17 Mad. 473 at p. 474 ; Syed Ameer Ali *v.* Syed Ali, 5 W.R. 289 and 19 I.A. 221.
9. 3rd Ed., Vol. 15, p. 211.
10. (1964) 2 M.H.C.R. 31.
11. Manraj *v.* Rameshwar, 1969 Raj. L.W. 507 at pp. 512-13.

representative for the property, that, even if *A*'s allegation found to be false could be treated as an estoppel, *B*'s allegation found to be true would be also an estoppel; and "estoppel against estoppel setteth the matter at large"; but that, although *A*'s allegation was receivable in evidence against *A* and her representative, they were not concluded by such allegation and the decision thereon.[1]

Madras.

83. Estoppel by attestation.—The plaintiff, who has attested the document with full knowledge of its contents is estopped from contending the validity of the gift.[2]

In *Ramakotayya* v. *Viraraghavayya*,[3] a Full Bench of this Court has held that if the next presumptive male reversioner consents, though for no consideration, to an alienation without necessity by a Hindu widow (e.g., a gift as in that case) the transacton will be binding on him when he actually succeeds to the estate. The consent was given in that case by the presumptive reversioner by attesting the gift deed.[4]

84. Estoppel by contract.—In a Full Bench decision of the Patna Court in *Hindustan Construction Co.* v. *State of Bihar*,[5] their Lordships held that a contract with the Union Government or the State Government made without complying with the formalities of Sec. 175(3) of the Government of India Act, 1935, or Art. 299(1) of the Constitution of India is a void contract. There is no question of estoppel with regard to a contract of this description.

There is no question of estoppel or ratification in a case where there is contravention of the provisions of Art. 299(1) of the Constitution. The reason is that the provisions of Sec. 175(3) of the Government of India Act and the corresponding provisions of Art. 299(1) of the Constitution have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against unauthorised contracts.[6]

It is now well settled that where a contract between the Government and a private individual is not in the form required by Art. 299(1) of the Constitution, it was void and could not be enforced and, therefore, the Government cannot be sued by a private individual for breach of such a contract. Article 299 (1) lays down three conditions for the making of a contract by a Governor of a State. They are : It must be expressed to be made by the Governor, it must be executed, and the execution should be by such person and in such a manner as the Governor may direct or authorize. The principle is that provisions of Art. 299(1) are mandatory in character and the contravention thereof nullifies the contracts and makes them void. There is no question of estoppel or ratification in such a case. The reason is that the provisions of Art. 299(1) of the Constitution have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against unauthorised contracts. The provisions are embodied in the Constitution on the ground of public policy, on the ground of protection of general public and these formalities cannot be waived or dispensed with. That is the reason why the plea of estoppel or ratification cannot be permitted in such a case.[7]

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1. Civa Rau Hanaji *v.* Jevana Rai, (1964) 2 M.H.C.R. 31.
2. Allam Gangadhara Rao *v.* Gollapalli Gangarao, A.I.R. 1968 A.P. 291 at p. 297.
3. I.L.R. 52 Mad. 556 : A.I.R. 1929 Mad. 502.
4. Jagannatham Pillai *v.* Kunjithapatham Pillai, A.I.R. 1972 Mad. 390 at p. 393.
5. A.I.R. 1962 Pat. 336 (F.B.).
6. Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. *v.* Sipahi Singh, A.I.R. 1977 S.C. 2149 at p. 2153.
7. *See* Bhikaraj Jaipuria *v.* Union of India, A.I.R. 1962 S.C. 113 ; State of West Bengal *v.* B.K. Mondal and Sons, A.I.R. 1962 S.C. 779.

Where the Government expressly stipulated and the plaintiff expressly agreed that the Government will not be liable for the loss occasioned by any shortage in the estimated volume of the trees, he cannot go back on his agreement simply because it does not suit him to abide by it.[1]

85. Estoppel against mortgagee.—It is well established that a mortgagee is estopped from denying the title of the mortgagor to the mortgaged property at the time of mortgage. The principle underlying this rule of estoppel extends to licensees as well. The estoppel does not, however, prevent either a mortgagee or a licensee from proving that subsequent to the mortgage or the licence the mortgagor or the licensor lost his title to the property to which the mortgage or the licence related. So far, therefore, a mortgagee and a licensee stand on the same footing. But it would not, on that account be correct to say that the estoppel operating against a mortgagee and that the estoppel operating against a licensee are identical in nature or co-extensive in scope.

Repudiation of the mortgage by mortgagee.

A mortgagee cannot for, example, by repudiation of the mortgage convert his possession under the mortgage into one adverse to the mortgagor. During the period available to the mortgagor for redemption the possession of the motgagee will always be attributed to the mortgage despite any assertion by him of a claim hostile to the mortgagor. A licensee, however, is not precluded from setting up a claim of adverse possession even though he has not surrendered possession to the licensor. It may be mentioned that in this respect a licensee differs not only from a mortgagee but also from a tenant.[2]

Case-law.

It is well established that a mortgagee who has been put in possession by the mortgagor pursuant to a mortgage is estopped so long as that relationship continues between them from denying the mortgagor's title to the property.[3]

Rule.

The general rule is that the mortgagee cannot deny the right of the mortgagor but in extraordinary circumstances it can be done.[4] That rule prevents the mortgagee from disputing the title of the mortgagor and its application cannot be avoided by going into the very question and finding that the mortgagor had no title on the date of the execution of the mortgage.[5]

A mortgagee, is estopped from denying the title of the mortgagor and setting up an adverse possession in himself, unless the mortgagee has actually left the land and has further entered into possession of the property under a different status and title.[6]

86. Onus of proof as to estoppel.—The onus of establishing the facts and circumstances from which estoppel arises, rests upon the person pleading it.[7]

87. Essentials of estoppel.—Those who rely upon a document as estoppel must clearly establish its meaning.[8] Estoppels must be made out clearly.[9] An

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1. *Vide* Thawardas Pherumal *v.* Union of India, 1955 S.C.A. 862 ; 1955 S.C.J. 445 : (1955) 2 S.C.R. 48; 57 P.L.R. 369 : (1955) 2 M.L.J. (S.C.) 23 : 1955 M.W.N. 782 : A.I.R. 1955 S.C. 468, M. Alavi *v.* State, A.I.R. 1960 Ker. 94 at p. 96.
2. Bodhan *v.* Sri Bhundal Singh, A.I.R. 1965 All. 309 at p. 311.
3. Appu Goundar *v.* Munusami Kone, A.I.R. 1962 Mad. 395 at p. 396.
4. Arumugha Thevar *v.* Chella Thevar, (1952) 2 M.L.J. 14.
5. Appu Goundar *v.* Munusami Kone, A.I.R. 1962 Mad. 395 at p. 396.
6. Shri Ram *v.* Thakur Dhan Bahadur Singh, A.I.R. 1965 All. 223 at p. 225.
7. Mitra Sen Singh *v.* Janki Kunwar I.L.R. 46 All. 728 (P.C.).
8. Rani Mewa Kunwar *v.* Rani Hulas Kunwar, 13 B.L.R. 312 (P.C.).
9. Tweedie *v.* Poorno Chunder Gangooly, 8 W.R. 125.

estoppel must be clear and non-ambiguous.[1] It must also be free, voluntary and without artifice.[2] Certainty is essential to all estoppels.[3]

88. Caused or permitted to believe to be true.—A party relying upon Sec. 115, Evidence Act, has to establish that the declaration had been believed and had been acted upon. Where truth is accessible to a party, the plea of estoppel upon representation fails.[4]

There is no estoppel where both parties are equally acquainted with true facts.[5] There can be no estoppel when the truth of the matter appears on the face of the proceeding.[6] Section 115 does not apply when the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement.[7] A purchaser at an execution sale of a holding who proves that in the sale certificate granted to him the annual rent of the holding is described as Rs. 8, does not thereby establish the plea of estoppel that the landlord is not thereby entitled to realise a higher rent ; to establish an estoppel it is necessary to prove a statement anterior to his purchase which may have influenced his conduct.[8] The doctrine of estoppel conduct does not apply in a case in which the party claiming that the other side is bound by the estoppel had express notice of the fact which he says was not represented to him by the other side as the true fact.[9] Section 115 does not apply to a case where a relief otherwise caused has only been allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised.[10]

The main question is whether the representation has caused the person to whom it has been made, to act on the faith of it.[11] It must be shown that the representation has altered the position of somebody who has acted upon it[12] or that somebody has been induced to accept some less favourable arrangement that he would not otherwise have done :[13] e.g. where a person actively assisted another in getting a property conveyed to her and in getting her name registered and thus causing her to change her position.[14] If a presumptive reversioner joins in the alienation of the estate and has the full benefit of the transaction he is estopped when the reversion

And acted upon such belief.

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1. *Per* Kay, L.J., in Low *v.* Bouveire, (1891) 3 Ch. 105.
2. Bigelow on *Estoppel*, p. 553, cited in Mowji Shamji *v.* National Bank of India, I.L.R. 25 Bom. 499 at p. 516.
3. *Per* Jenkins, C. J., in L.W. Rivettcarnac *v.* The New Muffasil Co., I.L.R. 26 Bom. 54 at p. 75, citing Bigelow on *Estoppel*, p. 559.
4. Mohammad Shafi *v.* Mohammad Said, A.I.R. 1930 All. 847 at p. 848 : I.L.R. 52 All. 248 : 122 I.C. 871.
5. Mst. Oodey Koowar *v.* Mst. Laddoo, 13 M.I.A 558 at p. 600 ; Ranchodlal Vandravandas *v.* Secretary of State, I.L.R. 35 Bom. 182 : William Jacks & Co. *v.* Joosab Mohammed, I.L.R. 48 Bom. 38.
6. Tara Lal Singh *v.* Sorobar Singh, I.L.R. 27 Cal. 407 at p. 413 (P.C.).
7. Mohori Bibi *v.* Dharmodas Ghose, 30 I.A. 114, applied in Narayan *v.* Raoji, I.L.R. 28 Bom. 393.
8. Aman Ali *v.* Mir Hossain, 10 C.L.J. 605.
9. Sarat Chandra *v.* Rajendra Lal, 18 C.W.N. 420.
10. Joy Chandra Banerjee *v.* Sreenath Chatterjee, I.L.R. 32 Cal. 357.
11. Helun Dasi *v.* Durgadas Mundal, 4 C.L.J. 323; *see* also Narsing Das *v.* Rahiman Bai, I.L.R. 28 Bom. 440 ; Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 (P.C.).
12. William Jacks & Co. *v.* Joosab Mohamed, I.L.R. 48 Bom. 38; Durga *v.* Jhinguri, I.L.R. 7 All. 511, *per* Mahmood, J., affirmed on appeal in Jhinguri *v.* Durga, I.L.R. 7 All. 878.
13. Beni Prasad *v.* Mukhtesar, I.L.R. 31 All. 316.
14. Raj Kumar Jagannath *v.* Syed Abdullah, 22 C.W.N. 891 : Raja of Deo *v.* Abdullah, I.L.R. 45 Cal. 909 (P.C.).

falls to him from questioning the alienation on the ground that at the time of alienation he could not pass any title.[1]

89. Neither he nor his representative.—"Every estoppel ought to be reciprocal, i.e. to bind both parties, and this is the reason that.....a stranger shall neither take advantage nor be bound by the estoppel Privies in blood....privies in estate....privies in law.....shall be bound and take advantage of estoppels."[2] Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by anyone except by that person.[3]

90. Who are representatives.—A purchaser at an execution sale is not as such the representative of the judgment-debtor within the meaning of this section.[4] These cases, however, were explained and disapproved in the case of *Debendra Nath Sen* v. *Mirza Abdul Samed Sarabi*,[5] where it was held that the purchaser at the execution sale is bound by the same rule of estoppel as the judgment-debtor and the execution-purchaser of the interest of a mortgagor is as much bound by the rule of estoppel not to dispute the validity of the mortgage as the mortgagor himself.[6] This latter view has been taken in *Radhakanta* v. *Ramananda*,[7] *Bepin Kristo Roy* v. *Jugesswar Roy*,[8] *Nandilal Agrani* v. *Jogendra Chundra Dutta*,[9] *Kishori Mohan Roy* v. *Mohammad Muzoffar Hossein*.[10] In execution of a money decree certain property was purchased, the said property was subject to a mortgage, but not mortgage executed by the judgment-debtor, although the judgment-debtor would himself have been estopped from denying liability under the mortgage on account of his conduct in connection with the mortgage transaction; *held* that the purchaser was equally bound as the judgment-debtor.[11] But the view that the execution-creditor is under all circumstances estopped by consideration which affect the judgment-debtor, has been dissented from in *Veerappa Chetty* v. *Ramasami Chetty*.[12]

Mortgage by wife.

A Hindu husband purchased some lands in the name of his wife who after his death mortgaged them and the mortgagee purchased them at a sale held in execution of the decree obtained upon the mortgage; in the meantime, the lands have been sold in execution of a money-decree against the husband and taken possession of by the decree-holder purchaser. The mortgagee-purchaser then sued for a declaration that the lands belonged to the wife and for possession; *held* that the husband having held out his wife as the real owner, the purchaser in execution of the money-decree, was estopped from disputing the title of the wife.[13] A mortgagee who in execution of a decree for sale in his favour has purchased the mortgaged property himself cannot be permitted in another suit on a prior mortgage of the

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1. Shunmugha *v.* Koyappa, 60 I.C. 635 (Mad.).
2. *Per* Lord Coke, Co. Litt. 352; *see* also Hatti Kudur *v.* Ander Sayed, 27 I.C. 785 (Mad.).
3. Syed Ameer Ali *v.* Syed Ali, 5 W.R. 289; Syed Nurul Hossein *v.* Sheosahai, 3 B.L.R. 437 (P.C.) ; Ranga Rau v. Bhawayammi, I.L.R. 17 Mad. 473.
4. Prabhu Lal *v.* Mylne, I.L.R. 14 Cal. 401 ; Basi Chunder Sen *v.* Enayat Ali, I.L.R. 20 Cal. 236.
5. 10 C.L.J. 150.
6. Referring to Kishori Mohun Roy *v.* Mohammad Mozaffar Hossesin, I.L.R. 18 Cal. 188 ; Mohammad Mozaffar Hossein *v.* Kishori Mohun Roy, 22 I.A. 129 ; I.L.R. 22 Cal. 909 and other cases; *see* also Kanhan *v.* Kamala, 21 C.L.J. 441.
7. 16 C.W.N. 475.
8. 34 C.L.J. 256.
9. 28 C.W.N. 403.
10. I.L.R. 18 Cal. 188.
11. Prayag Raj *v.* Sidhu Prosad Tewari, I.L.R. 35 Cal. 877.
12. 53 I.C. 579 (Mad.) ; *see* the authorities discussed in that case.
13. Annoda Mohan Roy *v.* Niphamari Loan Office Ltd., 26 C.W.N. 436.

same property to set up the defence that the mortgagor was incompetent to execute the mortgage in suit.[1] But where a property was transferred by a widow to an alienee from whom a prospective reversioner takes a mortgage of a portion of it, he is not estopped on the death of a widow from disputing the validity of the alienation.[2] In this last mentioned case, Lord Dunedin explained the decision in *Behari Lal* v. *Madho Lal*,[3] *Bajrangi Singh* v. *Mano Karnikar Baksh Singh*,[4] *Devi Prasad Choudhry* v. *Golap Bhagat*.[5]

An estoppel binding on an execution-debtor as between himself and a third party would not bind his execution-creditor as the latter does not claim through the execution-debtor but against him.[6]

Plea of estoppel available to decree-holders.

The decision in *Sarat Chander Dey* v. *Gopal Chunder Laha*[7] is a clear for the proposition that when a plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution sale, as his representative or as one claiming under him.[8]

91. Some instances of parties or representatives.—Grantor and grantee claiming under the title of the grantor;[9] and under-*raiyat* who claims under a

Lease by *ryot*.

permanent lease granted by a *ryot* can successfuly maintain a suit for possession or defend his suit for possession against the *ryot*.[10] But where the sub-lease is the only title on which the grantee relied the grantee's suit to recover *khas* possession should be dismissed where the sub-lease

Sub-lease.

is inadmissible being in contravention of Sec. 85(2) of the Bengal Tenancy Act.[11] An executor under a will who has acted as such is estopped thereby from setting up an adverse title to the property disposed of by the will.[12] A person who elects to take legacy under a will is estopped from setting up a title contrary to its provisions, but when the party sought to be estopped was in possession when his right under the will arose,

Legacy.

the person asserting such estoppel cannot succeed without proving his own title.[13] Whatever interest a mortgagor is bound by the mortgage and it is not open to him to say that he has no interest in the property.[14]

A mortgagee cannot dispute the mortgagor's right to enforce the

Mortgagee.

redemption.[15] The rule that a mortgagor cannot set up against his mortgagee, the title of a third person is applicable

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1. Prayagaraj *v.* Sidhu Prosad Tewari, I.L.R. 35 Cal. 877 ; Bishumbhar Doyal *v.* Parshadi Lal, 10 A.L.J. 112; Bakshi Ram *v.* Liladhar, I.L.R. 35 All. 353; Totaram *v.* Hargobind, I.L.R. 36 All. 141.
2. Rangaswami Goundan *v.* Nachiappa Goundan I.L.R. 42 Mad. 523 (P.C.).
3. 19 I.A. 30 : I.L.R. 19 Cal. 236.
4. 35 I.A. 1 : I.L.R. 30 All. 1.
5. I.L.R. 40 Cal. 721.
6. Richwar *v.* Jenkin, 19 Q.B.D. 451 ; Wills *v.* Hughes, (1917) 2 K.B. 845 (C.A.).
7. 19 I.A. 203 : I.L.R. 20 Cal. 296 (P.C.).
8. Krishna Bhupati *v.* Vikram, I.L.R. 18 Mad. 13.
9. Rupchand *v.* Sarveswar, I.L.R. 33 Cal. 915 ; Narayan *v.* Kalgunda, I.L.R. 14 Bom. 404.
10. Basarat Ullah *v.* Kasirunnessa, 11 C.W.N. 190 ; Jagatbundhu *v.* Radha Krishna, I.L.R. 36 Cal. 920 ; Abdul Aziz *v.* Kanthu Mullik, I.L.R. 38 Cal. 512 ; Manik Borai *v.* Bani Charan, 13 C.L.J. 649 ; Ganesh *v.* Thanda, 24 C.L.J. 539.
11. Jarip Khan *v.* Dorafa Bewa, 17 C.W.N. 59, followed in Baisnab *v.* Sarat, 24 C.L.J. 538.
12. Srinivasa Moorthy *v.* Venkatta Varoda, I.L.R. 29 Mad. 239, affirmed on appeal in Srinivasa *v.* Venkatta, I.L.R. 34 Mad. 257 ; Munisami *v.* Maruthammal, I.L.R. 84 Mad. 211.
13. Probodh *v.* Harish 9 C.W.N. 309.
14. Bholanath Sen *v.* Baloram Das, 27 C.W.N. 607 (P.C.) ; Gopal *v.* Jadumani, 15 C.W.N. 915 ; Nandilal *v.* Jogendra, 28 C.W.N. 403.
15. Jagniram *v.* Sheoraj, 30 I.C. 234 (O.).

also where, the mortgagor is a trustee acting in a public capacity but it is inapplicable where the mortgage is void as contrary to statute.[1] A trustee of an endowment may commit a breach of trust and still may be estopped as against a *bona fide* transferee for value without notice of the breach of trust, although the beneficiaries may not be estopped by the improper conduct of the trustee.[2] Although the representative of the mortgagor cannot as such question the validity of the mortgage it would be open to them as *mutwallis* to plead that the property was *wakf* and that the mortgage of it was void.[3] A religious trust will not be estopped by any act or conduct of the trustee committed in breach of trust.[4]

Endowment; trustee.

Two members of a joint Hindu family mortgaged some of the joint family properties, representing that they were entitled to deal with the whole interest; one of them inherited the shares of the other members who had not joined in the mortgage and after the properties were sold in execution of the mortgage-decree, he sued for the recovery of those shares; *held* that he was bound by the estoppel created by the statement and it was not upon to him to assert that the shares were not bound by the mortgage.[5] If two persons jointly mortgage a property which stands in thier names, one of them or his successor is not competent to content subsequently as against the mortgagee or his representatives that the other mortgagor had no title to the property and that he himself was the sole owner.[6] The heir at-law of an occupancy *ryot* is not estopped from questions the validity of a testamentary device made by the latter.[7]

Hindu joint family members.

92. Estoppel by pleading.—It is absolutely necessary to plead estoppel if it is intended to rely on it; this is not a technical rule of pleading but a matter of substance.[8]

In order to raise the plea of estoppel the facts on which it is based must be pleaded. It has been said that estoppel is eminently a matter of pleadings. If not set up in the pleadings or issues it cannot be availed of.[9]

Estoppels must be specially pleaded and strictly proved. They operate between the person making the declaration and the person believing and acting upon it and the representatives of those persons.[10]

Estoppel must be proved and pleaded.

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1. Mahamaya Debi *v.* Haridas Haldar, 20 C.L.J. 183 : 19 C.W.N. 208, dissenting from Malika *v.* Ratanmani, C.W.N. 493 ; Bhaiganta *v.* Himmat, 24 C.L.J. 103 ; Surendra *v.* Khitindra, 29 C.L.J. 434 ; Gulzar Ali *v.* Feda Ali, I.L.R. 6 All. 24.
2. Sidhu Sahu *v.* Gopi Charan Das, 17 C.L.J. 233.
3. Nandan Singh *v.* Jumman, I.L.R. 34 All. 640.
4. Perumal Gramani *v.* Mohammad Kasim Sahid, 28 I.C. 840 (Mad).
5. Saroda *v.* Gosto, 27 C.W.N. 943.
6. Baldeo *v.* Bhayalal, 21 C.L.J. 635.
7. Amulya *v.* Tarini, I.L.R. 42 Cal. 254, dissenting from Haridas *v.* Udoy, 12 C.W.N. 1086; *see* however the Full Bench case of Dayamayi *v.* Ananda Mohun, I.L.R. 42 Cal. 172 (F.B.), and the Special Bench decision in Chandra Benode Kundu *v.* Ali Bux Dewan, I.L.R. 48 Cal. 184 (F.B.), on the question of estoppel against the *ryot* or the landlord as regards the transferability of occupancy holdings.
8. Chandi Charan Nath *v.* Samla Bibi, 22 C.W.N. 179; *see* Order VIII, rule 2. C.P.C. : *see* also Safar Ali *v.* Mohesh, 23 C.L.J. 122 and Krishna Doyal Gir *v.* Syed Md. Amirul Hasan, 19 C.W.N. 942, in which it was pointed out citing Coppinger *v.* Norton, (1902) 2 Ir. Rp. 241, that all estoppels are not included in that rule, e.g. *res judicata.*
9. Bansilal *v.* Kanshi Ram, A.I.R. 1975 H.P. 15 at p. 18.
10. Govindbhai *v.* Dahyabhai, A.I.R. 1937 Bom. 326 at p. 333 : 39 Bom. L.R. 332 : 1 I.L.R. (1937) Bom. 402; *see* also Alvi Kumar Saha *v.* Central Bank of India, 1982 Lah. I.C. 1571.

In *Somnath Singh* v. *Ambika Prasad*,[1] all the necessary facts were pleaded by the defendants. When they were proved, what remained was only to draw the legal inference from them that the plaintiffs were estopped. A party cannot be penalised for not suggesting through its pleadings a rule of law to the Court; a party is not bound to plead the law.

The defence of estoppel can always be taken if it is warranted by the facts proved or admitted even if those facts have not been specifically pleaded.[2]

Where the facts on which the plea of estoppel is based are on the record there is no reason why it should not be entertained in second appeal.

If it is found that any representation was intentionally made by one party and it was acted upon by the other party, the rule of estoppel will apply.[3]

The law is settled that a plaintiff cannot be allowed to succeed against his own pleadings.[4]

There can be no estoppel against the statute. If a question of estoppel is patent and apparent on the record, then, even if there were estoppel against a party, a Court would not be estopped from considering the point. The principle of estoppel cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, as a party cannot by its admission or previous conduct confer jurisdiction on a Court where none exists.[5]

Second appeal; argument based on estoppel.

To sustain on second appeal, an argument based on estoppel there have been a proper trial of a distinct and specific pleading on the point.[6]

Estoppel by pleadings : case-law.

In execution of a decree obtained by the defendant the plaintiff preferred a claim to a property attached on the ground that it was not the personal property of his father but that it was *debutter* property; the claim being disallowed, he preferred an appeal which was dismissed upon the defendant's objection that it was not an order under Sec. 224, C.P.C. *held* that in a regular suit by the plaintiff for declaration that the property is *debutter* the defendant is estopped from raising the question that it was barred by Sec. 224.[7] A defendant is estopped to set up in a course of appeal a plea which he has directly and fraudulently repudiated in the Court below.[8] But a paintiff may rely upon several different rights alternatively though they may be inconsistent, for instance, a right of ownership and of easement in the alternative over the same plot of land.[9]

Ordinarily, where a plaintiff wants to show that the defendants are estopped from arising a certain plea by reason of their attitude in a previous suit between the parties the plaintiff must produce the written statement filed by the

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1. A.I.R. 1950 All. 121 at p. 131.
2. Co-operative Town Bank of Padigan *v.* Shanmugam Pillai, A.I.R. 1930 Rang. 265 at p. 268.
3. Abdulla Sha *v.* Mohammad Yakub, A.I.R. 1938 Lah. 558 at p. 559 : 40 Punj. L.R. 848.
4. Parasram *v.* Smt. Naraini Devi, A.I.R. 1972 All. 357 at p. 358.
5. *See* Bhagwan Singh *v.* Tasaddug Hussain, A.I.R. 1929 All. 549 : 115 I.C. 642 : 1929 A.L.J. 889 ; *see* also Mahabir *v.* Narain, A.I.R. 1931 All. 490 at p. 494.
6. Ram Gopal *v.* L. Mohan Lal, A.I.R. 1960 Punj. 226 at p. 229 : Pappamal *v.* Alamelu Ammal, I.L.R. 1929 Mad. 467 : 119 I.C. 152.
7. Haradhan *v.* Purna, 11 C.W.N. 145 ; *see* notes under Sec. 31, *ante*.
8. Satyabhama Dasi *v.* Krishna Chunder Chatterjee, I.L.R. 6 Cal. 55 : C.L.R. 375 ; *see* in Sir Rajah Malraju *v.* Sir Rajah Venkatadri, 24 C.W.N. 64 (P.C.).
9. Narendra Nath Barari *v.* Abhoy Charan, I.L.R. 34 Cal. 51 (F.B.) ; *see* also Mohammad Baksh Khan *v.* Hosseini Bibi, 15 I.A. 81 : I.L.R. 15 Cal. 684 ; Official Assignee of Bengal *v.* Bidya Sudari Dasi, 24 C.W.N. 145.

defendant in that suit in order to give the Court, where the plea of estoppel is raised, a full and clear idea of the attitude adopted by the defendants.[1]

The plaintiff had, in his plaint, claimed to recover the whole of the debt from the defendants personally as well as from the mortgaged property.

The defendants by confessing judgment prevented the plaintiff from showing that the period of limitation had been extended under Secs. 19 and 20, Limitation Act, and it is not open to them now to say that the personal remedy is barred by time.[2]

Where a party made specific averment in the plaint that the document is nothing but a will, he cannot be allowed to say that the said document is not a will but a family arrangement.[3]

In the earlier partition suit filed by Harishankar and Shivshanker against their eldest brother Gourishankar, the business was admitted to be a joint-family business, and a receiver was appointed over the books of accounts on that basis. In the insolvency proceedings, the business was also admitted by Gourishankar to be a joint-family business. By reason of the aforesaid both Harishankar and Gourishankar are now estopped from urging that the business was carried on in partnership.[4]

An employee who denied the very fact of enquiry having been made by the enquiry officer is not at all in a position to make a complaint about any defect in such an enquiry or any want of opportunity in such an enquiry.[5]

Minor's suit.

The ground upon which protection is afforded to a defendant in a suit instituted by a minor is removed when the defendant at all material time is aware, or has received notice, of the minority of the plaintiff and prefers the objection for the first time on appeal when the trial has gone against him.[6]

The plaintiff No. 1 booked 100 bales of cotton from Akola on the Central Railway for being delivered at Rajgangpur on the South-Eastern Railway. A complete wagon was hired and allotted for that purpose and it started with the goods train. The evidence in the case showed that the wagon in which the plaintiff No. 1's cotton bales were loaded was set on fire. Whatever goods were saved were forwarded to the destination and delivery was given to the plaintiff No. 1. The Inspector of Claims actually assessed the damage and issued a certificate. This claim was the subject-matter of the suit. The plaintiff No. 1 had insured the goods with the plaintiff No. 2, and according to the terms of the insurance policy, the amount payable to the plaintiff No. 1 was found to be Rs. 11,634.67 P. The plaintiffs claimed in the suit only this amount as that was the amount paid by the plaintiff No. 2 to the plaintiff No. 1 in full discharge of the insurance under the policy. The fact of insurance and the reimbursement thereafter and the subrogation as a result of the terms of the policy were recited in the plaint.

The defendants denied the act of subrogation, and refused to recognize the plaintiff No. 2 as a person authorized to file a suit. Under the circumstances, a decree for the suit came to be passed in favour of the plaintiff No. 2 against the defendants. Being aggrieved the defendants filed the appeal.

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1. Mohammad Khalil Khan *v.* Mahboob Ali Mian, A.I.R. 1942 All. 122 at p. 127 : I.L.R. 1944 All. 103 : 1941 A.L.J. 721 : 1941 A.W.R. (H.C.) 379.
2. Ralia Ram *v.* Hira Lal, A.I.R. 1928 Lah. 653 at p. 654.
3. Kasturchand Chhotmal *v.* Kapurchand Kewalchand, A.I.R. 1975 M.P. 136 at p. 140.
4. Shyam Sundar Bhartia *v.* Gourishankar Bhartia, A.I.R. 1980 Cal. 230 at p. 241.
5. Factory Manager, Model Mills (Nagpur) Ltd., Nagpur *v.* State Industrial Court, Nagpur, A.I.R. 1967 Bom. 147 at p. 153 ; *see* also 1963 S.C. 114.
6. Mst. Fuli Bibi *v.* Khokai Mondal, A.I.R. 1928 Cal. 537 at p. 539 : I.L.R. 55 Cal. 712 : 111 I.C. 349.

Held that having refused to recognize the plaintiff No. 2 as a subrogatee defendants could not now advert to the same position which was pleaded by the plaintiffs and then seek to non-suit the plaintiffs.[1]

93. Estoppel by judgment.—An estoppel by judgment arises if the controversy has been finally determined by a competent Court. The judgment must be one within its competence. If the decision of the Court is a nullity there can be no basis for raising the plea of estoppel.[2]

94. "Intentionally".—It is settled law that the word "intentionally" in Sec. 115 does not mean that the conduct of the person making the representation should have been fraudulent or that it should not have been made under a mistake or misapprehension. The motive of state or knowledge of the representor is immaterial.[3]

The word "intentionally" has been explained in the decision of the Judicial Committee in the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*.[4] In that decision what their Lordships have said is this—

Privy council view.

> "The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in the particular way must have been under no mistake himself or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was included to act."

So long as cannot be said that there was any duty cast upon the defendants not to rely upon the statement made in the plaint but to make further enquiries, it cannot be said that the word "intentionally"as used in Sec. 115, Evidence Act, has not been satisfied.[5]

Case-law.

In *Sarat Chunder Dev* v. *Gopal Chunder Laha*,[6] the Privy Council held that the word "intentionally" was used for the purpose of declaring the law in India to be precisely the same as the law of England and that a fraudulent intention is by no means necessary to create an estoppel, over-ruling the opinion expressed on this point.[7] In the case of representation there must be evidence to show that the person making it intended not merely to make the representation but also that the representation should be acted upon.[8] The existence of estoppel does not depend upon the motive or the knowledge of the matter on the part of the person making the representation; it is not essential that the intention should have been fraudulent or that it should not have been made under a mistake or misapprehension.[9]

Whether an estoppel has been created or not.

In determining whether an estoppel has been created, the main question is whether the representation has caused the person, to whom it has been made, to act on the faith of it.[10]

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1. Union of India *v.* M/s. Kalinga Textiles Private Ltd. Company, A.I.R. 1969 Bom. 401 at p. 404, 405.
2. Surjit Singh *v.* Pritam Singh, A.I.R. 1975 H.P. 43 at p. 47.
3. Harbans Lal Arora *v.* Divisional Superintendent, Central Railway, Jhansi, A.I.R. 1960 All. 164 at p. 174.
4. I.L.R. (1892) 20 Cal. 296 : 19 I.A. 203 : 6 Sar. 224 (P.C.).
5. Barkat Ali Haji *v.* Prasanna Kumar, Talukdar, A.I.R. 1929 Cal. 819 at p. 821 : 33 C.W.N. 873.
6. I.L.R. (1892) 20 Cal. 296 (P.C.).
7. Ganga Sahai *v.* Hira Singh, I.L.R. 2 All. 809 and Vishnu *v.* Krishnan, I.L.R. 7 Mad. 3 ; *see* also the decision of the Bombay High Court in 7 Bom. L.R. 179 at p. 184.
8. Kadappa *v.* Martanda, I.L.R. 17 Bom. 227.
9. Helan Dasi *v.* Durga Mandal, 4 C.L.J. 323.
10. *Ibid.*

The meaning of the word "intentionally" as used in the section is no longer *res integra*. In the leading authority on the point in *Sarat Chunder Dey* v. *Gopal Chunder Laha*,[1] it was observed thus :

> "A person who, by his declaration, act, or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so intentionally within the meaning of the statute, if a reasonable man would take the representation to be true and believe it was meant that he should act upon it".

This decision has been accetped as laying down good law in *R.S. Maddanappa* v. *Chandramma*,[2] *Smt. Geeta Mishra* v. *Utkal University*.[3]

95. A thing.—An admission on a point of law is not an admission of a "thing" so as to make the admission a matter of estoppel within the meaning of Sec. 115.[4] The word "thing" refers to a fact and not a proposition of law; it may refer to a belief in a fact.[5] In *Jethabhai* v. *Narthabhai*,[6] it was said that Sec. 115 requires that to create an estoppel there must be a representation as to some state of facts alleged to be at the time actually in existence. If the representation relates to a promise *de futuro*, it can be binding not as an estoppel but as a contract.[7] The word "thing" means a fact in existence or past. A proposition of law or a promise to make a gift is not a 'thing' within the meaning of this section.[8] A representation on a matter of law, e.g. validity of an adoption, creates no estoppel.[9] A representation that the interest of deceased Raja Mia had been acquired by the person making the representation is a "thing" within the meaning of the section.[10]

"Thing" meaning of.

96. Silence and duty to speak.—A man is bound to speak out in certain cases, and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction.[11] There is an obligation to truth in speech and act, but no obligation to speak or act where no confidence is given or accepted, merely for the purpose of guarding or furthering the interests of strangers, proceeding wholly *in invictum*, and with an omission to enquire, which is equivalent knowledge.[12] Where enquiry is expressly made of the person, he is bound, to under the circumstances to have given definite and full information.[13] A duty to speak, which is the ground of liability, arises wherever and only where silence can be considered as having an active property, that of misleading.[14] Where there is no knowledge of the action about to be taken, there can be no duty to speak.[15]

Duty to speak and ground of liability.

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1. (1982) 19 Inds. App. 203 (P.C.).
2. A.I.R. 1956 S.C. 1812.
3. A.I.R. 1971 Orissa 276 at p. 280.
4. Jatindra Mohan Tagore *v.* Gnanendra Mohan Tagore, 9 B.L.R. 377 (P.C.) : 18 W.R. 357 ; Gopee Lall *v.* Mst. Chandra Olee, 11 B.L.R. 391 : 19 W.R. 12 ; Jagwant Singh *v.* Silan Singh, I.L.R. 21 All. 285 ; Tekchand *v.* Gopal Devi, 13 I.C. 482.
5. Raj Narain Bose *v.* Universal Life Assurance Co., I.L.R. 7 Cal. 594 ; Jugal Kishore *v.* Bhatu, I.L.R. 2 Pat. 720.
6. I.L.R. 28 Bom. 399.
7. *See per* Selborne, L.C., in Maddison Alderson, (1883) A.C. 473 and *per* Lord Macnaghten in George White-church Co. Ltd. *v.* Cavanaly, (1902) A.C. 117 a p. 130.
8. Mapyu *v.* Maung Po Chet, 39 I.C. 385 (Bur.), following Langdon *v.* Dond, 10 Allen. 433.
9. Rajambal *v.* Shanmugha, 70 I.C. 653 (Mad.).
10. Barkat Ali Haji *v.* Prosanna Kumar Talukdar, A.I.R. 1929 Cal. 819 at p. 821 : 33 C.W.N. 873.
11. Gherah *v.* Kunji Behari, I.L.R. 9 All. 413 at p. 419 : (1887) 7 A.W.N. 48 citing Story.
12. *See per* Lord Selborne in Agra Bank *v.* Barry, L.R. 7 Eng. & Ir. App. at p. 157 ; *see* Churaman *v.* Balli, I.L.R. 9 All. 591 : (1887) 7 A.W.N. 121.
13. 2 N.W.P. 315.
14. 1 C.L.J. 23 ; Pickard *v.* Sears, 6 A & E. 469 and Fox *v.* Mackreth, 2 R.R. 55.
15. Chintaman Ramchandra *v.* Dareppa, I.L.R. 14 Bom. 506 at p. 510.

When silence is of such a character and under such circumstances that it would be a fraud on the other party, for the party who has kept silence, to deny what his silence has induced, it will operate as an estoppel.[1] Silence, without fraud, cannot operate as an estoppel to assert one's rights over property, when the party sought to be estopped was at the time in possession; for possession is notice.[2] If, however, the defendants or their predecessors intentionally allowed their vendors to continue in possession after their alleged purchase, and, consequently, the plaintiff, in ignorance of the transfer, instituted the former suit against the original vendors and continued to prosecute it against them, while one of the defendants actively defended the suit, nominally as the pleader of his vendors without disclosing the real situtation, and, if all this was done with a view to mislead the plaintiff, and the plaintiff was actually misled, then, the defendant's conduct was fraudulent and they could not be allowed to say that the fruits of the plaintiff's previous litigation were illusory and that the suit now instituted was barred by limitation.[3] Mere silence or delay in suing, without any overt act or omission calculated to mislead creates no estoppel, and, in the absence of clear and tangible grounds, the period of limitation cannot be shortened.[4]

Intentionally allowing an act to be done.

In *Bhagwandutt Singh* v. *Lachmi Narayan Singh*,[5] it is laid down that mere silence cannot operate as an estoppel unless there was a duty to speak. To the same effect is *Umaram Gogoi* v. *Puruk Chand*[6] and *Niharabala Devi* v. *Shashadhar Ray*.[7]

Mere silence when is not estoppel.

It is well-known principle of law that at an auction sale the auction purchaser purchases only the right, title and interest of the judgment-debtor. It is the duty of the decree-holder and perhaps to a certain extent of the judgment-debtor to see that the sale prolcamation contains the necessary particulars given in Order XXI, rule 66, Cr. P.C. If there is an omission and a mortgage charge is ommitted, then the mere fact that the holder of that mortgage was present at the time of the auction-sale would not debar him afterwards from maintaining an action on his mortgage.[8]

Auction sale; what title passes in an.

The main condition subject to which alone silence amounts to a representation is that a legal duty was owed by the representor to the representee to make the disclosure the omission of which is relied upon as creating an estoppel.[9]

Estoppel by silence.

In *Thomas Barclay* v. *Hassain Ali Khan*,[10] it was held that no general rule could be formulated as to when silence might be unlawful in transaction between men at arm's length. Where a party fails to make his rights known, where fairness and good conscience require that the party should do so to protect the interest of others, that party cannot be heard as against them to assert such rights.[11]

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1. 7 C.L.J. 604 ; Joy Chandra Banerjee *v.* Srinath Chatterjee, 1 C.L.J. 23 : I.L.R. 32 Cal. 357.
2. Joy Chandra Banerjee *v.* Srinath Chatterjee, 1 C.L.J. 23 : 1 L.R. 32 Cal. 357.
3. *Ibid.*
4. 5 P.W.R. 1908.
5. A.I.R. 1930 Pat. 150 : 119 I.C. 882.
6. A.I.R. 1925 Cal. 993 : 85 I.C. 540.
7. A.I.R. 1931 Cal. 485 : 134 I.C. 567 : I.L.R. 58 Cal. 358.
8. Radhe Lal *v.* Kishore Lal, A.I.R. 1935 Lah. 527 at p. 528 : 37 Punj. L.R. 301 : 157 I.C. 811.
9. Chowdhury Ally Meah *v.* Maymyo Municipal Committee, A.I.R. 1940 Rang. 187 at p. 189.
10. 6 C.L.J. 601.
11. Bajlakshmi Dasi *v.* Smt. Susilabala Dasi, A.I.R. 1950 Cal. 351 at p. 352 : 85 C.L.J. 149.

In *Abdul Ali* v. *Maiklan*,[1] Basil Scott, C.J., and Batchelor, J., held that a prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase and in support of their view they also referred to three cases; *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.*,[2] *Natal Land & Co.* v. *Good*[3] and *Naiz Ullah Khan* v. *Nazir Begam*.[4] The same rule will apply whether the estoppel be by judgment or by representation.[5]

Estoppel by judgment or representation.

A *mutwalli* in possession can say to the beneficiaries—

> "Now I discover that the settlement in *wakf* is void, I have no right to hold the property as *mutwalli;* you are really the owners of the property and I am only entitled to hold a share as the heir of the grantor.

Mutwalli.

> "There cannot be any estoppel as regards that position being taken by the *mutwalli*."[6]

97. Instances of estoppel or no estoppel by declarations.—A mortgagee of certain property represented to an intending purchaser that he had no security over it, and induced him under that belief to buy. It was held that he could not subsequently put his mortgage in force as against the purchaser.[7] A person wilfully made a false statement as to the value of certain horses, in order to induce a railway company to carry them at a lower rate of freight, and it was decided that he was thereby estopped from proving their real and greater value in an action against the company for their loss.[8] Three estates *K.S.* and *P*, were mortgaged by *A* to *B* as a security for a loan. Another person obtained a money-decree against *A*, *B* purchased this decree, and in execution thereof brought the village *K* to sale. At the sale he gave out to the world of buyers that he intended to burthen *K* with the whole sum due to him. The bidding was in consequence very low, and he purchased for Rs. 950, the real value of *K* being Rs. 20,000. *B* subsequently sued on the mortgage-bond to recover Rs. 12,212, principal and interest. It was held, that his purchase of *K* under the above circumstances precluded him from recovering in this suit.[9] A High Court in India, at the instance of the appellants counsel confined its decision in a case to a single point upon an undertaking being given that no appeal should be preferred to the Privy Council. It was held by the Privy Council that the appellant that thereby precluded himself from appealing.[10] The same principle was applied, when a judgment-debtor, being arrested in execution of a decree, filed a petition in Court, undertaking not to appeal against the decree on condition that the judgment-creditor released him and agreed to accept, payment of amount of the decree by instalments, and the judgment-creditor released him and agreed

Wilfully making false statement.

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1. I.L.R. 35 Bom. 297 : 10 I.C. 890 : 13 Bom. L.R. 268.
2. (1894) 1 Ch. 578 : 63 L.J. Ch. 366 : I.L.R. 8 Rang. 791 : 70 L.T. 131 : 42 W.R. 365.
3. (1868) L.R. 2 P.C. 121 : 5 Moo. P.C. (N.S.) 132 : 16 W.R. 1086.
4. I.L.R. 15 All. 108 : 1892 A.W.N. 246.
5. Kanik Mandal *v.* Medni Rai, A.I.R. 1942 Pat. 317 at p. 318 : 23 P.L.T. 213 : 20 I.C. 560.
6. Mst. Rukeya Banu *v.* Mst. Nazira Banu, A.I.R. 1928 Cal. 130 at p. 134 : 32 C.W.N. 248 : I.L.R. 55 Cal. 448 : 105 I.C. 647.
7. Manu Lal *v.* Chuni Lall, L.R. 1 I.A. 144 : 21 W.R. 21.
8. M'Cance *v.* The London and North-Western Railway Company, 7 H. & N. 447.
9. Baijonath Sahai *v.* Dullhan Biswanath Koer, 24 W.R. 83.
10. Amir Ali *v.* Inderjit Singh, 14 M.I.A. 203 : 9 B.L.R. 460.

accordingly.[1] So where the judgment-debtor agreed not to appeal in consideration of the judgment creditor allowing him time to satisfy the decree.[2]

Where some of the sons of a Hindu female who had only a daughter's interest in the property joined in a mortgage executed by her represented that the property was being mortgaged by them for legal necessity; *held* that the sons would be estopped from deying the validity of the mortgage and the operative character of the consequential execution sale.[3] Where the predecessors of the plaintiffs had granted a lease for 20 years to the predecessors of the defendants on receipt of a certain amount of premium and the lease expressly provided that the grantee would have the status of a *ryot*; *held* that the doctrine of estoppel applied and the plaintiff was not competent to prove that the status of the original grantee was other than what was described in the grant.[4]

Lease.

A brought a suit for ejectment against *D*. The suit was dismissed on the ground that *D* was a *ryot* and was entitled to a notice to quit. *A* preferred an appeal during the pending of which *D* died, and his interest was sold to *M* and *C*, who on a petition by *A* were added as respondents though *A* did not admit the validity of their purchase. The appeal was dismissed. *A* then subsequently brought a suit against *M* and *C* for ejectment. *Held* that as *A* was not estopped from asserting that they were trespassers.[5] Where *H* made representations in the conveyance to which he was a party but his statements could not have materially influenced either the vendor's or the vendee's conduct in the matter, *held* that Sec. 115 did not apply.[6]

Suit for ejectment.

An offer of sale was made to a person having a right of pre-emption, but he refused it. It was held that he could not afterwards set up his right of pre-emption.[7]

Offer of sale and pre-emption.

A person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter his position of his own detriment.[8]

Use of estoppel.

The service of notice of foreclosure on the occupant of mortgaged property was held not to estop the mortgagee from disputing such occupant's title to redeem.[9]

Notice of foreclosure.

98. Representative.—The word "representative" in the section cannot be confined to a gratuitous transferee or volunteer and to a subsequent transferee for value with notice of the circumstances creating an estoppel.[10]

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1. Pratab Chandra Das *v.* Arathoon, I.L.R. 8 Cal. 455 : 10 C.L.R. 443 : *see* also Bahir Das Chakravarti *v.* Nabin Chandra Pal I.L.R. 29 Cal. 306 ; Uttam Chandra *v.* Khetra Nath, I.L.R. 29 Cal. 577 ; Chandrabala *v.* Prabodh Chandra Roy, I.L.R. 36 Cal. 422.
2. Anant Das *v.* Ashburner & Co., I.L.R. 1 All. 267 ; *see* also Rajmohan Gosain *v.* Gaur Mohan Gosa in 4 W.R. (P.C.). 46 : 8 M.I.A. 91.
3. Shib Chandra *v.* A.C. Dulcken, 28 C.L.J. 123.
4. Iswar Chandra Nath *v.* Gournanda Nath, 39 C.L.J. 337, following Bamandas *v.* Nilmadhab, I.L.R. 44 Cal. 771 ; 24 C.L.J. 541.
5. Damodar Narayan *v.* Miller 27 C.W.N. 461 : 69 I.C. 134 (P.C.).
6. Gurnarayan *v.* Sheo Lal, I.L.R. 46 Cal. 466 (P.C.).
7. Braja Kishore Sarma *v.* Kiriti Chandra Sarma, 7 B.L.R. 19.
8. Girish Chandra Ghosh *v.* Iswar Chandra Mukharji, 3 B.L.R. (A.C.) 337 12 W.R. 226 : Karali Charan Banerji *v.* Mahtab Chandra, Sev. Rep. July-December 1864, p. 29.
9. Prannath Rai Chaudhri *v.* Rukia Begum 7 M.I.A. 359.
10. Dara Sivarao *v.* Kala Subbarao, A.I.R. 1934 Mad. 302 at p. 302.

Privy Council view on purchase by mortgagee in execution sale and estoppel.

In *Poresnath Mukherji* v. *Anathnath Deb*,[1] the principle laid down is that a purchase by a mortgagee in execution of the mortgage-decree does not place him a better position as regards the estoppel which could be asserted against the motgagor himself. The same view has been expressed in a later decision of the Privy Council reported in *Mohammad Mozaffer Hussain* v. *Kishori Mohun Roy*.[2] The same view is also referred to in *Kalidas Chaudhuri* v. *Prasanna Kumar*.[3]

99. Proceedings in Court.—A judgment obtained against a person in the belief that he executed a document in his own right, does not debar a subsequent suit against the rightful owner when it is subsequently learnt that he executed it in latter's behalf.[4] A party litigant cannot be permitted to assume inconsistent position in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This doctrine applies not only to successive stages of the same suit but also to another suit; provided that the second suit grows out of the judgment in the first.[5] Where a party appears against an order treating it as one under a particular section, it is not open to him in second appeal by the opponent to urge that the order was not under that section.[6] Whether Bhotras fall within any of the sub-groups of the Schedule Tribes enumerated in Part IX of the schedule to the 1950 Order is a question which could not have been permitted to be raised for the first time in the second appeal.[7] Where a suit which was dismissed for non-prosecution was restored on condition of payment of costs to the defendant and the defendant got the costs taxed and obtained an allocator, *held* that the defendant having taken this advantage under the order was precluded from appealing against it.[8] When a party in a previous litigation used a document and gave up the disclaimed having any title under a document as a testamentary devise, *held* that in a subsequent suit he cannot be allowed to set up the document as a valid will and testament.[9] Where a person accepts a benefit on an order of a Court he is precluded subsequently from challenging the validity of that order but this principle is not applicable where the benefit accepted would in any case be his, whether the appeal succeeded or failed.[10]

Assuming inconsistent position in Court.

Presumption of minority.

Where in a case when the plaintiffs failed to come in the witness box by themselves, the defendants moved an application in which it was prayed that a commission may kindly be issued by the Court to examine plaintiffs and their mother but even at that stage the plaintiffs did not state that they themselves will appear in witness-box as their own witnesses and in the interrogatories

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1. I.L.R. (1883) 9 Cal. 265 : 9 I.A. 147 (P.C.).
2. I.L.R. (1895) 22 Cal. 909 : 22 I.A. 129 : 6 Sar. 583 (P.C.).
3. A.I.R. 1920 Cal. 354 : 50 I.C. 189 : I.L.R. 47 Cal. 446.
4. Ammakane *v.* Murugaya, I.L.R. 47 Mad. 850.
5. Dijendra *v.* Jogesh 39 C.L.J. 40, following Bhaja Chowdhury *v.* Chuni Lal, 11 C.W.N. 284 : 5 C.L.J. 95 : Giris *v.* Bepin, 27 C.L.J. 535 : Bamacharan *v.* Nemai, 35 C.L.J. 58; Gokhai Pradhan *v.* Behari Lal Pandit, 17 C.W.N. 565 : 16 C.L.J. 404; Bhagirathi Das *v.* Baleshwar, I.L.R. 41 Cal. 69.
6. Bindeswari *v.* Lakpat, 15 C.W.N. 725 ; Raghubar Dayal *v.* Raghunandan, 15 C.W.N. 736.
7. Raghunath Pradhani *v.* Damodra Mahapatra, A.I.R. 1978 S.C. 1820 at p. 1823.
8. Banku Chandra *v.* Marium Begum, 21 C.W.N. 232, referring to Nani Lal *v.* Harendra, 12 C.L.J. 556 and Tinkler *v.* Hidler, (1849) 4 Ex. 191.
9. Sreemuthoo Raghoonadha *v.* Kuttamanachiar, 10 W.R.I. (P.C.).
10. Jogendra *v.* Khoda Buksha, 72 I.C. 554 (Cal.) ; Bepin Behary *v.* Jotindra, 6 I.C. 813 (Cal.).

drafted on behalf of the plaintiffs no question was put to mother as to when the plaintiffs were born to her, it was held that there was absolutely no evidence on the record by virtue of which it could be said that the plaintiffs were minor at the time of the sale.[1]

In the instant case, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". Therefore, the rebuttal does not have to be conslusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'.[2]

On raising objection in a suit.

A mortgagor is precluded from raising the objection that the sale of the mortgaged property in execution of the decree in the mortgage suit is invalid by reason of the decree *nisi* in that suit having been made absolute, if such objection is not raised at an early stage of the proceedings.[3]

In *Bheru Singh* v. *Ramgopal*,[4] it is held that :

> "If the decree is patently illegal, the executing Court may refuse to execute it. But if the alleged illegality is arguable and the judgment-debtor has failed to raise it in the earlier litigation, he cannot question the legality of the decree at the stage of execution."

It is clear, therefore, that the executing Court cannot hold an investigation in order to determine whether the Court which passed the decree lacked jurisdiction to do so.[5]

Effect of withdrawal of money deposited in Court by the other party.

When the purchaser of a non-transferrable occupancy holding makes a deposit and the landlord who is the decree-holder withdraws the amount, he cannot be permitted to urge that the sale of the holding in favour of the depositor is inoperative.[6] Such withdrawal would not amount to recognition of the purchaser in execution proceedings which are under the Civil Procedure Code and not under the Bengal Tenancy Act.[7] Nor will the landlord be estopped if he had objected to withdraw the deposit and on the Court over-ruling the objection, withdrew the same.[8] In this connection, *see* 2 Pat. L.J. 540 and 4 Pat. L.J. 115 (F.B.). Nor in a case where there is nothing to show that the fact of the depositor's interest was brought to the knowledge of the landlord.[9]

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1. Sarwan Singh *v.* Ashok Kumar, A.I.R. 1983 P. & H. 366 at pp. 368, 369.
2. **Hiten P. Dalal *v.* Bratindranath Banerjee, 2001 (3) C.T.C. 243 at pp. 249-50 (S.C.).**
3. Gunindra Prosad *v.* Baijnath Singh, I.L.R. 31 Cal. 370.
4. A.I.R. 1972 M.P. 217.
5. Ahmed Khan *v.* Mohammad Khasim Sab, A.I.R. 1976 Kant. 13 at p. 16.
6. Thomas Barclay *v.* Syed Hossein Ali, 6 C.L.J. 601; Nalini Behary Roy *v.* Fulmoni Dasi, 15 C.L.J. 388; Gadhadhar *v.* Midnapore Zamindary Co. 27 C.L.J. 385 ; Jugal Mohini *v.* Sreenath 12 C.L.J. 609.
7. Surendra Narain Mahata *v.* Jugal Kishore Ghose, 20 C.W.N. 849.
8. Bhataram Das *v.* Kshitish Chander Lahiri, 30 I.C. 83 (Cal.).
9. Bharat *v.* Modhusudan, 34 I.C. 337 (Cal.).

Benami purchase by judgment-debtor applied

A judgment-debtor made a *benami* purchaser of the decree obtained against himself and other judgment-debtors and took out execution which was submitted to by the other judgment-debtors. It was held that their having so submitted did not prevent them from objecting, when a further application for execution was made, that a co-judgment-debtor being the real purchaser was not entitled to execute the decree.[1] In a suit for possession of land against a person who was really a trespasser, it was held by a Full Bench that, by setting up in this written statement a false case of being a tenant, he did not preclude himself from also raising the defence of limitation.[2] When a person claimed as his own property attached in execution of a decree against another person, and, his claim being rejected without inquiry, purchased the property at the sale, it was held that his so purchasing did not stop him from asserting as against a mortgagee prior to the sale that the property was his independently of the sale.[3]

Execution rule; purchaser is not a representative of the judgment debtor.

A purchaser at an execution-sale is not as such the representative of the judgment-debtor within the meaning of Sec. 115 of the Evidence Act.[4] *H*, being born deaf and dumb, was under Hindu law, incapable of inheriting his father's estate. In a certain arbitration proceeding to which the defendant *G* was, but *H* was not, a party, it was held that *H* was an heir to his father's estate. *G*, after this award was made expressed to it his assent in writing. *H* subsequently sued *G* for his father's estate, and it was held, that as *H* was not a party to the arbitration proceedings, *G* was not estopped by his assent to the award from questioning *H*'s right of inheritance.[5] One Shidapa Bapu died indebted to the defendant Malkhana. On his death his widow Sagawa became his heir. In 1878 Malkhana brought a suit to enforce payment of the debt due by the deceased, Shidapa Bapu, and he made Baslingawa, the mother of Shidapa, defendant in the suit, omitting Sagawa altogether. He obtained an *ex parte* decree and inexecution the house of Shidapa, then in possession of Baslingawa, was sold. Subsequently, Sagawa adopted the plaintiff, Baswantapa, and filed a suit on behalf of her adopted son to set aside the sale and recover the house. It was held that the plaintiff was entitled to have the sale set aside as there was nothing to indicate that Sagawa took any step to deceive Malkhana and her mere quiescence, while he wilfully sued the wrong person, could not deprive the plaintiff of his legal rights.[6]

Cases where "no estoppel" was awarded.

In the following cases also it was held that there was no estoppel : *In re Parmananda Jivandas*[7] (rights of Secretary of State under lease against person whose position had not been altered); *Cheran* v. *Kunj Bihari*[8] (prior decree-holder bidding at a sale held at instance of subsequent decree-holder for property previously purchased by him, and afterwards suing for a declaration that such property was not affected by the sale); *Banwari Das* v. *Muhammad Mashiat*[9] (decree-holder who held prior registered incumbrance over property about to be sold making bids at

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1. In accordance with the Full Bench decision in Sarup Chandra Hazra *v.* Trailokhnath Rai, 9 W.R. 230; Abhia Charan Rai Chaudhri *v.* Nobin Chandra Rai Chaudhri, 23 W.R. 95.
2. Dinomani Debi *v.* Durga Prasad Mazumdar, 12 B.L.R. 274 : 21 W.R. 70; Maidin Saiba *v.* Nagapa, I.L.R. 7 Bom. 96.
3. Hanuman Dat *v.* Asadula, 7 N.W.P. Rep 145.
4. Prabhu Lal *v.* Myine, I.L.R. 14 Cal. 401 ; Bashi Chandra Sen *v.* Inayat Ali, I.L.R. 20 Cal. 236.
5. Ganga Sahai *v.* Hira Singh, I.L.R. 2 All 322 : 11 I.A. 20.
6. Basantapa Shidapa *v.* Ranu and Malkhana, I.L.R. 9 Bom. 86.
7. I.L.R. 7 Bom. 109.
8. I.L.R. 9 All. 413.
9. I.L.R. 9 All. 690.

sale and not personally announcing his incumbrance) ; *Muhammad Samiuddin Khan* v. *Mannu Lal*[1] (assignee of original mortgagor allowing original mortgagor to sue for redemption, and subsequently suing on his own account for redemption).

Plea of estoppel not upheld.

There is, however, one case, *Solano* v. *Ram Lal*,[2] in which there was held to be no estoppel, although the prior decree-holder had brought the property to sale, giving an incorrect description of it, and not giving notice of his own interest in it.

Execution of money decree.

Where in execution of a money decree against the defendant an occupancy holding belonging to him was sold and he had failed to raise the objection at the time of the sale that the holding was not transferrable *held* that is was not competent to him to resist the purchaser after the confirmation of the sale.[3] Where before the sale the judgment-debtor never suggested that the property to be sold was exempted, *held* that it was not open to him to contend afterwards that the Court had no jurisdiction to order the sale.[4] Where it was said that strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do.[5] Where one of the parties to a suit made an oral application accepting the arbitration and took an active part in the proceedings; *held* that he was estopped from objecting to the legality of the proceedings on the ground that he did not sign the application for reference to arbitration.[6] A person who purchases a property in execution of his own decree apparently subject to a mortgage lien as declared by the Court without however acquiescing in the order is not estopped from questioning the validity of the mortgage by way of defence in the suit brought against him by the mortgagee to enforce his mortgage lien.[7] A plaintiff who has purchased the debtor's immovable property in execution of his own money decree, as already mortgaged with possession to a third person, is not estopped before his sale is confirmed, to sue for a declaration that the mortgage was fraudulent and without consideration.[8] Where no decree as provided for under Sec. 90 of the Transfer of Property Act had been obtained, but the decree-holder executed the original mortgage decree for the unsatisfied balance by attachment and sale of the other properties of the judgment-debtor and the latter though served with notice did not object and the proceedings were struck off, *held* that in subsequent execution proceedings the judgment-debtor is estopped from raising the objection that no decree under Sec. 90 had been passed.[9] A legal representative of a deceased judgment-debtor allowed execution to proceed against him for nearly a year without objection and obtained stay of sale on the plea that he would satisfy the decree and also paid a part of the debt and thus obtained the consent of the decree-holder to adjournment of sale; *held* that he was

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1. I.L.R. 11 All. 386.
2. 7 C.L.R. 481.
3. Bhiram Ali *v.* Gopi Kanta, I.L.R. 24 Cal. 355; Sheikh Murulla *v.* Sheikh Barulla, 9 C.W.N. 972 ; Doorga Charan *v.* Kaliprasanna, I.L.R. 26 Cal. 727; Dwarka Natha Pal *v.* Tarini Sankar, Roy, I.L.R. 34 Cal. 199.
4. Pandurang Balaji Kishnaji *v.* Govind, I.L.R. 28 Bom. 125, relying on Malkarjun *v.* Narhari, I.L.R. 25 Bom. 337 (P.C.).
5. *See* also Ramchhaibar Miser *v.* Bachu Baghat, I.L.R. 7 All. 641; Durga Charan Mandal *v.* Kali Prasanna Sarkar, I.L.R. 26 Cal. 727 ; Umed *v.* Jasram, I.L.R. 29; All. 612; Lala Ram *v.* Thakur Prasad, I.L.R. 40 All. 680.
6. Gauri Sankar *v.* Ganga Ram, 52 I.C. 859 (Pat.).
7. Shahziauddin *v.* Kailash Chandra, 2 C.L.J. 599.
8. Ganesh *v.* Purshottam, I.L.R. 33 Bom. 311.
9. Madhu Sudan *v.* Kailash Chunder, 2 C.W.N. 254.

estopped to say subsequently that the decree was incapable of execution against him.[1] Where a plaint had been returned to the plaintiff to be presented to the proper Court, it is not open to him to appeal from the order of return after he has taken back the plaint and refiled it in the Court directed.[2]

Election, either to appeal or to carry out order of remand.

A party affected by an order or remand should make his election either to, prefer an appeal against the order of remand or carry out the order of remand. He cannot, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an objection to the order of remand.[3] The two remedies, *viz.*, applications for review of a decree and a suit to set aside the same are co-existent, and if an aggrieved party has recourse to doctrine of election review and has failed, the doctrine of election does not apply in bar of a regular suit for the same relief, but if he succeeds in one proceeding the judgment absorbs all his other remedies.[4] Where both the parties agreed to be bound by the decision of the Trial Court to be arrived at by inspection of the locality, neither of them is permitted to resile from the agreement in an appeal[5] but application by one of the parties only does not estop him from questioning in appeal the correctness of the decision when it is not shown that the other party had also agreed.[6] Where both parties to a suit referred the matter in dispute between them to the Court and agreed to abide by its decision, *held* that no appeal lay from the decree passed by the Court, it being in the nature of an arbitrator's award.[7]

Agreement to be found by decision of Court.

Where the only agreement proved between the parties in a claim case is that the claim petition should be allowed but without costs against the other party *held*, in a suit subsequently instituted, that there was no estoppel against the other party.[8] In a suit to redeem a mortgage, one Musammat Ladu to avoid an objection taken as to want of parties, filed a petition disclaiming all interest in the estate. She had then only an expectant right to the estate to which on the death of her son she became absolutely entitled. It was, therefore, held that she was not estopped from setting up her rights to the property in a subsequent suit brought against her for possession of it. Their Lordships were of opinion that, even assuming that Musammat Ladu by her petition did intend to convey to the plaintiff a present interest in the property which she supposed of assumed she had, there was no principle of law or justice by which that could prevent her from setting up her real right when that right had accrued.[9] In *Abdul Rahim* v. *Madhavrav Apaji*,[10] it was held that mere admissions that mortgage had been converted into a sale, even in depositions and pleadings, did not operate as estoppel, or prevent the mortgagor from redeeming his property.

In the instant case, pursuant to the order of remittance passed by the High Court the appellant took a chance by participating in the proceedings before the

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1. Conventry *v.* Tulsi Pershad, I.L.R. 31 Cal. 822.
2. Beni Madhab *v.* Jotindra, 5 C.L.J. 580. following Pearce *v.* Chaplic, (1846) 9 Q.B. 802 and Neale *v.* Electric, etc. Co. Ltd. (1906) 2 K.B. 558.
3. Baikunta *v.* Nawab Salimullah, 6 C.L.J. 547, and *see* the authorities discussed in that case.
4. Mst. Godal Koer *v.* Badshah Bahadur, 13 C.W.N. 1197, when a large number of authorities have been discussed and Ram Gopal *v.* Prasanna, 10 C.W.N. 929 doubted.
5. Shahzadi Begum *v.* Mohammad Ibrahim, I.L.R. 43 All. 266.
6. Ghulam Hossein *v.* Ganesh Lal, 75 I.C. 619 (All.).
7. Sayed Zain *v.* Kalabhai, I.L.R. 23 Bom. 752; Nidamarthi *v.* Thammanna, I.L.R. 26 Mad. 76.
8. Venkatarama *v.* Narayana, 28 I.C. 536 (Mad.).
9. Udey Kunwar *v.* Ladu, 13 M.I.A. 585.
10. I.L.R. 44 Bom. 78.

Rent Controller taking up the matter in appeal. Thus, having acquiesced in the proceedings the appellant cannot question the first remittance order.[1]

Kistbandi.

The decree holder and the judgment-debtor filed a *kistbandi*, agreeing that the amount of the decree should be paid by instalments with interest, and the judgment-debtor by his conduct for several years treated this *kistbandi* as if it were the decree. It was held that he could not afterwards object that the *Kistbandi* could not be executed as a decree and that a fresh suit must be brought thereupon.[2] The notification of property for sale in execution of a decree stated the Government revenue to be Rs. 3,146 instead of Rs. 8,146. The judgment-debtor thus applied to the Court for a postponement of the sale. "Under such circumstances it is prayed that a postponement of one month be granted, the *attachment and the notification of sale being maintained*". It was held that his petition amounted to an admission that there was no mistake or irregularity likely to mislead, and that the judgment-debtor could not afterwards take advantage of the above mistake in order to have the sale set aside.[3] From this case of *Girdhari Singh* v. *Hurdeo Narain Singh*[4] was distinguished *Mahatab Deo* v. *Lilanand Singh*,[5] where there was a mere petition for a month's time.[6] Where in a petition for postponement of sale the judgment-debtor said that if the sale be stayed as prayed, he would raise no objection on the ground of irregularities in the publication of the proclamation already issued; it was held that the judgment-debtor was not competent to impugn the validity of the sale on the ground that the sale proclamation had not been properly published.[7] A party who does not raise an objection to the proclamation is estopped from complaining of an irregularity resulting from an erroneous statement which he should have corrected.[8]

Objection to sale proclamation and its effect.

Setting aside sale.

In a proceeding to set aside a sale it was agreed that the judgment-debtor should have time upto a certain date to pay up the full decretal amount, and that then the sale should be set aside but that if he failed, the sale should stand good. On the day fixed for the payment the judgment-debtor paid a portion of the money and obtained further time from the Court to pay the balance. On the judgment-debtor tendering the balance on the day fixed by the Court for payment, the decree-holder refused to accept the money; *held* that the judgment-debtor was estopped from contesting the legality of the sale.[9] In the case of *Mina Kunwari* v. *Jagat Setani*,[10] certain petitions asking for time alleged to have been put in by that judgment-debtor, were relied upon as precluding him from contending that the execution of the decree was barred by limitation. Their Lordships of the Privy

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1. Rukmini Amma Saradamma *v.* Kailyani Sulochana, 1993 (1) S.C.C. 499 at p. 505.
2. Dinonath Sen *v.* Guru Charan Pal, 14 B.L.R. 287 : 21 W.R. 310 ; *see* also Sheo Ghulam Lal *v.* Beni Prasad, I.L.R. 5 Cal. 27.
3. Girdhari Singh *v.* Hurdeo Narain Singh, L.R. 3 I.A. 230.
4. L.R. 3 I.A. 230.
5. I.L.R. 7 Cal. 613 : 9 C.L.R. 398.
6. *See* also Raman *v.* Kunhayan, I.L.R. 17 Mad. 304.
7. Raja Thakur Barham *v.* Ananta Ram Marwari, 2 C.L.J. 584, distinguishing Preo Lall Paul *v.* Radhika Prasad Paul, 6 C.W.N. 42; *see* also Lakshmi Prasanna *v.* Rajendra, 47 I.C. 831 (Cal.).
8. Umadi Rajha *v.* Sri Raja Velugoti, I.L.R. 38 Mad. 387, ref. to Giridhari Singh *v.* Hurdeo Narain Singh, 3 I.A. 230; Olpherts *v.* Mahabir Pershad Singh, 10 I.A. 25; Arunachellam *v.* Arunachellam, I.L.R. 12 Mad. 19 (P.C.) and Behari Singh *v.* Mukhat Singh, I.L.R. 28 All. 273.
9. Uttam Chandra *v.* Khetra, I.L.R. 29 Cal. 577, ref. to Pratap *v.* Arathoon, I.L.R. 8 Cal. 455.
10. L.R. 10 I.A. 119 : I.L.R. 10 Cal. 196 : 13 C.L.R. 385.

Council said : "They contain no admission that the decree could be legally executed against the respondent, and are not within the description of estoppel".....When parties allow a suit to be conduct in the Lower Courts as if a certain fact was admitted, they cannot afterwards in special appeal question it and recede from their tacit admission.[1] (No objection for ten years to the allowance of interest in accounts in execution.) *A* a decree-holder, having attached lands belonging to his judgment-debtor, entered by mistake one parcel under two numbers as two parcels in the sale-proclamation. This parcel was in consequence twice put up to sale and was knocked down, first to *A* himself and afterwards to *B*. In a suit by *B* to restrain *A* from entering on the land, it was held that *A* was estopped by his own mistake from setting up a title against *B*[2]. Where a defendant made no objection at the time to the purchaser of the plaintiff's interest in the suit substituting his name on the record for that of the plaintiff, he was not afterwards allowed to contend that the suit had thereby abated.[3] *A* purchased certain property at a sheriff's sale and again conveyed to *B*. Neither *A* nor *B* made any attempt for 11 years to assert their right to the property, or gave any intimation of their purchase to *C*, who was in possession. *C* sold to *D* without any remonstrance from them either before or after the sale. In a suit by the assignee of *B* to obtain possession of the property, it was held that *A* and *B*, were estopped by their conduct from asserting their rights against that purchaser, and that their assignee was in the same position as they were.[4]

Value of property in dispute.

Where the plaintiff brought his suit in the Munsif's Court and paid court-fees on the annual rental on Rs. 4.4; *held* that he was not debarred for subsequently raising the point that for the purpose of the Privy Council Appeal under Sec. 110, C.P.C., the value of the property in dispute was Rs. 11,400.[5] The valuation made the purposes of the Stamp Law does not prevent a party from obtaining leave to appeal by proving that the real value of the subject- matter does not fall short of the appealable amount; but a defendant who had previously adopted the value given in the plaint for the purpose of an appeal preferred by him should not be allowed to contest that valuation on the principle that a party cannot approbate and reprobate.[6] A plaintiff cannot be permitted to turn round at the final stage of a litigation and put forward a case inconsistent with the allegations in the plaint.[7] A tenant holding under a permanent lease granted before the Transfer of Property Act impugned his landlord's title in a suit for rent. In a subsequent suit for ejectment it was held that the lease was liable to forfeiture under the general rule that a tenant cannot impugn his landlord's title.[8]

Where a landlord in execution of a money-decree causes the sale of an occupancy holding and purchases it himself, he is not estopped from pleading non-transferability without his consent in a subsequent suit brought by mortgagee of the occupancy *ryot*; the English law of mortgage and a consequent estoppel is not applicable to such a case.[9] Where an auction purchaser purchases a property

1. Mahima Chandra Rai Chaudhri *v.* Ram Kishore Acharji Chaudhri, 15 B.L.R. 155 : 23 W.R. 174; Devaji Gayaji *v.* Godabhai Dodebhai, 2 Bom. H.C. Rep. 28; Harihar Mukharji *v.* Raj Kissen Mukharji, 23 W.R. 251 ; Kanailal Khan *v.* Shoshi Bhushan Biswas, 8 C.L.R. 117; Gopal Sahu Deo *v.* Jairam Tewari, 9 C.L.R. 402.
2. Thinnapa Chetti *v.* Murugappa Chetti, I.L.R. 7 Mad. 107.
3. Bir Chandra Rai Mahapatra *v.* Bansi Dhar Rai Mahapatra, 3 B.L.R. (A.C.) 214.
4. Mahesh Chandra Chatarji *v.* Issar Chandra Chatarji, 1 Jur. N.S. 266.
5. Surendra *v.* Dwarkanath, I.L.R. 44 Cal. 119.
6. Kumar Basant Kumar Roy *v.* Secretary of State, 14 C.W.N. 872.
7. Kali Mohun *v.* Maharaja Birendra Kishore, 22 C.L.J. 309.
8. Kally Dass Ahiri *v.* Monmohim Dasi, I.L.R. 24 Cal. 440.
9. Asmatunnessa *v.* Harendra Lal Biswas, I.L.R. 35 Cal. 904.

which is not sold subject to a mortgage but the existence of the mortgage was notified in the proclamation of sale *held* on a suit brought by the mortgagee for sale that the auction-purchaser was not estopped from questioning the mortgage.[1] But if a person purchases an estate subject to a mortgage or undertakes to discharge it he cannot be heard to deny the validity of the mortgage.[2] A person without title obtained mutation in her name of an under-proprietary right in a share in a village. She remained in possession for eight years, paying rent to the *talukdars* who gave receipt describing her as *pukhtuda*. In a suit by the *talukdars* for possession and mesne profits; *held* that the *talukdars* although estopped from claiming mesne profits for the year in respect of which they had received rent, were not estopped from denying that the defendant had an under-proprietary right, nor were they to be taken to have waived their rights.[3] The fact that a compromise has been entered into between the parties to proceedings under Sec. 145, Cr., P.C., by which they have agreed to hold the property in dispute in certain defined shares, does not preclude either party from having recourse to the Civil Court for the determination of question of title.[4] Where an administrator *pendente lite* has retained as his remuneration more than what he was entitled to claim and such amounts have been passed by the Court with the knowledge of the plaintiffs and without any objection taken by them a suit to recover from him such excess not barred by estoppel.[5]

Estoppel by conduct of Court.

The plaintiff was the widow of the defendant, and as the defendant died before execution was completed, she was added as his L.R. When the creditor attached certain properties as belonging to the deceased husband of the palintiff, she filed an application claiming that the attached property belonged to her under a sale-dead of 1896. The Subordinate Judge passed a brief order in the following terms :

> "In these circumstances I am not prepared to uphold, the claim and refer the petitioner to a regular suit. The petition is dismissed."

The widow filed a suit on the strength of the observation in the concluding portion of the above order.

Held that the advice would not make it *res judicata* or create any estoppel as against the other party. The other party could contend that the suit was barred under Sec. 47, C.P.C.[6]

Execution proceedings.

If a judgment-debtor after receipt of notice under Order XXI, rule 66 or of the knowledge of the contents of the sale proclamation before it is issued neglects to take any objection to the proceedings he should not in justice be allowed to take such objections at the sale or afterwards.[7]

100. Estoppel in execution proceedings.—In *Uttam Chandra* v. *Khetra Nath*,[8] in execution of respondent's decree, certain property belonging to the applicant was sold. The sale was confirmed. Then the judgment-debtor put in an application for the setting aside of the sale on the ground of irregularity and fraud.

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1. Shib Kunwar Singh *v.* Sheo Prosad Singh, I.L.R. 28 All. 418; Jairajmal *v.* Radhakishen, I.L.R. 35 All. 257.
2. Kalidas Saha Chowdhury *v.* Prosunno Kumar Das, 24 C.W.N. 269 at p. 273.
3. Mittra Sen Singh *v.* Janki Kunwar, I.L.R. 46 All. 728 (P.C.).
4. Gopidas *v.* Madholal, I.L.R. 45 All. 162.
5. Osmond Beeby *v.* Khitish Chandra, I.L.R. 41 Cal. 771.
6. Maddali Machamma *v.* Chaparala Kanakamma, A.I.R. 1935 Mad. 923 at pp. 924-25 : 1935 M.W.N. 785 : 158 I.C. 907.
7. Maharaj Bahadur Singh *v.* Sachindra Nath Roy, A.I.R. 1928 Cal. 328 at p. 331 : 32 C.W.N. 309.
8. I.L.R. 29 Cal. 577.

On 16th December, 1899, the judgment-debtor put in a compromise petition to which the decree-holder consented, and it was agreed that the sale should be set aside on the judgment-debtor paying the full decretal amount by a fixed date with the reservation that if he failed the sale would stand good. He paid a portion of the money on the appointed date and obtained further time to pay the balance. This balance he tendered on a subsequent date, but the decree-holder refused to accept it. Their Lordships of the Calcutta High Court observed as follows :

> "The judgment-debtor, it appears to us, is estopped from contesting the legality of the sale."

The same view was expressed by a Division Bench of the Patna High Court in *Bata Krishna Prasad* v. *Apurba Krishna Mitra*.[1]

When judgment-debtor is estopped from raising an objection.

The judgment-debtor is estopped from raising an objection that the inadequate price was due to under valuation in the sale- proclamation on account of the fact that he did not take any objection to the sale-proclamation even though notice under Order, XXI, rule 66, C.P.C., was served personally upon him.[2]

The objections, which can be taken at the time of the execution, need not necessarily be agitated in the grounds of appeal when the decree of pre-emption on merits is sought to be set aside. The executing Court is duty bound to see that the pre-emption amount for which the decree for possession of the land has been passed, is paid to the judgment-debtor and that the amount is deposited in time in accordance with the terms of the decree. If that is not done, it cannot be held as a matter of law that since no such grievance was made in the grounds of appeal, therefore, the objection cannot be taken at the stage of the execution.[3]

In the case reported in the *Karnataka Bank Ltd. Bangalore* v. *K. Shamanna*,[4] the judgment-debtor themselves requested the Court that proposed sale should not be advertised in the local newspapers. *Held* that having prevented the Court from publishing the date of sale in the newspaper the judgment-debtors cannot be allowed after the sale is held to question the sale on the ground that there was no proper publication of sale in the local newspapers. The judgment-debtors are estopped from contending to the contrary.

Estoppel against auction purchaser.

No estoppel can arise against the auction-purchaser on the question whether the deficiency in price can be recovered from him.[5]

Misleading auction-purchaser by decree-holder, effect.

By the neglect of his duty under the Civil Procedure Code, 1908, the decree-holder led the auction-purchaser to believe that what was sold was the entire field and induced him to pay full price for the same. *Held* that the decree-holder, would be estopped from proving that he intended to sell only half share and not the whole field. The decree-holder must make

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1. A.I.R. 1938 Pat. 199; Baidyanath Rai *v.* Satyanarain Rai, A.I.R. 1960 Pat 39 at pp. 38-39 : 1959 B.L.J. 594.
2. Kalu Ram *v.* Shambhoo Singh, A.I.R. 1964 Raj. 84 at p. 86 : 1964 R.L.W. 19 : I.L.R. (1964) 14 Raj. 216.
3. Labh Singh *v.* Hardayal, A.I.R. 1977 Punj. 294 at p. 297.
4. A.I.R. 1972 Mys. 321 at p. 323.
5. Gopal Krishna Das *v.* Sailendra Nath Biswas, A.I.R. 1975 S.C. 1290 at p. 1296.

good his representation by assuring to the auction-purchaser possession of the whole field. If he cannot, then he must compensate him to the extent that he is unable to make good his representation.[1]

Parties who have in effect agreed to the figure which is to be advertised for the information of intending bidders, cannot be heard later on to plead that the figure was unduly low, that in effect they were consenting parties to a conspiracy to mislead bidders.[2]

Question of validity of the execution sale of agriculturist house.

Where a house belonging to an agriculturist passes out of his hands by reason of an execution sale, he cannot challenge the validity of the sale at a later stage by a separate action.[3]

A person who had been present at the time of attachment and at the time of the auction-sale knew what was going on. He had the right either to object under rule 58 or rule 100, Order XXI. He chose the latter course and that gave him a right of suit under rule 103. There is no question therefore of estoppel.[4]

Where the decree-holder at first objected to the sale but then allowed it to proceed, and took part in it by bidding; and then took from the Official Receiver his share of the proceeds of the sale, he cannot turn round and say that the sale was void.[5]

Election of the decree-holder as to the mode of execution of decree.

In the case reported in *Hanmant Bhimrao* v. *Gururao Swamirao*,[6] it has been held that once the decree-holders have elected to execute the whole decree, they cannot seek to execute the decree in respect of each instalment as it falls due. But in *Devi Dayal* v. *Ram Kumari Devi*,[7] it was clearly stated that unless the decree-holder is estopped from changing the position it is open to him to make a fresh election.[8]

Consent decree—Compromise.

Once a compromise is arrived at the plaintiff should ask the Court to record the compromise. If he, however changes his mind and the other party also acquiesces the suit should proceed on merits. But he cannot later one, come back to the compromise. His conduct amounts to a repudiation of the compromise.[9]

Compromise decree does not operate as *res judicata*.

It is now well settled that though a compromise decree may not operate as *res judicata* under Sec. 11. C.P.C., it would operate as estoppel by judgment. This principle has been laid down with great emphasis in *In re South American and Mexican Co., Ex Parte Bank of England*[10], in the following words of Lord Herschell :

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1. Dayaldas *v.* Shankar, A.I.R. 1931 Nag. 116 at p. 118 : 14 N.L.J. 20 : 134 I.C. 269.
2. Ramanathan *v.* Ramanathan, A.I.R. 1929 Mad. 275 at p. 277 : 30 M.L.W. 995 : 117 I.C. 705.
3. Sabha Ram *v.* Kishan Singh, A.I.R. 1931 All. 112 at p. 113 : 1930 A.L.J. 1599 : I.L.R. 52 All. 1027 : 133 I.C. 478.
4. Mohammad Hayat *v.* Ghulam Nabi, A.I.R. 1931 Lah. 598 at p. 598 : 32 Punj. L.R. 390 : 132 I.C. 201. Under Rule 103 as amended by C.P.C. (Amendment) Act, 1976 provides for appeal, instead of a suit against adjudication under Rule 100.
5. Bonagiri Sreeramulu *v.* Karumuri Venkatanarasimham, A.I.R. 1938 Mad. 1004 at p. 1006 : (1938) 2 M.L.J. 835 : 48 L.W. 476 : 1938 M.W.N. 1013.
6. A.I.R. 1943 Bom. 36 : I.L.R. (1943) Bom. 55 : 44 Bom. L.R. 880 : 204 I.C. 526.
7. A.I.R. 1961 All. 107 at p. 108.
8. *See* also Abdul Latif Khan *v.* Mst. Sikandar Begam, A.I.R. 1953 All. 283—unless the judgment-debtor has been prejudiced it would be open to the decree-holder to re-elect in the matter.
9. Firm Ramchandra Mathura Lal *v.* Kalusingh Nathraj, A.I.R. 1961 M.P. 245 at p. 247.
10. (1895) 1 Ch. 37 at p. 50 : 64 L.J. Ch. 189.

"....a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end...."

English law.

In a later decision reported in *Hoystead* v. *Commissioner of Taxation*,[1] it was further pointed out that where a decision by a competent court has been reached on the basis of an admission by a party, that party would be estopped from questioning it in a new legal proceeding.

Privy Council view.

An order by consent is as effective as an order of the Court made otherwise than by consent. A party bound by a consent order, as was tersely observed by Byrne, J., in *Wilding* v. *Sanderson*[2]—

Estoppel under compromise decree.

"must when once it has been completed, obey it...."

The only difference in this respect between an order made by consent and not so made is that the first stands unless it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal.[3]

In a later Privy Council decision reported in *C.H. Kinch* v. *E.K. Walcott*,[4] it was pointed out that there was, in essence no distinction between a decision on consent operating as *res judicata* and a decision by consent operating as estoppel except as regards the method of setting it aside.

Consent operating as *res judicata* and also estoppel.

These principles have been followed in many Indian decisions.[5]

A consent decree has to all intents and purposes the same effect as *res judicata* as a decree passed *in victum*. It raises an estoppel as much as a decree passed *in victum*.[6]

As pointed out in *Kumara Venkata Perumal* v. *Ramaswamy*[7]—

"The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise, must depend upon the answer to the question; 'Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree"?

Compromise decree; test for determining estoppel in.

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1. (1926) A.C. 155 : 95 L.J. P.C. 79.
2. (1897) 2 Ch. 534 : 66 L.J. Ch. 684 : 45 W.R. 675 : 77 L.T. 57.
3. C.H. Kinch *v.* E.K. Walcott, A.I.R. 1929 P.C. 289 at p. 294 : 118 I.C. 7 : 57 M.L.J. 429 : 30 M.L.W. 606.
4. 57 M.L.J. 429 : 30 M.L.W. 606 : A.I.R. 1929 P.C. 289 : 118 I.C. 7.
5. Ramrao *v.* Dattadayal, A.I.R. 1948 Nag. 304 : I.L.R. (1947) Nag, 889 and Raja of Venkatagiri *v.* Madras Province A.I.R. 1947 Mad. 5 (2) : I.L.R. (1947) Mad. 190 : Kailash Chandra *v.* Kulamani Chakra, A.I.R. 1956 Orissa 210 at p. 210 : 21 Cut. L.T. 199.
6. Commentary of Sir Dinshaw Mulla on Sec. 11 of the Civil Procedure Code at page 84 of the 11th Ed., under the caption "Consent decree and estoppel"; Sunderbai *v.* Devaji Shankar Deshpande, A.I.R. 1954 S.C. 82 at p. 84 : 1953 S.C.J. 693 : (1953) 2 M.L.J. 782.
7. I.L.R. 35 Mad. 75 : 9 I.C. 875 : (1911) 1 M.W.N. 990 : 21 M.L.J. 709 : 9 M.L.T. 487.

In *Ata Mohammad* v. *Lachman Das*,[1] the plaintiff instituted a suit for recovery of Rs. 2,385-10-0 when two instalments remained unpaid. This suit was compromised on 22nd August, 1935, and the plaintiff was granted a decree for the full amount and costs. Subsequently, another suit was instituted on 28th August, 1936. It was pleaded by the defendant *inter alia* that full consideration for the bond had not been paid. *Held* that the consent decree in the previous suit was not a bar to the plea raised by the defendant in the subsequent suit.

When an infant on attaining majority be estopped.

101. Person—Infant.—In *Lal Samnath Singh* v. *Ambika Prasad Dubey*,[2] it has been said that "where the representation was made on behalf on the infant by his guardian or next friend or other person legally competent to bind him by such representation the infant on attaining his majority or the person who made such representation, as the case may be, is liable to be estopped thereby." As a general proposition the position of law is that a representation made by a minor would not operate as an estoppel. But where his guardian or a person legally competent to bind him makes a representation (in the instant case, the *karta* of a joint Hindu family is such a person) on behalf of the minor and himself, then both the minor and the person legally competent to bind the minor, are estopped from challenging it.[3]

"Person"; meaning of.

There has been some difference of opinion amongst the several High Courts as to whether Sec. 115 applies to the case of infants, as will be pointed out presently, the question now seems to be settled in view of the Privy Council decision in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*.[4] In *Dhurmodas Ghose* v. *Brahmo Dutt*,[5] Jenkins, J., dissenting from *Ganesh Lala* v. *Bapu*,[6] held that the general law of estoppel as enacted by Sec. 115 will not apply to an infant unless he has practised fraud operating to deceive. On appeal in the same case,[7] Maclean, C.J., and Prinsep, J., held that the term "person" in the section is amply satisfied by holding it to refer to a person of full age and competent to enter into a contract. Amir Ali, J., proceeded on the ground that the section was inapplicable to a minor because when the law of contract declared that an infant shall not be liable upon a contract or in respect of a fraud in connection with a contract he cannot be made liable upon the same contract by means of an estoppel under Sec. 115.[8] On appeal to the Privy Council in *Mohori Bibi* v. *Dharmodas Ghose*,[9] their Lordships said : "The Courts below seem to have decided that this section does not apply to infants; but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statements." Where an infant obtained a loan upon a representation which he knew to be false that he was of age; *held* that the infant will not be estopped from pleading his minority notwithstanding his fraudulent representation.[10] This case, however, was distinguised by Jenkins, J.,

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1. A.I.R. 1941 Lah. 116 at p. 117 : 42 P.L.R. 749 : 193 I.C. 781.
2. A.I.R. 1950 All. 121.
3. Gulabchand *v.* Chhatra Singh, 1961 J.L.J. 395 at p. 396.
4. 21 C.W.N. 257 (P.C.).
5. I.L.R. 25 Cal. 616.
6. I.L.R. 21 Bom. 198.
7. I.L.R. 26 Cal. 381.
8. *See* also Golam Abdul *v.* Hem Chunder, 20 C.W.N. 418.
9. I.L.R. 30 Cal. 539. (P.C.).
10. Dhanmull *v.* Ram Chandra Ghose I.L.R. 24 Cal. 265.

in *Sreemutty Mohun Bibi* v. *Sarat Chand Mitter*[1] and he held that where an infant by fraudulent misrepresentation as to his age induced the plaintiff to advance him money on the security of a mortgage and the defence of plea of infancy the plaintiff was entitled to put in replication alleging fraud on the part of the defendant and was entitled to a mortgage decree for the amount. This view was upheld on appeal in *Sarat Chand Mitter* v. *Mohun Bibi*.[2] When a person between 18 and 21 years of age executed a conveyance with the knowledge that his minority has been extended by reason of an order under Sec. 7 of the Guardian and Wards Act, in favour of vendees who were not aware of that fact, *held* that he was estopped from taking advantage of his minority.[3] Cases bearing on the point whether fraudulent representation by an infant raises an estoppel against him are referred to in *Ram Charan Das* v. *Jayram Majhi*,[4] in which it was also held that an infant is not estopped by the acts or admissions of other persons.

Fraudulent misrepresentation by a minor.

In *Ganesh* v. *Bapu*,[5] it was held that Sec. 115 makes no exception in respect of an infant, and that proof of fraud on the part of an infant is not essential. In *Fazul Bhoy* v. *The Credit Bank of India*,[6] a minor had applied for and was alloted certain shares in a limited company ; he received dividends and continued to do so after attaining majority and it was held that his conduct while *sui juris* estopped him from denying as between himself and the company, that he was a shareholder. *Ganesh* v. *Bapu*[7] has been followed in *Dada Saheb* v. *Bai Nahani*.[8] The question again arose in *Gurushidd Swami* v. *Parawa*,[9] but it was not decided. In these cases, it appears, the Privy Council decision in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*[10] was not referred to.

No exception under Sec. 115, Evidence Act, to minors is made.

In *Vaikuntaram* v. *Authimolam*,[11] it was observed that an estoppel cannot overrule a plain provision of law, and the statutory provision that a minor is incompetent to incur a contractual debt, cannot be overruled by estoppel. In this case the minor was allowed, on attaining majority, to resile from his original plea.[12]

Estoppel cannot overrule a provision of law.

The Lahore High Court held in *Wasinda* v. *Sitaram*,[13] that Sec. 115 is applicable to minors following *Ganesh* v. *Bapu*.[14]

The matter seems to be now settled by the decision of the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*,[15] where their Lordships have held that the principle recently given effect to in the case of *R. Leslie Co. Ltd.* v. *Sheill*[16] would

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1. 2 C.W.N. 17.
2. I.L.R. 25 Cal. 371.
3. Surendra Nath Roy *v.* Krishna Sakhi Dasi, 15 C.W.N. 239.
4. 17 C.W.N. 10.
5. I.L.R. 21 Bom. 198.
6. I.L.R. 39 Bom. 331.
7. I.L.R. 21 Bom. 198.
8. I.L.R. 41 Bom. 480.
9. I.L.R. 44 Bom. 175.
10. 21 C.W.N. 257 (P.C.).
11. I.L.R. 38 Mad. 1071.
12. Raghavalu *v.* Adhinarayana, I.L.R. 62 Mad. 323.
13. I.L.R. 1 Lah. 389.
14. I.L.R. 21 Bom. 198.
15. 21 C.W.N. 257 (P.C.).
16. (1914) 3 K.B. 607.

apply. In the last mentioned case the learned Judges of the King's Bench Division observed—

> "To do otherwise would be nothing but enforcing a void contract as it would be a simple thing for those who prey upon infants to obtain from them materials which could be used to support a charge of fraud quite as easily as obtaining the usual promissory note. The result would be that the infant would have both to establish his infancy and to face a charge of fraud."

Privy Council view.

On the authority of the above Privy Council decision, it has been held in Madras, *per* Coutts-Trotter, J., that *R Leslie Co. Ltd.* v. *Sheill*[1] concludes the matter in all cases where the minor is a defendant and concludes it in his favour but in this country courts have a statutory right to impose conditions under Sec. 41 [now Sec. 33(1) of Act 47 of 1963] of the Specific Relief Act and that right is recognised in *Mohori Bibi* v. *Dharmodas Ghose*[2] and that condition may be imposed where the minor is the plaintiff. Seshagiri Aiyar, J., held that the fact that the infant is a plaintiff and not a defendant should make no difference in the principle to be applied.[3]

Minor as defendant.

In *Radhesham* v. *Behary Lal*,[4] it has been held that even on the assumption that a minor has made false representation as to his age he cannot be made to repay money which he has spent merely because he received it under a contract induced by his frauds and a distinction was drawn as to the position of the minor if he had sued as a plaintiff, in which event his liability to make restitution was affirmed.[5]

Suit for the recovery of money paid against minors.

No suit will lie for recovery of money paid to a minor on his executing a promissory note on the ground that the minor obtained the money by fraud.[6] The authorities are clear on the point and it is enough to refer to *R. Leslie Co. Ltd.* v. *Sheill*,[7] the principle given effect to in which was approved by the Judicial Committee in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*.[8] A deed executed by minors being admittedly a nullity, according to Indian law, is incapable of founding a plea of estoppel.[9]

Enforceability of a contract against a minor; English law.

It is to be observed that, so far as the English law is concerned, there is no authority for the proposition that a contract, which is void under the statute on the ground of infancy, can be enforced simply because it has been entered into on the faith of false representation as to age which the minor is precluded from denying. In the case of *Levene* v. *Brougham*,[10] the plea of estoppel against the minor was rejected by the Court of Appeal. It must be remembered that, as observed by their Lordships of the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Laha*,[11]

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1. (1914) 3 K.B. 607.
2. I.L.R. 30 Cal. 539 (P.C.).
3. Mallacheruva Raghavayya *v.* Mallacheruva Subbayya, 43 I.C. 908 (Mad.) ; Guruswamy *v.* Budhkaran, 53 I.C. 14 (Mad.); *see* also Kapura *v.* Arjun Singh, 75 I.C. 269 (Punj.).
4. I.L.R. 40 All. 558.
5. *See* also Liladhar *v.* Peary Lal, 62 I.C. 258 (All.) ; Mohammad Said *v.* Bishambhar Nath, I.L.R. 45 All. 644.
6. Potluri Rangarao *v.* Sait Chowgmal Vardichand & Co., A.I.R. 1934 Mad. 560 at p. 560.
7. (1914) 3 K.B. 607 : 83 L.J.K.B. 1145 : 111 L.T. 106.
8. A.I.R. 1916 P.C. 242 : 39 I.C. 401 : 43 I.A. 256 (P.C.).
9. Nawab Sadiq Ali Khan *v.* Jai Kishore, A.I.R. 1928 P.C. 152 at p. 156 : 26 A.L.J. 685 : 47 C.L.J. 628 : 32 C.W.N. 874 : 55 M.L.J. 88 : 28 M.L.W. 17 : 30 Bom. L.R. 1346.
10. (1909) 25 T.L.R. 265 : 53 S.C.J. 243.
11. I.L.R. (1893) 20 Cal. 296 : 19 I.A. 203 : 6 Sar. 224 (P.C.).

Sec. 115, Evidence Act, has not enacted as law in India anything different from the law of England on the subject of estoppel and the English decisions are therefore relevant to the discussion of the subject.

In India, the rule against the application of the doctrine of estoppel to a contract void on the ground of infancy has been adopted, not only by the Calcutta High Court, but also by the High Courts at Madras, Allahabad and Patna.[1] A Division Bench of the Lahore High Court has, however, favoured the view taken by the Bombay High Court in *Wasinda Ram* v. *Sita Ram*.[2]

Leading case

In the case of *Mohori Bibi* v. *Dharmodas Ghose*,[3] which was an appeal from the judgment of the Calcutta High Court in *Brahmo Datt* v. *Dharmodas Ghose*,[4] their Lordships refrained from expressing their opinion.

Another Privy Council view.

Nor is there anything in the judgment in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*,[5] which can be treated even as an *obiter dictum* on the subject of estoppel. No case of estoppel was either set up or decided in that case.

Rule.

It will be seen from the foregoing discussion that not only the English law, but also the balance of the judicial authority in India, is decided in favour of the rule that where an infant has indcued a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract and though Sec. 115, Evidence Act, is general in its terms, it must be read subject to the provisions of the Contract Act declaring a transaction entered into by a minor to be void.[6]

Plea of infancy and estoppel.

In *Gadigeppa Bhimappa* v. *Balangauda, Bhimangauda*[7], it was held that an infant is not estopped from setting up the plea of his infancy where he has fraudulently represented that he is of age and thereby induced another to enter into a contract with him.[8]

False representation as to his age by minor; effect.

Where a minor defendant making a false representation as to his age to the plaintiff executes a mortgage-deed the contract is void[9] and the defendant is not estopped from pleading his minority under the provisions of Sec. 115, Evidence Act. On the question whether the plaintiff is entitled to restitution of the sum which he paid to the minor defendant under the contract. There is a violent conflict of opinion between the High Courts in India. The decision in *Khan Gul* v. *Lakha Singh*[10] was given by a Bench of five Judges out of whom four were of opinion that the minor defendant could be compelled to

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1. *Vide* Vaikuntarama Pillai *v.* Authimoolam Chettiar, I.L.R. (1915) 38 Mad. 1071 ; 23 I.C. 799 : 26 M.L.J. 612 : Jagarnath Singh *v.* Lalta Pershad, I.L.R. (1909) 31 All. 21 : 5 A.L.J. 674 : 1 I.C. 562 : (1908) A.W.N. 267 and Ganganand Singh *v.* Rameshwar Singh, A.I.R. 1927 Pat. 271 : 6 Pat. 388.
2. I.L.R. (1920) 1 Lah. 389 : 59 I.C. 398.
3. I.L.R. (1903) 30 Cal. 539 : 30 I.A. 114 : 8 Sar. 374 (P.C.).
4. I.L.R. (1899) 26 Cal. 381 : 3 C.W.N. 468.
5. A.I.R. 1916 P.C. 242 : 43 I.A. 256 : (1916) A.C. 575 (P.C.).
6. Khan Gul *v.* Lakha Singh, A.I.R. 1928 Lah. 609 at p. 615 : I.L.R. 9 Lah. 701 : 30 P.L.R. 60 : 111 I.C. 175.
7. A.I.R. 1934 Bom. 561 : I.L.R. 55 Bom. 741 : 135 I.C. 161 (F.B.).
8. Mst. Kundan Bibi *v.* Magan Lal, A.I.R. 1932 All. 710 at p. 712 : 139 I.C. 718.
9. *See* Mohori Bibi *v.* Dharmodas Ghose, I.L.R. 30 Cal. 539.
10. I.L.R. 9 Lah. 701 : 30 P.L.R. 60 111 I.C. 175 : A.I.R. 1928 Lah. 609 (F.B.).

restore the money which he received under contract. One Judge dissented from this view and held that the minor could not be compelled to restore the money which he had received. That judgment was followed by a Single Judge of the Calcutta High Court in *Manmatha Kumar Saha* v. *Exchange Loan Co. Ltd.*[1] The opposite view was taken by the Allahabad High Court in *Ajodhia Prasad* v. *Chandan Lal*.[2] That case was decided by three Judges who after considering the Lahore case all came to the conclusion that the minor defendant could not be compelled to restore money which he had received under the contract. Peshawar J. C.'s Court considered that the view of the Allahabad High Court was the correct one. To hold otherwise would be to evade the provisions of the Contract Act as interpreted by the Privy Council in *Mohori Bibi* v. *Dharmodas Ghose*.[3] The following passage in the Allahabad case appears to be particularly pertinent :

Allahabad High Court view.

"To pass a decree against a minor enforcing his pecuniary liability would, while holding that the contract is void and unenforceable, at the same time be passing a decree against him on the footing that he had entered into the contract and has not carried out its terms."

There were remarks to a similar effect by their Lordships of the Privy Council in the Calcutta case referred to.[4]

No estoppel can be pleaded against a statute. If the Contract Act declares that the contract by a minor is void nothing can prevent the minor from pleading that such a contract is void on the ground of the minority.[5]

Representation by an infant does not operate as estoppel against him.

A representation made by an infant is not allowed to operate against him as an estoppel, where the estoppel, if allowed, would have the effect of depriving him of the protection against liability on his contract. But "where the representation was made on behalf of the infant by his guardian, or next friend, or other person legally competent to bind him by such representation, the infant on attaining his majority or the person so making the representation on his behalf until that event, as the case may be, is liable to be estopped thereby".[6] It is stated by Bigelow on *Estoppel*, 6th Ed., p. 626, that "an infant is not estopped by the act of his guardian in receiving money unless acting under authority of law".[7]

Transfer in favour of minor on consideration.

The law as laid down by several Benches of the Allahabad High Court is that when a transfer is made of property in favour of a minor and the minor has paid consideration for it, such a transaction cannot be held to come within the principle laid down by their Lordships of the Privy Council in *Mohori Bibi* v. *Dharmodas Ghose*.[8] The first case is that of *Ulfat Rai* v. *Gauri Shankar*.[9] It was held that the trnasfer in favour of the minors was valid and could be enforced by them. The case reported in *Navakotti Narayan* v. *Logalinga Chetty*,[10] was not followed.

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1. A.I.R. 1936 Cal. 507.
2. A.I.R. 1937 All. 610 : I.L.R. (1937) All. 860 : 1937 A.L.J. 688 (F.B.).
3. I.L.R. 30 Cal. 539 : 30 I.A. 114 : 7 C.W.N. 441 : 3 Sar. 374 (P.C.).
4. B. Kala Ram S. Bhag Singh *v.* Fazal Bari Khan, A.I.R. 1941 Pesh. 38 at pp. 38, 39 and 40.
5. Ajudhia Prasad *v.* Chandan Lal, A.I.R. 1937 All. 610 at p. 615 : I.L.R. (1937) All. 860 : 1937 A.L.J. 688 : 1937 A.W.R. 661.
6. *See* Bower on *Estoppel by Representation*, 1923, p. 162.
7. Lal Somnath Singh *v.* Ambika Prasad, A.I.R. 1950 All. 121 at p. 131.
8. I.L.R. (1903) 30 Cal. 539 : 30 I.A. 114 : 7 C.W.N. 441 : 8 Sar. 374 (P.C.).
9. (1911) 33 All. 657 : 11 I.C. 20 : 8 A.L.J. 670.
10. I.L.R. 33 Mad. 312.

In *Munni Kuar* v. *Madan Gopal*,[1] it was held that inasmuch as there was nothing in law to prevent a minor from becoming transferee of immoveable property so a minor in whose favour a valid deed had been executed is competent to sue for possession of the property conveyed. In *Narain Das* v. *Mst. Dhania*[2] it was held that a minor was capable of purchasing immovable property and where such a purchase has been completed by execution and registration of a sale-deed he can sue to recover possession of the property purchased upon tender of the balance of the purchase money.[3] In the case of *Thakur Das* v. *Mst. Pulti*,[4] a Bench of the Lahore High Court held that a mortgage in favour of a minor was enforceable by him where the consideration has been paid by him in full.

Minor can purchase immovable property.

102. Crown or State.—Like all other individuals the Crown or State may be brought within the grip of estoppel. There may be estoppel against the Government.[5]

There is one exception to the rule that estoppels ought to be reciprocal, i.e. should bind both parties and this is the case of the Crown; for the King is not bound by estoppels though he can take advantage of them. On the other hand, the King shall take advantage of estoppel though he be not party to the record; for he is always present in the Court. The rule is the same apparently in the case of estoppels by deed, but not general in the case of estoppels by *pais*. The King is, however, it would seem, bound by estoppels arising out of criminal proceedings as he is necessarily a party to them.[6]

Exception to the rule.

When a party to an appeal has induced the Court to pass an order on a certain representation made to the Court, that party cannot later on be heard to say that order passed by the Court on his request is illegal. The Government, like any other party, cannot be allowed to approbate and reprobate.[7]

In *Toolsemoney Dasee* v. *Maria Cornelius*,[8] the Crown had by letter relinquished its claim to the assets of a bastard; it was held that the Crown would be estopped from asserting its claim to the property. When a municipality having under an expectation created and encouraged by the Government that a certain interest would be granted, taken possession of land with the consent of the Government and without objection by Government, laid out money upon the land, it was held that the Municipality had an equitable right to have such an expectation realised, and the Crown came within the range of equity; such equity differed essentially from the doctrine embodied in Sec. 115 of Evidence Act.[9] *Srinibas Prasad Singh* v. *Keso Prasad Singh*,[10] it was held that the doctrine of

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1. I.L.R. (1916) 38 All. 62 : 31 I.C. 792 : 13 A.L.J. 1084.
2. I.L.R. (1916) 38 All. 154 : 35 I.C. 23 : 14 A.L.J. 55.
3. Zafar Ahsan *v.* Zubaida Khatun, A.I.R. 1929 All. 604 at p. 605 : 1929 A.L.J. 1114 : 121 I.C. 398.
4. A.I.R. 1924 Lah. 611 : I.L.R. 5 Lah. 317.
5. *See* Toolseemoney Dassee *v.* Maria Cornelius, 11 Beng. L.R., 144 ; *In re* Parmanandas, I.L.R. 7 Bom. 109 at p. 117.
6. Everest and Stroders *Law of Estoppel*, 3rd Ed., pp. 8, 9.
7. V.M.S. Kandasamy Nadar *v.* Province of Madras, A.I.R. 1953 Mad. 391 at pp. 391-92 : (1951) 1 M.L.J. 804 : 65 L.W. 787.
8. 11 B.L.R. 144.
9. Municipal Corporation of Bombay *v.* Secretary of State, I.L.R. 29 Bom. 580 ; *see* in this connection Dadoba Janardhan *v.* Collector of Bombay, I.L.R. 25 Bom. 714 : Jethaboy *v.* Collector of Bombay, I.L.R. 25 Bom. 752.
10. 15 C.W.N. 475.

equitable estoppel would not apply where the act involves the waiver or renouncement of a right to perform a public duty and the Sovereign power is not bound by the *ultra vires* acts of its agents.

It is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers.[1] The facts that sales of country liquor had been exempted from sales-tax, *vide* Notification no. ST- 1149/X- 802 (33)-51 dated 6th April, 1959 could not operate as an estoppel against the State Government and preclude it from subjecting the sales to tax if it felt impelled to do so in the interest of the revenues of the State which are required for execution of the plans designed to meet the ever-increasing pressing needs of the developing society. It is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative sovereign or executive powers. The Government cannot divest itself of the right incidental to its office by conduct which in the case of a private person, would amount to estoppel and in characterizing the demand for sales-tax made by the appellants as illegal.[2]

The doctrine of promissory or equitable estoppel does not apply to representations and assurances by the Government or by officers acting on its behalf. Unless the element of detriment is proved, the person aggrieved cannot rely on the plea of promissory estoppel.[3]

There can be no estoppel against any policy statement of the Government in the exercise of its sovereign State or executive functions.[4]

The plea of equitable estoppel cannot operate against the provisions of the Act. In the instant case the company initially established itself for the production of rayon trade pulp and the Government bound itself to supply the raw material. Later on the Government permitted the company to purchase and the company did purchase private forests and further agreed that the forests purchased by the company be immune from acquisition by the Government under the proposed legislation for acquisition of private forests for a period or sixty years. *Held* that the surrender by the Government of its legislative powers to be used for public good cannot avail the company or operate against the Government as equitable estoppel.[5] There is no doubt that Sec. 115 incorporates an equitable doctrine which prevents a party from adopting two inconsistent positions. Nevertheless, the basis upon which equity operates against the party which makes a representation is that the party relying on the estoppel has been misled into altering its position to its disadvantage due to the representation. The party to which the representation is made must have been induced to act in the belief that the representation was true. Where all the facts are within the knowledge of both parties there is no question of one party acting on the faith of an incorrect representation.[6]

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1. Excise Commissioner U.P. Allahabad *v.* Ram Kumar, A.I.R. 1976 S.C. 2237 at p. 2241; Jit Ram Shiv Kumar Messrs *v.* State of Haryana, A.I.R. 1980 S.C. 1285 at p. 1291 ; N. Ramanatha Pillai *v.* State of Kerala, (1974) 1 S.C.R. 515 : A.I.R. 1973 S.C. 2641 and State of Kerala *v.* Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd., (1974) 1 S.C.R. 671 : A.I.R. 1973 S.C. 2734.
2. Excise Commissioner, Uttar Pradesh, Allahabad *v.* Ram Kumar, A.I.R. 1976, S.C. 2237 at pp. 2241-43.
3. Madras Steelware Industry, Madras *v.* Joint Chief Controller of Imports and Exports, Madras, A.I.R. 1976 Mad. 376 at pp. 381, 382.
4. Union of India *v.* P. Maruthai Pillai, A.I.R. 1979 Mad. 207 at p. 215.
5. Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd. Birla Kootam Movoor, Kozhikode Kerala *v.* State of Kerala, A.I.R. 1973 Kerala 36 at p. 44.
6. Shiv Ditta *v.* Kidar Nath, A.I.R. 1972 H.P. 20 at p. 22.

103. Court of Wards.—Conduct or representation by the Court of Wards may give rise to an estoppel.[1]

There is nothing in Sec. 3. Court of Wards Act to indicate that the Legislature intends to prohibit a ward from becoming the transferee of property.[2]

104. Corporation.—At common law a corporation cannot do an act *in pais* without their common seal, but they may do an act upon record without either sealing or signing because they are estopped by the record from saying that it was not their act.[3] In *Goodrick* v. *Venkanna*,[4] the agreement was signed by the defendant but was not executed under seal by the Commissioners. In a suit brought by the Commissioners for a portion of the sum due to them by the defendant, it was held that as both parties had acted under the agreement, and as the defendant had the full benefit of the contract, it would be contrary to equity and good conscience to allow him to set up as ground of defence that there was no contract in point of law. The doctrine of estoppel and part-performance apply to corporations. But no sort of estoppel, part-performance or notifications can bind a corporation to a transaction which the Legislature in substance has forbidden it to undertake.[5] The principle that illegality negatives the estoppel is discussed in the case of a company in *Madras Hindu Mutual Benefit Permanent Fund* v. *Raghaba Chetti*.[6] In *Kunj Kishore* v. *Official Liquidator*,[7] a company was held estopped from pleading the invalidity of their Articles of Association against holders in due course of *hundis*. As regards the rules relating to estoppel by conduct against the company or the shareholders, see *In re East Indian Trading and Banking Co.*[8] and *In re Mercantile Credit and Financial Association*.[9]

Doctrine of estoppel and part-performance is applicable.

The respondent acting upon the solemn promise made by the appellant incurred huge expenditure and if the appellant is not held to its promise, the respondent would be put in a very disadvantageous position and therefore the principle of promissory estoppel can be invoked in this case. Thus the principle of promissory estoppel would certainly estop the corporation from backing out of its obligation arising from a solemn promise made by it to the respondent.[10]

For examining the question on principle as when estoppel can be pleaded against an artificial person which can only be created by charter or by statue it is necessary to examine closely the decision of the Judicial Committee given in *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*[11]

When estoppel can be pleaded.

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1. Goura Chandra *v.* Secretary of State, I.L.R. 28 Mad. 130 (P.C.) ; Mitra Sen Singh *v.* Janki Kunwar, I.L.R. 46 All. 728 (P.C.).
2. The Collector of Meerut incharge, Court of Wards, Meerut, and Special Manager of Estate of Bibi Naushaba Begum *v.* Lala Haridian Singh, A.I.R. 1945 All. 156 at p. 157 : 1945 A.L.J. 94 : 1945 A.W.R. (H.C.) 28 : 221 I.C. 434.
3. Mayor of Thelford's case, 1 Salk 192 ; 3 Salk 103 ; Mayor of Kidderminister *v.* Hardwick, L.R. 9 Ex. 13 ; *see* also Ram Sukh Shukla *v.* State of Uttar Pradesh, 1982 Lah. I.C. 1893.
4. I.L.R. 2 Mad. 104.
5. *In re* Abdul Rasul, I.L.R. 41 Cal. 518 at p. 534.
6. I.L.R. 19 Mad. 200.
7. I.L.R. 36 All. 416.
8. 3 Bom. H.C. 113.
9. 3 Bom. H.C. 125.
10. Gujarat State Financial Corporation *v.* Messrs Lotus Hotels Pvt. Ltd., A.I.R. 1983 S.C. 848 at p. 852.
11. (1937) A.C. 610.

Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them relying on which other persons have altered their position to their prejudice.[1]

Capacity of natural and that of artificial person—Distinction between.

There is a fundamental distinction between the capacity of natural person and of an artificial person which has been created by statute or charter. To a natural person whatever is not expressly forbidden by the law is permitted by the law. In the case of an artificial person, e.g. a corporation the rule applicable to a natural person is reversed. Whatever is not permitted expressly or by necessary implication by the constituting instrument is prohibited by the doctrine of *ultra vires*.[2] This fundamental principle has been laid down in many cases : *Ashbury Railway Carriage and Iron Co.* v. *Riche*,[3] *Attorney-General* v. *Great Eastern Railway Company*.[4]

Bank.

The bank is not estopped from contending that the names of the palintiffs (shareholders) should remain in the register of shareholders against certain shares, because they knew about the transfers and impliedly accepting the transfer of the shares.[5]

A public body is not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice.[6]

The mere fact that Municipal Corporation started supplying electricity and charging for the same should not estop Municipal Corporation from demolishing the structure. Mere supply of electricity cannot amount to according sanction for a building.[7]

Where the responsibility for the letter of the agent of the company is admitted by the company in the written statement, the defendant company is estopped from taking up the position different from the earlier stated in respect of the subsequent policies.[8]

Estoppel against Improvement Trust.

In *Atam Nagar Co-operative House-Building Society Ltd., Ludhiana* v. *State of Punjab*,[9] the Improvement Trust granted an exemption in favour of the land purchased by the members of a society under certain schemes for urban development and the scheme was quashed because the Trust had caused inordinate delay in executing the same. When a new scheme of the same type was adopted, the Trust declined to honour its earlier commitments. It was held that the Trust cannot be allowed to ignore the claim of the earlier applicants in whose favour rights have come into existence on account of the operation of the principle of estoppel.

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1. Laghu Udyog Karmachari Cooperative Housing Society Ltd. *v.* State, A.I.R. 1975 M.P. 93 at p. 98 ; *see* also Kasturchand Chhotmal *v.* Kapurchand Kewalchand, A.I.R. 1975 M.P. 136.
2. Srtibhusan Mukerjee *v.* Corporation of Calcutta, A.I.R., 1949 CAl. 20 at pp. 23-24.
3. (1875) L.R. 7 H.L. 653 : 44 L.J. Ex. 185.
4. (1880) 5 A. C. 473 at p. 481 : 49 L.J. Ch. 545.
5. Bank of Hindustan Ltd. *v.* Mowtha Suryanarayana Rao, A.I.R. 1957 Mad. 702 at p. 713 : 1957 M.W.N. 558 : (1957) 2 M.L.J. 517 : 70 M.L.W. 715 : I.L.R. (1975) Mad. 1058.
6. Laghu Udyog Karmachari Co-operative Housing Society Ltd. *v.* State, A.I.R. 1975 M.P. 93 at p. 98.
7. United Taxi Operators Co-operative (Urban) Thrift and Credit Society Ltd., Delhi, Messrs. *v.* Municipal Corporation, Delhi, A.I.R. 1967 Punj. 12 at p. 84.
8. Scotish Union & National Insurance Co. *v.* N. Roushan Jahan Begam, A.I.R. 1945 Oudh 152 at p. 160.
9. A.I.R. 1979 Punj. 196 at p. 198.

Trust permitting the petitioner to develop colony cannot go back from its promise.

It is clear from Sec. 38 of the M.P. Town Improvement Trust Act, 1960 that one of the purposes of this Act was to provide housing acommodation for any class of inhabitants within the trust area and in fact it was in pursuance of this that the scheme was framed. But it appears that the trust was satisfied that the petitioner's scheme of developing a housing colony for a particular category of persons who were entitled to be members of the society could be permitted as this section talked of housing accommodation for any class of inhabitants within the area and therefore it cannot be doubted that when the Trust passed the resolution permitting the petitioner to develop a housing colony for a particular class of inhabitants in the area, it could not be said that the Trust did not in accordance with the purposes of the Act.

By this resolution the trust held out a promise to the petitioner and this promise the trusts in law could perform. In pursuance of this promise after intimation from the Trust the petitioners went ahead and got a sale deed executed in its favour from Moolchand. Apparently, therefore, the trust could not be permitted to go back from his promise.[1]

105. Agent.—*See* Sec. 237 of the Contract Act. The rule , however as enunciated by Lord Cranworth in *Ramsden* v. *Dyson*,[2] is in these words : "If indeed the principal knows that persons dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal and knowing this allows the person so dealing to expend money in the belief that the agent had an authority which in fact he had not, it may be that in such a case a Court of Equity would not allow the principal afterwards to set up want of authority in the agent.....In *Rampertab* v. *G. Marshal*,[3] the right of a third party against the principal on the contract of his agent, though made in excess of the agent's authority, was enforced where the evidence showed that the contracting party has been led into an honest belief in the existence of the authority to the extent apparent to him. The principles have been clearly stated in *Ruso Chinese Bank* v. *Li Yan Sang*,[4] in which it has been laid down that a person, who deals with an agent whose authority he knows to be limited, does so at his peril; that in order that the principle of holding out should in any given case of agency apply to the act done by the agent and be relied upon to bind the principal it must be an act of that paritcular class which the agent is held out as having a general authority on behalf of his principal to do; but if the agent be held out as having a limited authority to do on behalf on his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class; that where the principal did not by any negligent or improper act allow the agent to be apparently invested with an authority beyond on greater than the limited authority which the customer knew him to possess there could not be any estoppel as against the principal in respect of any of the steps in a transaction whereby the customer was deceived by the agent acting beyond his authority.[5]

Section 237, Contract Act.

Right of a third party against principal enforceable.

Estoppel against principal.

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1. Laghu Udyod Karmachari Co-operative Housing Society Ltd., Indore *v.* State of Madhya Pradesh, 1974 M.P.L.J. 887 at pp. 893-94.
2. L.R. 1 H.L. 129.
3. I.L.R. 21 Cal. 701 (P.C.).
4. 14 C.W.N. 381 (P.C.).
5. *In re* Abdul Rasul, I.L.R. 41 Cal. 518 at p. 535.

106. Estoppel against principals.—The law recognizes agency by estoppel, that is to say if a person allows another to transact with third parties on his behalf and makes them believe that the person doing so on his behalf, then such person will be bound by the transactions entered into by the ostensible agent.[1]

Agency by estoppel.

Where the plaintiff, a contractor, has been supplying materials to the defendant railway for several years and all the contracts under which he made supplies were entered into by the Manager and Engineer of the defendant Railway and he was always paid by the defendant Railway is estopped from pleading that the Manager who had entered into the contract was not authorised to do so.[2]

A representation made by an agent is as effectual for the purpose of estoppel as if it had been made by a principal.[3]

107. Partner.—*See* Sec. 28 of the Indian Partnership Act. A person, though not in fact a partner may by his acts and conduct hold himself out to strangers as such as to become liable by estoppel.[4]

108. Manager of Hindu family.—If a member of a Hindu joint family acquiesces in the mangement of the property by his father and in the dealings of the latter and the property issued in execution of decree against other, such a member is estopped from claiming his share afterward.[5] If a member of a joint Hindu family holds out another as the manager of the whole estate he is estopped from contending that the mortgage effected by the latter is not binding on his share, if the latter did as a matter of fact borrow the money for the benefit of the family.[6]

In the instant case, the admission clearly and unmistakably shows that the father of the appellants was in possession of 125 *tolas* of gold belonging to the joint family. As the appellants are the successors in interest and legal representatives of Dasarath, the statement of Dasarath regarding the possession of gold clearly binds them. No evidence was adduced by the appellants as to what happened to the gold subsequently. In the normal course, it must be presumed that the gold remained with the family. Merely because the Commissioner's report does not advert to the existence of gold, the admission made by Dasarath cannot be ignored as to the possession of the gold. Thus, it was held that on the date of the suit the family of the appellants was in possesion of 125 *tolas* of gold, if not more, which belonged to the joint family comprising Tayappa and Dasarath.[7]

109. Officials of the Court.—There can be no estoppel against a litigant arising out of wrongful acts of Court permitted or performed by its own officials.[8]

110. *Pardanashin* lady.—There is no authority for the proposition that there is any rule of law or of equity, which can justify a court in holding that a *paradansahin* woman is exempt from the effect of estoppel even though it is found as a fact that she did make the declarations and representations relied upon with a full knowledge of their nature and effect.[9]

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1. Moosa Bhoy *v.* V. Krishtiah, A.I.R. 1952 Hyd. 79 at p. 80.
2. Gaekwar, Baroda State Railway *v.* Sheikh Habib Ullah, A.I.R. 1934 All. 740 at pp. 749-50 : 1934 A.L.J. 1093 : I.L.R. 56 All. 828 : 853 I.C. 824.
3. Kathiyumma *v.* Urathel Marakkar, A.I.R. 1931 Mad. 647 at p. 649 : 1931 M.W.N. 570 : 133 I.C. 375.
4. Porter *v.* Incell, 10 C.W.N. 313.
5. Damudar Doss *v.* Mahoram Pandah, 13 C.L.R. 96.
6. Krishnaji Mahadev *v.* Moro Mahadev, I.L.R. 15 Bom. 32.
7. Modi Krishna *v.* Modgi Krishna Bai, A.I.R. 1994 A.P. 16 at p. 21.
8. Balgobind *v.* Sheo Kumar, 82 I.C. 184 (All.).
9. Mst. Sunder Kuer *v.* Shah Udey Ram, A.I.R. 1944 All. 42 at p. 39 : 1944 A.L.J. 19 : 1944 A.W.R. (H.C.) 8 : I.L.R. (1947) All. 81.

111. No estoppel against statutes.—It is well settled that there is no estoppel against statute. Equitable estoppel has absolutely no application to cases where there are clear provisions of statutes.[1]

In that connection the famous observation made by Lord Russell in *Ariff's* case,[2] may suitably be quoted which runs as follows :

> "Their Lordships do not understand the dicta to mean that equity will hold people bound as if a contract was in fact made; nor do they understand them to mean that equity can override the provisions of statute....."

It is often said that there can be no estoppel against a statute based on grounds of general public policy. As pointed out by Lord Racdliffe in *Kok Hoong* v. *Leong Kweng Mines Ltd* :[3]

> "A principle as widely stated as this might prove to be rather an elusive guide, a more direct test to apply is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the Court must give effect in interests of the public genreally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Genreal social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection or for protection of others. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms".

Briefly, those provisions of law which are meant to protect a person or a class of persons even against his or their own voluntary acts cannot be defeated by a plea of estoppel.[4] But those provisions of law which exist only for the benefit of a person or a class of persons can be waived by the beneficiaries. Such beneficiaries can be estopped thereafter from invoking the statutory benefit in their favour.[5]

There can be no estoppel against law.[6]

Erroneous interpretation of statutory rules.

In the instance case, by erroneous interpretation of the Rules if pensionary benefits are granted to someone it would not mean that the said mistake should be perpetuated by direction of the Court. It would be unjustifiable to submit that by appropriate writ, the Court should direct something which is contrary to the statutory rules. In such cases, there is no question of application of Art. 14 of the Constitution. No person can claim any right on the basis of decision which dehors the statutory rules nor can there be any estoppel. Further, in such cases there cannot be any consideration on the ground of hardship. If the Rules are not providing for grant of pensionary benefits it is for the authority to decide and frame appropriate rules but the Court cannot direct payment of pension on the ground of so-called hardship likely to be caused to a person who has resigned without completing qualifying service for getting pensionary benefits. As a normal rule, pensionary benefits are granted to a government servant who is required to

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1. Madan Bari *v.* State of Bihar, 1968 B.L.J.R. 342 at p. 348 : *see* also West Bengal Board of Secondary Education *v.* Basanta Rani Ghosh, A.I.R. 1982 Cal. 467 ; Ambala Goods Carriers Pvt. Ltd., Ambala *v.* Regional Transport Authority, A.I.R. 1977 H.P. 46 at p. 50.
2. 58 I.A. 91 at p. 104.
3. 1964 A.C. 993 at p. 1016.
4. Jagdish Chandar Bhalla *v.* Lakshman Swarup, I.L.R. (1971) 1 Delhi 504, reviewing the Supreme Court decisions on the point.
5. Jagan Nath *v.* Abdul Aziz, A.I.R. 1973 Delhi 9 at p. 12-13.
6. Ranibhotla Ramanna *v.* Government of Andhra Pradesh, (1972) 1 Andh. W.R. 170 at p. 182.

retire on his attaining the age of compulsory retirement except in those cases where there are special provisions.[1]

One of the reasons given by the learned Judges for pronouncing that view is that, if such a course is adopted by the Government, it would create confusion in the public mind. While it is true that it will be a very dangerous course to allow the State, where it is convenient, to contend that its own laws, rules, regulations or orders are invalid, the Court however has a duty to examine the validity or otherwise of a particular order, rule or regulation when its validity is questioned for it cannot allow an invalid order or law to be enforced merely for the reasons that it comes with illgrace from the authors of the very orders or at whose instance laws have been made to challenge their validity.

There can be no doubt that rule 7 of Chapter III, para 6 of the Rules framed by the Bar Council of India is a statutory provision. It was published in the Gazette long before the petitioner got himself enrolled as an advocate and the plea of estoppel is not available to him.[2]

There cannot exist an estoppel against a statute and jurisdiction cannot be conferred upon the Court by the inaction of parties or even by agreement of parties. If the original agreement intended to confer jurisdiction upon the Court, when it had none the agreement would be bad, but no estoppel as such would result. But it is really unnecesssary to evoke this principle of estoppel.[3]

The law precludes parties from extending time after the matter has been referred to the arbitrator, it will be contradiction in terms to hold that the same result can be brought about by the conduct of the parties. The age long established principle is that there can be no estoppel against a statute.[4]

It is true that a person who wants to take benefit of the legislation cannot at the same time, challenge it. But it is equally true that there cannot be estoppel against the statutes and if the provisions of law are *ultra vires*, a citizen can, by challenging a particular provision, insist for striking down that part of it, which infringes his legal rights and retaining other part of it which gives benefit to him, then a law can be considered for validity and even part of it can be struck down if doctrine of severability can be applied.[5]

There can be no estoppel against a statute but it can be legitimately argued that if a statute confers any benefit on a party, it is open to a party to give up that benefit unless the giving up of that benefit is contrary to public policy.[6]

There could be no estoppel against a statute. Therefore a party who had gone to arbitration under a contract which was void under some Act could not plead that his opponent having taken part in arbitration proceedings could not later repudiate the award as void.[7]

No estoppel can be claimed against a statutory obligation.[8]

What is meant by there being no estoppel against a statue is that a person is not estopped by a previous statement as to the existence of a statutory provision from contending that the converse is the statutory provision. If a judgment-debtor makes a statement that a house belonging to and occupied by an agriculturist is liable to be attached sold in execution of a decree passed against him he will not be estopped from

Estoppel against statute.

1. **Union of India** *v.* **Rakesh Kumar, (2001) 4 S.C.C. 309 at p. 321.**
2. Indra Bahadur *v.* Bar Council, Allahabad, A.I.R. 1986 All. 56 at p. 66.
3. Madhavdas Dwarkadas *v.* Jugal Kishore Saraf, A.I.R. 1983 Bom. 20 at p. 25.
4. State of Punjab *v.* Hardayal, A.I.R. 1985 S.C. 920 at p. 923.
5. Balwant Singh *v.* State of Rajasthan, A.I.R. 1983 Raj. 39 at p. 48.
6. Ranain *v.* Lt. Sewa Singh, A.I.R. 1972 Punj. 333 at p. 335.
7. Hiralal Pannalla *v.* Dalhousie Jute Co. Ltd., A.I.R. 1978 Cal. 119 at p. 123.
8. Miss Kailash Mehta *v.* Municipal Corporation Delhi, A.I.R. 1982 Delhi 59 at p. 62.

objecting to the attachment of his house on the ground that it belongs to and is occupied by him as an agriculturist and Sec. 60(1) (*c*), C.P.C., will override his statement. In *South Ottawa* v. *Perkins*,[1] it was observed at page 157 by Bardley, J.—

American Law

> "There can be no estoppel in the way of ascertaining the existence of a law.....whether it be a law, or not a law is a judicial question, to be settled and determined by the Courts and Judges. The doctrine of estoppel is totally inadmissible in the case."

If the terms of a statue are absolute and do not admit any of the relaxation or exemption, then anything done contrary to the terms of such a statue will be *ultra vires* and will be void and no person can be estopped from putting forward the contention that what he did was illegal or void. On the other hand, if a statute having prescribed certain conditions or qualifications for the doing of a certain thing itself provides for exemption therefrom under certain circumstances or authorises somebody to exercise the powers of exemption then anything done not in terms of those conditions or qualifications will not be *ultra vires* and will be said to be merely irregular and to such an act, the proposition that there can be no estoppel against a statute will have no application.[2]

This is the meaning of there being no estoppel against a statute. It is a representation of law and not of fact which cannot found an estoppel.[3] The only rule to which estoppels are subject is that they canot override the law of the land.[4]

Canadian Law.

The question of a clash between the law of the land and an estoppel arises only when the statement on which the estoppel is founded is about the state of the law of the land, i.e. is a statement of law. A mixed statement of fact and law cannot be said to be contrary to the law because in a certain state of facts it may be correct according to the law of the land. Even an erroneous statement of law was held to estop the maker in *Fenderson* v. *Fenderson*,[5] referred to with approval in 31 H.L.R. p. 665. It was observed in that case that it is generally stated that estoppel cannot be founded on a misrepresentaion of law; the basis is that everyone is presumed to know the law or that a statement of law is only an opinion and not a statement of fact. This is what is meant when it is said that there cannot be an estoppel against a statute.[6]

There cannot be estoppel against the statutues and, if the provisions of law are *ultra vires*, a citizen can, by challenging a particular provision, insist for striking down that part of it, which infringes his legal rights and retaining other part of it which gives benefit to him, then a law can be considered for validity and even part of it can be struck down if doctrine of severability can be applied. Therefore, the writ petition could not be rejected only on the ground that the petitioners are trying to take the benefit of the legislation and are still challenging it.[7]

There can be no estoppel against a statute. Rule 28 (1-A) and rule 57(2) of the Mineral Concession Rules, 1949, are statutory rules. They bind the Government as much as they bind others. The requirements of those rules cannot be waived by the State Governments.[8]

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1. 94 U.S. 260 at p. 277 : 24 L.E. 154.
2. K.K. Jacob (Minor) *v.* Madurai University, A.I.R. 1978 Mad. 315 at p. 320.
3. *See* Kai Ram *v.* Ma Kan Chand, (1956) 1 All. E.R. 783 ; *see* also Parsadwa *v.* Third Additional District Judge Banda, 1981 All. L.J. 559.
4. *See* St. Ann's Island Shooting and Fishing Club Ltd. *v.* King, 1950 Ex. C.R. Canada 185.
5. 102 All. 69.
6. Jai Jai Ram *v.* Smt. Lakshmi Devi, 1963 A.L.J. 832 at p. 833.
7. Balwant Singh *v.* State of Rajasthan, A.I.R. 1983 Raj. 39 at p. 48.
8. Nookala Setharamaiah *v.* Kotaiah Naidu, A.I.R. 1970 S.C. 1354 at p. 1959.

Proviso (*a*) to Art. 311(2) of the Constitution itself says that no enquiry need be held and no opportunity need be given.

This exemption is for the benefit of the administration and conducive to public interests, which cannot be forfeited by the administration by estoppel.[1]

If the provisions of law are *ultra vires*, a citizen can, by challenging a particular provision, insist for striking down that part of it, which infringes his legal rights and retaining other part of it which gives benefit to him, then a law can be considered for validity and even part of it can be struck down if doctrine of severability can be applied.[2]

Once owner-claimants were, under the law, entitled to a just compensation, for the requisition of the premises—they cannot be estopped from claiming just compensation merely because they had given a low figure of annual rent for purposes of taxation.[3]

There cannot be any estoppel where the grievance is that statutory rules have been violated. In cases where the challenge is based on the ground that the authority has failed to act in accordance with the statutory rules, the plea of estoppel cannot be sustained.[4]

Where Government is given powers to frame rules, they are generally framed by some officers of the Government and if they go beyond the authority conferred upon the Government, for the purposes of framing rules, those rules cannot bind the Government. In such cases there can be no estoppel, because the rules framed are against the statutory powers conferred upon the rule making body and there can never be estoppel against statute.[5] The doctrine of estoppel only applies to a contract *inter partes* and it is not competent to parties to a contract to estop themselves in the face of an Act of Parliament.[6] There is no estoppel against an Act of Legislature.[7] There can be no estoppel against the express terms of an Act of Legislature.[8]

It is well settled that in the case of special Acts, mere acquiescence, consent or estoppel would not entitle the Court to pass an order which is not in keeping with the provisions of the Act.[9]

112. On point of law.—It has been held times without number that there is no estoppel on a question of law.[10] Admission on matter of law, or any ignorance of legal right, cannot constitute any basis for estoppel.[11]

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1. Sunil Kumar Ghosh *v.* State of West Bengal, 73 C.W.N. 627 : (1970) 1 Lah. L.J. 588.
2. Balwant Singh *v.* State of Rajasthan, A.I.R. 1983 Raj. 39 at p. 48.
3. Seth Satnarain Goenka *v.* Union of India, A.I.R. 1970 Delhi 232 at p. 239.
4. C.J. Thakor *v.* Ahmedabad Distt. Panchayat, A.I.R. 1982 Guj. 183 at p. 188.
5. Pulwaoi Devi *v.* Union of India, A.I.R. 1977 Pat. 32 at p. 35.
6. Barrow's case, (1880) 14 Ch. D. 441, cited in Madras Hindu Mutual Benefit Permanent Fund *v.* Radava Chetty, I.L.R. 19 Mad. 200.
7. Shridhar *v.* Babaji, 16 Bom. L.R. 586; Mahabir Singh *v.* Narain Tewari, A.I.R. 1931 All. 490; Jai Sri Singh *v.* Prabhu Narain Singh, A.I.R. 1935 All. 127 ; Ajudhia Prasad *v.* Chandan lal, A.I.R. 1937 All. 610.
8. L. Prem Prakash *v.* Pt. Mohan Lal, A.I.R. 1943 Lah. 268 ; Ma Mo E *v.* Ma Kun Hlaing, A.I.R. 1941 Rang. 234; Darbari Lal Mudi *v.* Raneeganj Coal Association Ltd., A.I.R. 1944 Pat. 30; Walzi Chhatri *v.* Ganpat Singh, A.I.R. 1943 Pat. 386; Uchit Lal Misser *v.* Raghunandan Tewari, A.I.R. 1934 Pat. 666; State of Bihar *v.* Dukhulal Das, A.I.R. 1962 Pat. 140.
9. Amar Dass Chela Jai Ram Dass of Nabha *v.* Shiromani Gurdwara Parbandhak Committee, Amritsar, A.I.R. 1978 Punj. 273 at p. 283.
10. Shaik Ibrahim *v.* Commissioner of Income-tax, Andhra Pradesh, (1968) 69 I.T.R. 117 at p. 120.
11. Raghva Rajagopalachari *v.* State of Assam, A.I.R. 1965 Assam 109 at p. 110.

Rule 31 of Chapter III of the University Regulations confers a right on a candidate in Bachelor's Degree who has failed in the examination of a particular year, but has obtained pass marks in any subject or group of subjects to claim exemption from taking examination in the subject or group of subjects in which he has already passed for the next two occasions. But at the same time by Cl. (*a*) of its proviso unambiguously provides that this exemption shall not be available to the candidates for any examination "other than the two immediately following the examination in which he originally failed but earned the exemption. "In other words rule 31 entitles the candidate covered by sub Cl. (1) to appear in the next two examinations held by the University claiming this exemption, but not in any other examination beyond that. The university is not estopped from setting up the bar of Cl. (*a*) of proviso after it has issued the Admit card and allowed the petitioner to appear in the third examination in the subject in which he had failed and to answer the paper. The bar of Cl. (*a*) of the proviso to Rule 31 is statutory and goes to the root and operates to take away the eligibility or right or title of the petitioner to appear in the Bachelor's Degree examination with the privilege of exemption under Rule 31.[1]

Interpretation of the document is purely a question of law and there cannot be estoppel in such matters. To take a simple illustration, if a document is in fact a will, but if it has been wrongly described as a gift by a certain party, the Court will have to consider independently of admission of any party the correct nature of the document.[2]

No estoppel to defeat the provisions of a statute.

The principle of estoppel cannot be invoked to defeat the plain provisions of a statute,[3] e.g. non-registration of a company under the Indian Companies Act[4] sale-deed and mortgage-bond not registered under Sec. 54 of the Transfer of Property Act,[5] provisions of Sec. 78 of the Land Registration Act or Sec. 60 of the Bengal Tenancy Act,[6] non-certification of adjustment of a decree under Order XXI rule 2(3),[7] a transfer of a mere possibility within the meaning of Sec. 6 (*a*) of the Transfer of Property Act,[8] a permanent sub-lease which is invalid under Sec. 85(2) of the Bengal Tenancy Act.[9] In *Joginee Mohan* v. *Bhutnath*,[10] Maclean, C.J., expressed himself as disposed to take the view that a mortgagor would be estopped from questioning the validity of registration on the ground that there was no property situate within the jurisdiction of the Registration Office; and in *Sudhir Chunder Set* v. *Syed Abdullah*,[11] Woodroffe, J., held that the mortgagor will be estopped because the principle that an estoppel cannot be invoked to defeat the plain provisions of a statute, can have no application to a case like this.[12] So a lease in contravention of Sec. 9 and resignation in contravention of Sec. 10 of Khoti Settlement Act (Bombay Act 1 of 1880),[13] and exchange in violation of Secs. 54 and

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1. Haripada Das *v.* Utkal University, A.I.R. 1978 Orissa 68 at p. 70.
2. Sudesh Kumar *v.* Mook Chand, A.I.R. 1969 Raj. 22 at p. 23.
3. Jagad Bandhu Saha *v.* Radha Krishna Pal, I.L.R. 36 Cal. 920 ; Abdul Aziz *v.* Kanthu Mallik, I.L.R. 38 Cal. 512 and the cases referred to at p. 515.
4. Madras Hindu Mutual Benefit Permanent Fund *v.* Radava Chetty, I.L.R. 19 Mad. 200.
5. Jagad Bandhu Saha *v.* Radha Krishna Pal, *supra*.
6. Abdul Aziz *v.* Kanthu Mallik, I.L.R. 38 Cal. 512 : Bangshi Badan *v.* Kamala, 26 C.L.J. 90.
7. Shamlal *v.* Hazarimal, 15 C.L.J. 451 ; Trimbuck *v.* Hari, I.L.R. 34 Bom. 575 ; Jogindra *v.* Probhat, 19 C.L.J. 126.
8. Puncha Thakur *v.* Bindeshri Thakur, 19 C.W.N. 580.
9. Alimuddi *v.* Chintaharan, 23 C.W.N. 437.
10. I.L.R. 31 Cal. 146.
11. 22 C.W.N. 894.
12. *See* also Veerappa *v.* Kadiresan, 20 I.C. 385 (Mad.) ; Harsahai *v.* Chunni, I.L.R. 4 All. 14.
13. Shridhar *v.* Babaji, I.L.R. 38 Bom. 709.

118 of the Transfer of Property Act,[1] an agreement by which the parties waive or contract themselves out of the statute of limitation,[2] a *hundi* drawn as payable to bearer and not saved by the proviso to Sec. 26 of the Paper Currency Act.[3]

Where a deed was presented for registration more than four months after its execution and its registration was secured by the executant altering the date of the instrument, *held* that the executants would be estopped from questioning the registration.[4]

113. Erroneous admission by a Counsel on point of law.—An erroneous admission on a question of law made by a party or his agent does not preclude the party from making an assertion contrary to the admission.[5]

Voluntary retirement following an erroneous admission of the lawyer is no "waiver" by the defendant.[6]

In *Banarsi Das* v. *Kanshi Ram*,[7] the question was as to when a partnership had been dissolved. The Supreme Court observed :

> "In the plaint in the present suit the plaintiff Kundan Lal alleged in para. 10 that the partnership being at will it stood dissolved on 13th May, 1944, when Seo Prasad filed suit No. 105 of 1944 in the Court of the Sub-Judge, Lahore. No doubt, as pointed out by the High Court, Banarsi Das had admitted this fact in his written statement at not less than three places. The admission, however, would bind him only in so far as facts are concerned but not in so far as it relates to a question of law."

In *Kali Das Dhanjibhai* v. *State of Bombay*,[8] the Supreme Court observed as follows :

> ".....The appellant applied for registration under the Bombay Act and in the statement made under Sec. 7 he called his establishment a 'workshop' and described the nature of his business as a 'factory'. The learned Judges considered that this imported admission that his establishment was a 'shop' because of the use of the word 'shop' in 'workshop'. This might have raised an inference of fact against the appellant had nothing else been known but when the facts are fully set out as above and admitted, the appellant's opinion about the legal effect of those facts is of no consequence in construing the section. No estoppel arises."

In *Punjabai Bhilasa* v. *Bhagvandas Kisandas*[9] the Bombay High Court remarked that a pleader's admission on a pure question of law is not binding on his client.

In *Secretary of State* v. *Shibaprosad Jana*[10] the Calcutta High Court held that an erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from obtaining his legal rights.

In *Jagwant Singh* v. *Silan Singh*,[11] the facts were that in mutation proceedings the parties had made a joint application, stating that they owned and possessed the property left by the deceased owner in certain shares. In a suit relating to the

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1. Chidambara *v.* Vaidilinga, I.L.R. 38 Mad. 519.
2. Sitaram *v.* Katta, 21 I.C. 24 (Mad.).
3. Alagappa *v.* Alagappa, I.L.R. 44 Mad. 187.
4. Gopal *v.* Surendra, 16 C.W.N. 585.
5. Shiv Singh *v.* State Transport Appellate, Tribunal, A.I.R. 1969 All. 14 at p. 23.
6. Gurudeo Biswas *v.* Cheru Panna Seal, A.I.R. 1977 Cal. 110 at p. 117.
7. A.I.R. 1963 S.C. 1165.
8. A.I.R. 1955 S.C. 62.
9. A.I.R. 1929 Bom. 89.
10. A.I.R. 1919 Cal. 972.
11. I.L.R. (1899) 21 All. 286.

property the District Judge held that the plaintiff who was a party to the said application was bound by his admission and dismissed his claim which was contrary to it. This view of the District Judge was not accepted by a learned Judge of the Allahabad High Court and he held—

> "In appeal here it is contended by the learned vakil for the appellants, who has argued the case very ably, that the plaintiff's admission in the mutation proceedings forms no bar to the assertion of his legal rights in the present suit. I am of opinion that this contention must be sustained. When, in the mutation proceedings, the plaintiff stated that he and the two sets of defendants were, on Salig Singh's death, the owners of his property...in equal shares, he made, no doubt, under a misapprehension as to what were his legal rights, a mistaken statement of law. By law the plaintiff was the sole owner.....in the case *Juttendro Mohan Tagore* v. *Ganendra Mohan Tagore*,[1] their Lordships of the Privy Council observed at page 71 of the judgment : 'the plaintiff is not bound by an admission on a point of law, nor precluded from asserting the contrary in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled'."[2]

114. Estoppel against law.—There can be no estoppel against law.[3] The rule of constructive *res judicata* is really a rule of estoppel. There could be no estoppel against statute.[4]

Whether a particular suit is bad for partial partition or not is a question of law and there cannot be any question of estoppel against law.[5]

Estoppel against an Act of Parliament.

There can be no estoppel against an Act of Parliament or against an Act of Legislature and the principle of estoppel cannot be invoked to defeat the plain provisions of the statute.[6] As between a mortgagor and a mortgagee the principle of estoppel is inapplicable where the mortgage is void as contrary to a statute.[7]

It is difficult to see how plaintiff's failure to rely specifically on a statutory provision (Sec. 96 of the Motor Vehicles Act, 1939) can enable the insurers to invoke the principle of estoppel. Obviously no estoppel can be pleaded against the prohibitions enacted by statute.[8] The doctrine of estoppel cannot be invoked to render valid a transaction, which the Legislature has, on grounds of general public policy, enacted shall be invalid.[9]

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1. (1872) L.R. Sup. I.A. 47.
2. Shiv Singh *v.* State Transport Appellate Tribunal, A.I.R. 1964 All. 14 at pp. 23, 24.
3. Bar Das Dey & Co. *v.* Sri Sri Ishwar Tarakeshwar Sib Thakur Jiu, Shebait Mohant Srimat Dandiswami Hrishikesh, Ashram, A.I.R. 1969 Cal. 565 at p. 572.
4. Mst. Batul Begam *v.* B. Hem Chandar Mukherji, A.I.R. 1960 All. 519 at p. 521 ; Surajmull Nagoremull *v.* Triton Insurance Co. Ltd., A.I.R. 1925 P.C. 82 ; Maritime Electric Co. Ltd. *v.* General Dairies Ltd., A.I.R. 1937 P.C. 114 ; Mackintosh *v.* Gerard, 1947 A.C. 461 ; Kalidas Dhanjibhai *v.* State of Bombay, A.I.R. 1955 S.C. 62 : 1955 S.C.A. 340 : 1955 S.C.J. 150 : (1955) 1 S.C.R. 887 : 57 Bom. L.R. 702 : 56 Cr. L.J. 193 and Thakur Amar Singhji *v.* State of Rajasthan, A.I.R. 1955 S.C. 504 : 1955 S.C.A. 766 : 1955 S.C.J. 523 : (1955) 2 S.C.R. 303.
5. Amar Nath Dauli Ram *v.* Ganesha Ram Alakh Ram, A.I.R. 1971 Punj. 241 at p. 243.
6. Ahmed Bhauddin Parkar *v.* Babu Devji Zujam, A.I.R. 1930 Bom. 135 at p. 137 : I.L.R. 53 Bom. 676 : 31 Bom. L.R. 778 : 122 I.C. 113 ; Jagadbandhu Saha *v.* Radha Krishna Pal, I.L.R. 36 Cal. 820 ; Abdul Aziz *v.* Kanthu Mallik, I.L.R. 38 Cal. 512.
7. *See* Mahamaya Debi *v.* Haridas Haldar, I.L.R. (1914) 42 Cal. 455 : 19 C.W.N. 208 : 27 I.C. 400 : 20 C.L.J. 183.
8. Vanguard Fire and General Insurance Co. Ltd. *v.* Sarla Devi, A.I.R. 1959 Punj. 297 at p. 301 : 61 Punj. L.R. 683 ; Raghavendra Kripal *v.* Municipal Board, Hapur, A.I.R. 1959 All. 192 : 1959 A.W.R. (H.C.) 99 : 1958 A.L.J. 857.
9. Mst. Gaura Dei *v.* Mohammad Yasin Ali Khan, A.I.R. 1935 Oudh 121 at p. 127.

Supreme Court on estoppel against law.

There can be no estoppel against a statute. If the law requires that a certain tax be collected any assurance that it would not be collected, would not bind the State Government, whenever it chose to collect it.[1]

Right to challenge validity of an Act.

Even if it be assumed that the petitioner himself as Chairman of the Water Works Committee of the Board had orginally framed proposals for the impositions of water tax, this does not take away his constitutional rights of challenging the validity of the new taxation measure. There is no such thing as estoppel applying to a matter like this.[2]

On filing award.

An award has to be filed in the Court in which a suit would lie with regard to the subject-matter of reference. This is a statutory requirement and cannot possibly be circumvented by any agreement between the parties.[3]

Arbitration proceedings—both contract and award when void; effect of.

Where the contract and award in relation to it are void under an Act the party who had gone to arbitration under that contract cannot plead that his opponent having taken part in arbitration proceedings without protest could not repudiate the award as void.[4]

There can be no estoppel against a statute. A man may not estop himself by any conduct of his from pleading that an alienation made by him is in contravention of a provision of the Punjab Alienation of Land Act. He may, however, estop himself by such conduct from pleading that he is a member of a tribe to which protection is afforded by the Act.[5]

The sale of an occupancy holding is contrary to law and absolutely void and no estoppel arises against a statute.[6]

In *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*,[7] a private company sold electric energy to a local dairy business, but owing to a mistake in calculation over a period of twenty-eight months, the dairy was charged with only one-tenth of the electric energy supplied. Their Lordships of the Privy Council held that the electric company was not estopped from recovering the sum claimed; that the statutory duty was imposed on the electric company to charge and on the dairy to pay at scheduled rates for the electric current supplied and could not be defeated or avoided by a mere mistake in the computation of the accounts.

There can be no estoppel against a statute. Even if the agriculturists had stated in express terms that notwithstanding the provisions of Sec. 60, C.P.C., they were willing to get their house sold in execution of the decree, they cannot

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1. Messrs. Mathra Parshad and Sons *v.* State of Punjab, A.I.R. 1962 S.C. 745 at p. 748.
2. Raghavendra Kripal *v.* Municipal Board, Hapur, A.I.R. 1959 All. 192 at p. 195 : 1959 A.W.R. (H.C.) 99 : 1958 A.L.J. 857.
3. Vissamseth Chandra Narasimham *v.* Messrs. Ramdayal Rameshwarlal, A.I.R. 1966 A.P. 134 at p. 135.
4. Albion Jute Mills Co. Ltd. *v.* Jute and Gunny Brokers Ltd., A.I.R. 1953 Cal. 458 at p. 462.
5. S. Nand Singh *v.* Rahmat Din, A.I.R. 1946 Lah. 73 at p. 76.
6. Gopal Sahu *v.* Nand Kumar Singh, A.I.R. 1930 Oudh 300 at p. 300.
7. A.I.R. 1937 P.C. 114 : 168 I.C. 616 : 1937 A.C. 610 : 106 L.J. P.C. 81 : 156 L.T. 444 : (1937) 1 All E.R. 748 followed in Corporation of Calcutta *v.* Sasi Bhusan Mukherjee, A.I.R. 1947 Cal. 273 at p. 274; *see* also Sati Bhusan Mukherjee *v.* Corporation of Calcutta, A.I.R. 1949 Cal. 20.

be pinned down to that statement.[1] *Katwari* v. *Sita Ram*,[2] *Hanuman Prasad Narain Singh* v. *Harakh Narain*[3] and *Satdhar* v. *Ramchandra*[4] are authority for the proposition that where the land is inalienable, a plea that it cannot be touched in execution, is available to the judgment-debtor even in proceedings in execution even though no plea to this effect was raised in the suit itself.[5] In the case of *In re A Bankruptcy Notice*,[6] the main question was whether a party could be estopped by a letter of assent acted upon by the recipient from contending that a certain agreement was void for want of registration. Lord Atkin (then Atkin, L.J.) at page 97, remarked—

> "...it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid."

This principle was later approved by their Lordships of the Privy Council in the case of *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*[7]

The Act confers no authority on the Government to grant exemption from resumption, of *jagir* and an undertaking not to resume will be invalid, and there can be no estoppel against a statute.[8]

When failure to raise objection does not create any objection and *res judicata*.

Where the property is admittedly non-saleable, the executing Court cannot sell the property, and the failure to raise the objection in time does not create any estoppel and *res judicata* because there is no estoppel against the statute.[9]

There is no estoppel against a statute. Therefore, a judgment-debtor is not estopped from making the application under Order XXI, rule 90, C.P.C., for setting aside the sale simply because he did not appear in obedience to the notice served upon him under rule 66 of the same order for settling the terms of the proclamation of sale.[10]

Principle of estoppel does not apply to statute. In the instant case, the relevant rules being statutory it is difficult to entertain the plea of estoppel.[11]

Estoppel against law.

The question as to whether orders are illegal or invalid is a pure question of law and there can be no estoppel against law.[12] There can neither be estoppel against law nor waiver of the fundamental rights guaranteed by the Constitution.[13]

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1. Ram Naresh *v.* Ganesh Mistri, A.I.R. 1952 All. 680 at p. 681.
2. 19 A.L.J. 473.
3. 18 A.L.J. 59.
4. A.I.R. 1924 All. 261.
5. Dal Chand *v.* Parshadi Lal, A.I.R. 1947 All. 400 at p. 402 : 1947 A.L.J. 451 : 1947 A.W.R. (H.C.) 315.
6. (1924) 2 Ch. 76 : 93 L.J. Ch. 497.
7. A.I.R. 1937 P.C. 114 : 1937 M.W.N. 663 : 46 L.W. 105 : 168 I.C. 616 ; Mst. Kauleshwari Kuer *v.* Surajnath Rai, A.I.R. 1957 Pat. 456 at p. 462 : (1957) Pat. L.R. 168.
8. Thakur Amar Singhji *v.* State of Rajasthan, A.I.R. 1955 S.C. 504 at p. 534.
9. Sham Sundar Singh *v.* Dhirendra Nath Chandra, A.I.R. 1950 Pat. 465 at p. 469 : I.L.R. 29 Pat. 732.
10. View of the Allahabad High Court in Mohan Lal *v.* Kali Charan, A.I.R. 1927 All. 513 : 1927 A.L.J. 524 : 102 I.C. 126 : I.L.R. 49 All. 788 *contra* ; Madanlal *v.* Ripusudan Prasad, A.I.R. 1930 Nag. 191 at p. 193 : 124 I.C. 250.
11. Municipal Board, Pratapgarh *v.* Mahendra Singh Chawla, 1983 S.C.C. (L. and S.) 19 at p. 23.
12. Lady Dinbai Dinshaw Petit *v.* Dominion of India, A.I.R. 1951 Bom. 72 at p. 77 : 53 Bom. L.R. 229.
13. Monte de Guirim Educational Society *v.* Union of India, A.I.R. 1980 Goa 1 at p. 9.

There can be no estoppel against the statute. If a question of estoppel were dependent on the determination of some facts, a party may certainly be estopped from pleading it. But if it is patent and apparent on the record, then, even if there were estoppel against a party, a court would not be estopped from considering the point. The principle of estoppel cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a court, as a party cannot by its admission or previous conduct confer jurisdiction on a court where none exists.[1]

In *Dhanu Pathak* v. *Sona Koeri*,[2] the plaintiff brought a suit to eject the defendant from a piece of land in Chota Nagpur on the allegation that he, the defendant, was an under-*raiyat* of the plaintiffs who ever *raiyats* and that he did not vacate the land after the service of notice to quit. The defence was that the plaintiffs representing themselves as tenture-holders had inducted the defendant on the land and had made a *raiyati* settlement thereof. The Courts below found that the plaintiffs had in fact made the representation alleged. The defendant pleaded that the plaintiffs were estopped from representing that they were tenure-holders and were estopped from denying that he was a *raiyat*. On these facts the Special Bench held that the plaintiffs having represented themselves as tenure-holders were estopped from denying that the defendant was a *raiyat*. Courtney-Terrel, C.J., delivering the judgment of the Special Bench observed as follows :

> In this case...the defendant denies that the plaintiffs are *raiyats* and alleges that they are, as represented by them, tenure-holders.
>
> "This raises an issue of fact and it is not until that issue of fact is concluded in favour of the plaintiffs that any question of the operation of the statute can arise. It is true that the record-or-rights describes the plaintiffs as *raiyats* but this is a piece of evidence only to which is attached the statutory presumption of correctness which is subject to rebuttal. The first issue, therefore, is as to whether the plaintiffs are or are not tenure-holders and it is at this stage that the doctrine of estoppel operates. The plaintiffs having represented themselves as tenure-holders cannot be permitted to enter into a discussion of this question of fact but must be held bound by their own representation. No question, therefore, of the operation of the statute can arise. The plaintiffs are prevented from proving the fact which is indispensable before the matter of the statute can be considered."

Calcutta High Court view.

In *Chandra Kanta Nath* v. *Amjad Ali Haji*,[3] the Full Bench has laid down that where a lease, purporting to be of permanent character, is granted by a person, who, on the face of the document, professes to have a higher status than that of a *raiyat* (for example that of a tenure-holder or a *raiyat* holding at a fixed rate), the grantee, when his title as permanent lessee is challenged by his grantor, may invoke the aid of the doctrine of estoppel and plead that the grantor, cannot be permitted to prove the falsity of the recitals in the documents (on the faith of which he took lease) so as to enable him to derogate from his grant.[4]

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1. Bhagwan Singh *v.* Tasudduq Hussain, A.I.R. 1929 All. 549 : 115 I.C. 642 : 1929 A.L.J. 889 : 45 I.C. 642 ; Mahabir Singh *v.* Narain Tewari, A.I.R. 1931 All. 490 at p. 494 : 1931 A.L.J. 715 : 134 I.C. 21.
2. I.L.R. 15 Pat. 589 : A.I.R. 1936 Pat. 417.
3. I.L.R. 48 Cal. 783 : A.I.R. 1921 Cal. 451.
4. Smt. Ambika Devi *v.* Sachita Nandan Prasad, A.I.R. 1960 Pat. 289 at pp. 292-93 : 1960 Pat. L.R. 65.

As to right to waive the advantage of a law

The principle is well settled that every one has the right to waive and to agree to waive the advantage of the law or rule made solely for the benefit and protection of the individuals in their private capacity, provided that such waiver does not result in any infringement of any public right or public policy. Where the enactment contains an express prohibition against contracting out of it, no question of waiver can arise.[1] These principles have gained judicial recognition. In *Soho Square Syndicate Ltd.* v. *Pollard & Co.*,[2] it was pointed out that—

> "Where in an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only, or whether it is an act which intended, as a matter of public policy, to have a more extensive operation."

Raja Chetty v. *Jagannathadais*,[3] was a case under the Madras Buildings (Lease and Rent Control) Order of 1946. There it was ruled that the Act was intended solely for the benefit and protection of the individuals in their private capacity and as such it was open to any such individual to waive such benefits by contracting out of the Act. In *Kolappa Pillai* v. *Savarimuthu*,[4] a similar view was taken by the erstwhile Travancore High Court in respect of the benefits conferred on a certain class of debtors under the Travancore Debt Relief Act of 1916. The decision of the Travancore-Cochin High Court in *Narayanan Reddiar* v. *M.N. Pattar*[5] is also to the same effect.

It may be observed that a particular private right is matter of fact though depending upon rules of law.[6]

115. Estoppel against Government.—The Land Policy was initiated in exercise of executive powers of the State. Even if it be assumed that there was some representation contained in the Land Policy and the petitioners were also in contemplation for the benefits conferred under it, the question arises whether the plea of estoppel against the State is available to the petitioners. In *Excise Commissioner, U.P.* v. *Ram Kumar*[7] after referring to a number of its earlier decisions the Supreme Court ruled that it is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative sovereign or executive powers. The Supreme Court referred to the decision in *Rama Nathan Pillai* v. *State of Kerala*,[8] wherein quoted with approval the statement of law contained in *American Jurisprudence* 2nd at page 783 paragraph 123 to the effect that as a general rule the doctrine of estoppel will not be applied against the State in its Governmental, public or sovereign capacity. Again in the *Bihar Eastern Gangetic Fisherman Co-operative Society Ltd.* v. *Sipahi Singh*[9] the Supreme Court observed that the doctrine of promissory estoppel could also not be pressed into service as it is well settled that there cannot be any estoppel against the Government in exercise of its sovereign legislative and executive functions.

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1. T.K. Sivarajan *v.* Official Receiver, Quilon District Court, A.I.R. 1953 T.C. 205 at p. 207.
2. (1940) Ch. 638 : (1940) 109 L.J. Ch. 266.
3. A.I.R. 1950 Mad. 284 : (1949) 2 M.L.J. 694 : 62 L.W. 860.
4. 1943 T.L.R. 409.
5. (1950) 5 Bom. L.R. (T.C.) 421 : 1950 Ker. L.T. 295.
6. Kunjammalu *v.* Sekhara Menon Raman Menon, A.I.R. 1951 T.C. 127 at p. 129.
7. A.I.R. 1976 S.C. 2237.
8. A.I.R. 1973 S.C. 2641.
9. A.I.R. 1977 S.C. 2149.

The declaration of law in these cases to the effect that there can be no estoppel against the Government in exercise of its sovereign legislative or executive power is binding on the High Court.[1]

As a general rule the doctrine of estoppel will not be applied against the State in its Governmental, public or sovereign capacity. But an exception however arises where it is necessary to prevent fraud or manifest injustice.[2]

The plea of waiver when it is pressed against the Government has an uphill journey to make for success. Generally a State is not subject to an estoppel to the same extent as an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in government. Therefore, as a general rule the doctrine of estoppel will not be applied against the State in its Governmental, public or sovereign capacity.[3]

Where the petitioners were invited to set up industries by assuring them supply of the raw material, they changed their position on the basis of representations made by the State and when the factories were ready and they were in a position to utilise the raw material, the impugned Act came into force to obliterate their rights and enabled the State to get out of the commitments. The Supreme Court felt inclined to agree with the submissions made on behalf of the petitioners that the circumstances gave rise to a fact situation of estoppel. It is true that there is no estoppel against the Legislature and the vires of the Act cannot be tested by invoking the plea but so far as the State Government is concerned the rule of estoppel does apply.[4]

It is no doubt true that there is a limitation that the principle of estoppel does not operate at the level of Government policy. Where there is a change of Government policy, the statement is applicable but not in case where there is neither a change in the Government policy nor a replacement of the earlier policy by a new one.[5]

It is, however, quite fundamental that the doctrine of promissory estoppel cannot be used to compel the public bodies of the Government to carry out the representation or promise which is contrary to law or which is as outside the authority or power.[6]

Authorities do not support the extreme position that estoppel, waiver or acquiescence can be inferred from a mere omission to rush to the Court at the first sign of dirty work being contemplated.[7]

It is a settled law that the instructions contained in the Trade Notices regarding classification of a product are always binding on the Department and that the Department should be estopped from contending to the contrary.[8]

The Government like any other individual is bound by its promises knowing the intent that it would be acted upon by the promisee and if the promisee acts

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1. Smt. Meera Rani *v.* State of Uttar Pradesh, (1978) 4 A.L.R. 49 at pp. 55-56.
2. *See* Ramanatha Pillai *v.* State of Kerala, A.I.R. 1973 S.C. 2641 ; Laxman *v.* State of Karnataka, (1974) 2 Kant, L.J. 275 at p. 296.
3. Shrikrishnadas Tikara Messrs *v.* State of Madhya Pradesh, A.I.R. 1977 S.C. 1691 at p. 1693.
4. Vij Resins Pvt. Ltd. *v.* State of Jammu and Kashmir, A.I.R. 1989 S.C. 1629 at p. 1637.
5. K. Ram Mohan Rao *v.* Endowments Commissioner in Karnataka, Bangalore, A.I.R. 1989 Kant. 192 at p. 203.
6. Samit Mazumdar *v.* Utkal University, 1990 (32) O.J.D. 44 at p. 47 (Civil).
7. Bomi Munchershaw Mistry *v.* Kesharwani Co-operative Housing Society Ltd., 1993 (2) Bom. C.R. 329 at p. 368.
8. M/s. Christine Hoden (India) Pvt. Ltd. *v.* N.D. Gadag, 1993 (2) Bom. C.R. 169 at p. 179.

thereon and thereby alters his position then, in the event, the inescapable conclusion would be that the Government is to be bound by its promise without any exception in regard thereto.[1]

116. Estoppel against statute.— What is meant by "estoppel against statute" has been tersely stated in Art. 345 at page 176 of Halsbury's *Laws of England*, 3rd Ed., Vol. 15, in these terms :

> "The doctrine of estoppel cannot be invoked or render valid a transaction which the Legislature has, on the grounds of general public policy enacted shall be invalid....where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of this duty, cannot by estoppel be prevented from exercising his statutory powers."

One of the cases noted in the footnote in support of the second part of the passage extracted above is the case of *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*,[2] Lord Maugham delivering the judgment of the Board has quoted with approval at page 117, a passage from Lord Atkin's judgment in *In re A Bankruptcy Notice*[3], it may also be quoted with advantage only a few lines from that passage which say :

> "It...is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid."

This is a species for the application of the principle that there can be no estoppel against statute.[4]

The following observations of the Supreme Court in *Thakur Amar Singhji* v. *State of Rajasthan*[5] are not without significance in this context :

> "....The Act confers no authority on the Government to grant exemption from resumption and an undertaking not to resume will be invalid, and there can be no estoppel against a statute."

The decisions cited by Shri Avadh Behari do not dislodge or negative this position. The case of *Ministry of Agriculture and Fisheries* v. *Mathews*[6] clearly dealt with an *ultra vires* act. So also the case of *Rhyl Urban District Council* v.*Rhyl Amusements Ltd.*[7] dealt with an *ultra vires* act.

So also the decision of the Calcutta High Court in *Satibhusan Mukherjee* v. *Corporation of Calcutta*,[8] dealing with an *ultra vires* act of a corporate body, can have no relevance.

It is well settled that equity cannot override the provisions of a statute and there cannot be estoppel against the statute.[9] The matter came up for consideration before the Privy Council in *Ariff* v. *Jadunath Majumdar*.[10] Lord Russell of Killowan, while delivering the judgment of the Board observed (at page 104) as follows :

> "Their Lordships do not understand the dicta to mean that equity will hold people bound as if a contract existed, where no contract was in fact

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1. Steel Crakers *v.* M.S.T.C., A.I.R. 1992 Cal. 86 at p. 91.
2. A.I.R. 1937 P.C. 114.
3. (1924) 2 Ch. 76.
4. Messrs. Bokaro and Ramgur Ltd. *v.* Dr. Prasun Kumar Banerjee, A.I.R. 1968 Pat. 150 at p. 157.
5. A.I.R. 1955 S.C. 504.
6. (1949) 2 All E.R. 724.
7. (1959) 1 All E.R. 257.
8. A.I.R. 1949 Cal. 20.
9. Kisto Chandra Mandal *v.* Mst. Anila Bala Dasi, A.I.R. 1965 Pat. 487 at p. 495.
10. 58 I.A. 91 : A.I.R. 1931 P.C. 79.

made; nor do they understand them to mean that equity can override the provision of statute and (where no registered document exists and no registrable document can be procured) confer upon a person a right which the statute enacts shall be conferred only by a registered instrument."

The above principle laid down by the Privy Council has been consistently followed in India since then.

The objection regarding estoppel—whether legal or equitable—has to be specifically pleaded. There can be no estoppel against the operation of the statute as in this case under Sec. 17(4), Land Acquisition Act. In *Gyarsi Bai* v. *Dhansukh Lal*,[1] essential ingredients of estoppel have been summed up.[2]

It is now well settled that an estoppel cannot be pleaded against a statute.[3]

No waiver can be pleaded against statute.

On the point of law, neither estoppel nor waiver can be pleaded against a statute which imposes a positive duty upon a public officer in the general interests of the public. This was laid down by the Judicial Committee in *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*[4]

Hence, the plea of waiver, which is mere inference of an agreement to forego from conduct, cannot be placed higher.[5]

In the instant case, the Courts below held that the Trust having once allotted the plots and having collected part of the consideration, it could not have cancelled the allotments, probably basing the respondent's case on the principle of promissory estoppel. Here the Courts below have failed to notice the legal principle that there is no estoppel against law. The allotment of plots by the Trust is controlled by the statutory rules. Any allotment contrary to those rules will be against the law. Since the allotments made in favour of some of the respondents was based on wrong application of the reservation made for "local displaced person" those allotments were contrary to law. Hence, the principle of promissory/equitable estoppel cannot be invoked to protect such illegal allotments.[6]

Illegal allotments.

In the under-noted case in addition to the order of allotment made by the Collector, warrants of possession had also been issued in favour of the respondents. By reason of the two orders the respondents had acquired a right under the doctrine of promissory estoppel to call upon a Government to regularise the allotment of the land to them if for any reason the order of allotment made by the Collector was defective in any manner. Such being the case, even if no registered deed of conveyance or agreement of sale had been executed by the Government, the respondents had become entitled in law to claim title to the land and seek delivery of possession of the allotted land to them and to ask for a charge, in the absence of delivery of possession over the property for the money deposited by them under the allotment order.[7]

A promise was held out by the respondents to the petitioner, namely, that the land will be allotted to them at a rate fixed on "no profit no loss" basis and

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1. A.I.R. 1965 S.C. 1053 at p. 1056.
2. Jose Joaquim Sebastino Rodrigues *v.* Union of India, A.I.R. 1967 Goa 169 at p. 184.
3. Liberty Talkies, Messrs. *v.* State of Gujarat, A.I.R. 1968 Guj. 280 at p. 287.
4. 46 L.W. 105 : 1937 M.W.N. 663 : 168 I.C. 616 : A.I.R. 1937 P.C. 114.
5. Dhone Gopal Mukherjee *v.* Secretary, Land and Land Revenue Department, Government of West Bengal, A.I.R. 1966 Cal. 348 at p. 352.
6. **Jalandhar Improvement Trust *v.* Sampuran Singh, (1999) 3 S.C.C. 494 at p. 500 : A.I.R. 1999 S.C. 1347 : 1999 (4) Supreme 270.**
7. Tara Singh *v.* Kehar Singh, A.I.R. 1989 S.C. 1426 at pp. 1429, 1430.

that they may have to pay additional amount depending upon the ultimate determination of the cost of land by the respondents. The petitioners acted on this promise to their detriment. The amount which was demanded was paid by the petitioners and further expenditure has been incurred by them for the purposes of establishing educational institutions. The respondents cannot now go back on the promise so made and charge a sum higher than the rate arrived at on "no profit no loss" basis.[1]

In the instant case, the submission that the plaintiff is estopped by promissory estoppel in objecting the impleadment of the proposed defendant M/s. Progressive Transport Agency, is misconceived. There is no promissory estoppel against the settled proposition of law. The proposition of promissory estoppel shall not bind other person or saddle liability on other persons because of statement of a third person.[2]

So far as clarifications/circulars issued by the Central Government and or/State Government are concerned, they represent merely their understanding of the statutory provisions. They are not binding upon the Courts. The Supreme Court, in the instant case, held that the classifications and circulars were communicated to the concerned dealers but even so nothing prevents the State from recovering the tax, if in truth such tax was leviable according to law as there can be no estoppel against the statute.[3]

In the instant case, the Full Bench of the Andhra Pradesh High Court held the petitioner is not entitled to invoke the doctrine of 'promissory estoppel' in the face of statutory provisions governing the situation and the Government cannot be compelled by the invocation of promissory estoppel to act contrary to the provisions of the Factories (Amendment) Act, 1987 (20 of 1987).[4]

There can be no promissory estoppel against the exercise of legislative power of the State. So also the doctrine cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent of the Government must be held to have notice of the limitations of his authority. The Court can enforce compliance by a public authority of the obligation laid on him if he arbitrarily or on his mere whim ignores the promises made by him on behalf of the Government. It would be open to the authority to plead and prove that there were special considerations which necessitated his not being able to comply with his obligations in public interest.[5]

117. Representation must be of facts actually existing.—Section 115 requires that, to create an estoppel, the representation is as to some state of facts alleged to be at the time actually in existence.[6] If the representation relates to promises *de futuro*, it can be binding, not as an estoppel, but as a contract.[7] An estoppel must be a representation of an existing fact. If binding at all, a

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1. Rose Educational Scientific and Cultural Society (Regd.) *v.* Union of India, A.I.R. 1990 Delhi 75 at p. 79.
2. C. Doctor and Company Ltd., M/s. *v.* B.S. Mills Ltd., A.I.R. 1995 All. 19 at p. 20.
3. Bengal Iron Corporation *v.* Commercial-tax Officer, A.I.R. 1993 S.C. 2414 at p. 2420.
4. Sree Rayalaseema Alkalies and Allied Chemicals Ltd. *v.* Government of A.P., A.I.R. 1993 A.P. 278 at p. 289 (F.B.).
5. Jit Ram Shiv Kumar, Messrs. *v.* State of Haryana, A.I.R. 1980 S.C. 1284 at p. 1305.
6. Jethabhai Parbhudas *v.* Nathabhai Bavaji, I.L.R. 28 Bom. 399 at p. 407 : 6 Bom. L.R. 428.
7. *See per* Selborne, L.C., in Maddison *v.* Alderson, 8 A.C. 473 and *per* Lord Macnaghten in George Whitechurch Ltd. *v.* Cavanagh, (1902) A.C. 117 at p. 130.

representation *de futuro* must amount to a promise.[1] The plaintiffs were about to appeal from the decree passed in the suit which they had brought, and in consideration of their not appealing, the defendant's father relinquished his rights to the land in dispute. In such a case Sec. 115 is inapplicable.[2] A promise, not being a representation as to an existing fact, cannot by itself, be the foundation of an estoppel.[3] In a suit to redeem a mortgage, *A*, to avoid an objection taken as to parties, filed a petition disclaiming all interest in the estate. *A* had, than, only an expectant right to the estate, but to which she afterwards became entitled. *Held*, that the petition did not operate as an estoppel to a suit by her for possession of the estate.[4]

Foundation of an estoppel.

The doctrine is a simple one and in its essence is just a rule of evidence. If a person makes a representation of fact, and induces another to believe it and to act on it, the law prevents the former from denying the truth of his statement. But for this there must be a statement of fact, not a mere promise to do something in the future.

Rule.

This distinction was made by Lord Selborne in *Maddison* v. *Alderson*[5] :

> "I have always understood...that the doctrine of estoppel by representation is applicable only to representations as to some statement of facts alleged to be at the time actually in existence and not to promises *de futuro*, which, if binding at all must be binding as contract."

Privy Council view.

The same distinction was made in an earlier decision of the House of Lords in *Jorden* v. *Money*,[6] at page 131, and then again later by Lord Macnaghten in *George Whitechurch Ltd.* v. *Cavanagh*,[7] at page 130. It is obviously the distinction their Lordships of the Privy Council had in mind in *Ariff* v. *Jadunath Majumdar*,[8] at page 1247, where they state that they can find "no trace of any statement upon which any estoppel can be grounded" and continue :

> "....The acts of the respondent are referable to a verbal contract."[9]

It is a well-established rule that, in order that representation may operate as an estoppel, it must be representation of an existing fact and of not mere intention or future promises. The question has been fully discussed in Pollock's *Principle of Contract (Appendix not 1)* and summarised in Everest and Stroud's *Law of Estoppel*, 3rd Ed., p. 279.

Rule regarding representation to operate as estoppel.

Some plots of land were sold to various purchasers. The description of the plots conveyed as in the boundaries, was either "the proposed drainage road of the trust 'or' the proposed 100 foot wide drainage road of the Calcutta Improvement Trust."

The various purchasers of those plots claimed a right of way over the land by operation of the rule of estoppel.

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1. 7 Bom. L.R. 179 at p. 184.
2. Jethabhai, Parbhudas *v.* Nathabhai Bavaji, I.L.R. 28 Bom. 399 at p. 407 : 6 Bom. L.R. 428.
3. 11 O.C. 301.
4. 13 M.I.A. 585 at p. 598.
5. (1883) 8 A.C. 467 : 52 L.J.Q.B. 737 : 49 L.T. 303 : 31 W.R. 820 : 47 J.P. 821.
6. (1854) 5 H.L.C. 185 : 23 L.J. Ch. 865 : 101 R.R. 116.
7. (1902) A.C. 117 : 71 L.J.K.B. 400 : 85 L.T. 349 : 50 W.R. 218 : 9 Manson 351 : 17 T.L.R. 746.
8. A.I.R. 1931 P.C. 79 : 131 I.C. 762 : 58 I.A. 91 ; I.L.R. 58 Cal. 1235 (P.C.).
9. Totaram Jawaharlal Kalwar *v.* Harishchandra Harkishan Raja Khatri, A.I.R. 1937 Nag. 402 at p. 405 : 174 I.C. 7.

When a person makes a representation intending that another should act on it and it is shown that the representation was calculated to influence the judgment of a reasonable man, the presumption is that he was so influenced. The burden is not on the representee but on the maker to prove that the representee did not rely on makers' representation.[1]

Burden of proof in relation to reliance on representation.

In order to found an estoppel, the representation must be in respect of an existing thing and must be clear and unambiguous.[2] Cases as *Low* v. *Bouverie*[3] and *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National (West Indies) Steamships Ltd.*,[4] are authority for the proposition that to give rise to an estoppel representations should be clear and unequivocal, and that, if a representation is not made in such a form as to comply with this requirement, it normally matters not that the representee should have misconstrued it and relied on it.[5]

On representation.

Representation should be clear and unequivocal.

In *Asa Beevi* v. *Karuppan Chetti*,[6] Sadasiva Aiyar, J., took the view that as Mohammedan law prohibits relinquishment of rights of future inheritance, whether for consideration or not, such a relinquishment was void and it could not be relied upon as an estoppel. In the opinion of Spencer, J., a renunciation of a right to succession is not opposed to the principles of Mohammedan law and when, under that arrangement the heir-apparent accepts a benefit, he is estopped from repudiating the transaction by which he was benefited.

Relinquishment of rights of future inheritance; Mohammedan law.

On this difference of opinion the matter came up for hearing before three Judges whose decision is reported in *Asa Beevi* v. *Karuppan Chetti*.[7] The learned Judges agreed with the conclusion arrived at by Sadasiva Aiyar, J.[8]

118. Relation between Sec. 43, Transfer of Property Act and Sec. 115, Evidence Act.—The rule of law underlying Sec. 43, Transfer of Property Act is an extension of the rule of estoppel.[9]

Section 43, Transfer of Property Act, is often characterised as a rule of estoppel[10] but it is not estoppel which is a rule of evidence preventing a party from alleging and proving the truth of facts.[11]

There is a distinction between the rule of estoppel contained in Sec. 43 of the Transfer of Property Act and the one contained in Sec. 115 of the Indian Evidence Act. In the former, estoppel which exists by reason of the representation has the effect of transferring the property to the purchaser the moment the

Distinction between estoppel under this section and under Sec. 43, Transfer of Property Act.

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1. Greasley *v.* Cooke, (1980) 3 All. E.R. 710 at p. 713.
2. Mst. Gaura Dei *v.* Mohammad Yasin Ali Khan, A.I.R. 1935 Oudh 121 at p. 127.
3. (1891) 3 Ch. 82 : (1891-940) All. E.R. Rep. 348.
4. (1947) A.C. 46.
5. Woodhouse A.C. Israel Cocoa Ltd. S.A. *v.* Nigerian Produce Marketing Co., Ltd., (1972) 2 All E.R. 271 at p. 280 (H.L.).
6. 41 I.C. 361 : I.L.R. 41 Mad. 365.
7. 41 I.C. 361 : I.L.R. 41 Mad. 365.
8. Syed Sulaiman Sahib *v.* Kader Ibrahim Meeral Bibi, A.I.R. 1953 Mad. 161 at p. 163 : (1952) 2 M.L.J. 104 : 65 L.W. 496.
9. 7 C.L.J. 381 : *see* also 12 C.W.N. 515 (P.C.).
10. *See* Dhiyan Singh *v.* Jugal Kishore, A.I.R. 1952 S.C. 145.
11. Ramaswamy Pattamali *v.* Lakshmi A.I.R. 1962 Ker. 313 at p. 317.

transferor obtains the same during the subsistence of the contract. In the latter case there is no question of any transfer of property or of feeding the original grant.[1]

Effect of estoppel under Sec. 43, Transfer of Property Act.

Section 43, Transfer of Property Act, 1882, clearly enacts a rule of estoppel commonly known as "feeding the grant by estoppel." This estoppel cannot make a transfer forbidden by law good.[2]

This view was recognised by their Lordships of the Judicial Committee in the case of *Tilakdhari Lal* v. *Khedan Lal*.[3] In that case Lord Buckmaster in delivering the judgment of the Committee said :

Privy Council view.

"This principle of law, which is sometimes referred to as feeding grant by estoppel, is well established in this country. If a man who has no title whatever to property, grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes,[4].....*There may be statutory provision or provisions of native law which would prevent the operations of the doctrine;* for the law of conveyance in England depends on special and complicated considerations."

Doctrine of grant feeding the estoppel.

How far the doctrine of grant feeding the estoppel is applicable, apart from Sec. 43, Transfer of Property Act, is a question not free from difficulty.[5]

Onus of proof under Transfer of Property Act.

In order to invoke successfully the protection of Sec. 41 of the Transfer of Property Act the transferee must establish that (1) the transferor was the ostensible owner of the properties; (2) with the consent express or implied of the real owner, and (3) that the transferee paid consideration and (4) acted in good faith (5) after taking reasonable care to ascertain that the transferor had power to transfer.[6]

On duty of making inquiry into truth of representation.

Although Sec. 41 Transfer of Property Act, deals with a branch of estoppel, yet Sec. 115, Evidence Act, does not impose upon a person acting on the faith of a representation made to him the same duty of making enquiries into the truth of the representation as is imposed upon a transferee from an ostensible owner by Sec. 41, Transfer of Property Act. It is difficult to go the length of casting upon all persons claiming the benefit of estoppel the duty of making inquiries in every case about the truth of the representation made to him.[7]

As Farwell, J., stated in *Rimmer* v. *Webster*[8] :

Privy Council view.

"If the owner of property clothes a third person with the apparent ownership and right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the

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1. Arulayi Nadachi *v.* Jagadessiah Nedar, A.I.R. 1964 Mad. 122 at p. 126 : 76 M.L.W. 603 : (1963) 2 M.L.J. 365 : I.L.R. (1964) 1 Mad. 85.
2. Bindeshwari Singh *v.* Har Narain Singh, A.I.R. 1929 Oudh 185 at p. 187.
3. A.I.R. 1921 P.C. 112 : I.L.R. 18 Cal. 1; 47 I.A. 239 (P.C.).
4. Doed Christmas *v.* Oliver (1829) 5 Man. & R. 202 : 8 L.J.K.B. 137 : 10 B. & C. 181, discussed in Smith's *Leading Cases*, Vol. II, p. 724.
5. Kabul Chand *v.* Badri Das, A.I.R. 1938 All. 22 at p. 24 : I.L.R. (1938) All. 63 : 1937 A.L.J. 1240 : 1937 A.W.R. 1070 : 173 I.C. 130.
6. Catholic Mission *v.* Subbanna Goundan, A.I.R. 1948 Mad. 320 at p. 321 : (1948) 1 M.L.J. 11 : 61 L.W. 7 : 1948 M.W.N. 20.
7. B. Shiam Lal *v.* Mata Din, A.I.R. 1934 Oudh 460 at p. 461.
8. (1902) 2 Ch. 163 at p. 173 : 71 L.J. Ch. 561 : 86 L.T. 491.

transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who took it in a good faith and for value..."[1]

Section 41, Transfer of Property Act, applies to voluntary sales only but the principle of natural equity on which that provision as well as Sec. 115, Evidence Act, are based would apply even to an auction sale under Land Revenue Act.[2]

Where properties were purchased in the name of *R* and the other partner *G* had permitted *R* to deal with the property as its ostensible owner : *Held* that D was estopped from deying the right of *R* to mortgage the property on the principle laid down in Sec. 41, Transfer of Property Act.[3]

119. Estoppel of deed.—With respect to estoppels by deed, Indian laws do not recognize out of the Presidency-towns the division of contracts into those not under seal termed simple contracts and those under seal termed deeds or specialities; and even in the Presidency-towns the distinction is not recognized where a Hindu or Mohammedan is the defendant.[4] The principle that a man cannot be allowed to dispute the contents of a deed to which he set his hand and seal has therefore but little application in India, such application being limited to a portion of the community in the Presidency towns.[5] In another case it has been said that it would be inequitable that there should be anything in this country of the nature of the old English doctrine of estoppel by deed. It was, therefore, held that it was open to the defendant to plead that though he had nominally given a *kabuliat* in favour of the plaintiff, yet he did not really contract with her at all.[6] In India, their Lordships cannot find that a formal transfer of mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere*,[7] seems to them likely not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense and to litigation.[8] Deeds and contracts of the people of India ought to be liberally construed.[9] Untrue statements are sometimes introduced by draftsmen probably under the notion that it might impart some additional solemnity to the instrument.[10] So, a plaintiff who had executed a deed of conditional sale in favour of defendant was held not estopped from showing that it had been executed merely in order to protect the property against the claims of the plaintiff's son.[11] In order to prevent fraud it may be shown that an apparent deed of sale is really a mortgage.[12]

Scope.

Principle.

Liberal constructions of needs.

Untrue statements in a deed.

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1. Li Tse Shi *v.* Pong Tsoi Ching, A.I.R. 1935 P.C. 208 at p. 211 : 43 M.L.W. 12 : 159 I.C. 794.
2. Sheikh Hussain *v.* Phoolchand Harichand, A.I.R. 1952 Nag. 64 at p. 64.
3. Punjab and Sind Bank, Ltd., Lahore *v.* J. Rustomji, A.I.R. 1935 Lah. 821 at p. 822.
4. Ram Gopal Law *v.* Blaquiere, 1 B.L.R. (O.C.) 37.
5. Gourevallaba Ram Chandra *v.* Verappa Chetti, 2 Mad. Rep. 174.
6. Kedarnath Chakravartti *v.* Donzelle, 20 W.R. 352 : 7 B.L.R. 720.
7. 3 Mer. 210.
8. Gokaldas Gopaldas *v.* Puranmal Prem Sukh Das, I.L.R. 10 Cal. 1035.
9. Thakur Vasonji *v.* Mst. Chandra Bibi, 19 C.W.N. 873 (P.C.) : Hanooman Persaud Pandey *v.* Mst. Babooee, 6 M.I.A. 411 ; Ram Lall Sett *v.* Kanai Lal Sett, I.L.R. 12 Cal. 663 at p. 678.
10. Lala Achal Ram *v.* Raja Kazim Hossain 32 I.A. 113 : Upendra Nath Bose *v.* Bindesri Prasad, 20 C.W.N. 210.
11. Param Singh *v.* Lalji Mal, I.L.R. 1 All. 403.
12. Babuji *v.* Senavarji, I.L.R. 2 Bom. 231 ; Baksu Lakshman *v.* Govinda Lalji, I.L.R. 4 Bom. 594; Mahadaji Gopal Bakelkar *v.* Vithal Balla 1, I.L.R. 7 Bom. 78; Hem Chandra Sur *v.* Kali Charan Das, I.L.R. 9 Cal. 528: 12 C.L.R. 287; Kashinath Das *v.* Harihar Mukharji, I.L.R. 9 Cal 898.

A conveyance may be shown to be a mere *benami* transaction, and that the defendant is not the owner of the property but merely, the plaintiff's tenant in respect of it.[1] A stipulation in a bond that all payments should be endorsed on the back thereof does not estop the defendant from proving by other means that the debt or part of it has been satisfied.[2] A mere rectial in a deed does not operate as an estoppel.[3] Rectials may in some cases be conclusive between the parties.[4] The deed of conveyance of some land in Calcutta recited that the vendor "was seized of or otherwise well entitled to" the property intended to be sold "for an estate of inheritance in fee simple" and it purported to convey such an estate; in a suit for dower by the vendor's widow against the heirs of the purchaser, *held* that although as between the plaintiff and the defendants there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee simple, yet the recital was *prima facie* evidence against the purchaser and persons claiming through him that the estate conveyed was what it purported to be.[5] When both plaintiff and defendant professed to derive their title by virtue of a deed which the Court held to be invalid according to Mohammedan law, it was held that the defendant was not estopped from denying its validity.[6] Where the plaintiffs induced the defendants to believe the recitals in a deed to be true and to act on them and themselves supervised the creation by the defendants of the buildings on the land pruchased by them under the deed, *held* it was a clear case of estoppel by conduct.[7] Although all the parties to a deed are bound by the recitals in it, legitimately appertaining to the subject-matter of it, the estoppel is limited by the intention of the parties ; to give a recital that effect it must be shown that the object of the parties was to make the matter recited a fixed fact as the basis of their action.[8]

Mere recitals.

As pointed out by Casperz in his *Estoppels and the Substantive Law* (4th Ed.) para. 347, the doctrine of estoppel by deed in its technical sense cannot be said to exist in India. In *Ram Surun Singh* v. *Mst. Paran*,[9] wherein a widow pleaded in a suit to enforce a mortgage against her that the mortgage had been concocted by her to defeat the claim of her heirs, their Lordships of the Privy Council remarked that there was nothing whatever to prevent the defendant from showing the real truth of the transaction. The same principle was asserted by the Calcutta High Court in *B. Donzelle* v. *Kedar Nath*.[10]

Estoppel by deed and its applicability in India.

In *Param Singh* v. *Lalji Mal*,[11] a similar view was taken.[12]

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1. Sabaktulla *v.* Hari, 10 C.L.R. 199.
2. Kali Das Mitra *v.* Tara Chand Rai, 8 W.R. 316 : Girdihari Singh *v.* Lalu Koer, 3 W.R. Misc. 23; Narayanundir Patil *v.* Motilal Ramdas, I.L.R. 1 Bom. 45.
3. Manhu Sahu *v.* Budhu Jamadar, 13 W.R. 2; Gaurmani Debi *v.* Krishna Chandra Sanyal, I.L.R. 4 Cal. 397.
4. Barajeshwaree *v.* Budhanuddi, I.L.R. 6 Cal. 268.
5. Sarkies *v.* Prosannamoyee Dasee, I.L.R. 6 Cal. 794.
6. Kuvarbai *v.* Mir Alam Khan, I.L.R. 7 Bom. 107.
7. Bhubaneswari *v.* Haradhone, 21 C.W.N. 728.
8. Bepin Behary Mittra *v.* Tincowri Pathak, 13 C.L.J. 271, and the cases referred to in that case.
9. (1869) 13 M.I.A. 551 : 1 W.R. 156.
10. 7 B.L.R. 720 : 16 W.R. 186.
11. I.L.R. (1875) 1 All. 403.
12. Mrs. N. Johnstone *v.* Gopal Singh, A.I.R. 1931 Lah. 419 at p. 425 : 32 P.L.R. 840 : I.L.R. 12 Lah. 546.

If a certain document is fictitious it is not binding on either party.[1]

Fictitious documents.

As was held in *Gandy* v, *Gandy*,[2] and followed in Indian Courts, "there would be monstrous injustice of a party, having suggested one construction of a deed in a previous suit and succeeded on that footing were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed; it would be playing fast and loose with justice if the Court allowed that." It is not permissible for a party to approbate and reprobate or to blow hot and cold.[3]

Privy Council view.

In the case of *Stroughill* v. *Buck*,[4] Pateson, J., stated the law in these terms :

> "When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party,....."

Agreements as to correctness of a statement in a deed; and estoppel.

When the action is being brought by a person who is not a party to the deed, there can be no estoppel between a party to the deed and a third party ; as between the parties only to the deed can an estoppel possibly arise.[5]

120. Alteration in position essential for estoppel.—There is no estoppel unless the other party has changed his position on the faith of the representation.[6] A person will be estopped from contradicting a deed to the prejudice of another person, only if the latter has been led to change his status on the faith of the allegation contained in the deed.[7] Section 115 implies that no declaration, act or omission will amount to an estoppel, unless it has caused the person, whom it concerns, to alter his position. The altering of his position by the person pleading the estoppel is an essential part of the rule.[8] Where, in answer to a suit for demolition of a building as having been unlawfully erected on land belonging to the plaintiff, acquiescence of the plaintiff is pleaded, it must be shown that the plaintiff, knowing the defendant to be under mistaken belief that the land upon which he was building was his own, purposely remained quiet, until the building was completed.[9] Where a fact had not caused or permitted another person to believe a thing to be true and to act upon such belief, there was held to be no estoppel, under Sec. 115.[10]

Courts have power in appropriate cases to compel performance of the obligations imposed upon departmental authorities by orders which are executive

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1. Mst. Shib Dai *v.* Ghauri Lal, A.I.R. 1965 J. & K. 11 at p. 13.
2. 30 Ch. D. 57 : 54 L.J. Ch. 1154 : 53 L.T. 306 : 33 W.R. 803.
3. Mohammad Khalil Khan *v.* Mahboob Ali Mian, A.I.R. 1942 All. 122 at p. 127 I.L.R. (1942) All. 103: 1941 A.L.J. 721 : 1941 A.W.R. (H.C.) 379 : 199 I.C. 190.
4. (1885) 14 Q.B.D. 781 : 19 L.J.Q.B. 209 : 14 Jur. 741.
5. Lachman Lal *v.* Munshi Mahton, A.I.R. 1938 Pat. 708 at p. 711.
6. Venkatayammal Chetty *v.* Angathyammal, A.I.R. 1933 Mad. 471 at p. 475.
7. Param Sngh *v.* Lalji Mal, 1 All. 403 at p. 410.
8. Jhinguri Tewari *v.* Durga, I.L.R. 7 All. 878 : 5 A.W.N. (1885) 260 and Durga *v.* Jhinguri, I.L.R. 7 All. 511 at p. 515 : 5 A.W.N. (1885) 135.
9. 19 A.W.N. 191; Beni Ram *v.* Kundan Lal, I.L.R. 21 All. 496 (P.C.); 1 Bom. L.R. 400; 3 C.W.N. 502 : 26 I.A. 58 : 7 Sar. P.C.J. 523: Jugmohandas Vundrawandas *v.* Pallonjee Eduljee Mobedina, I.L.R. 22 Bom. 1 and 5 A.W.N. 100.
10. Yehwant Puttu Shenvi *v.* Radhabai, I.L.R. 14 Bom. 312 at p. 315; Rajnarain Bose *v.* Universal Life Assurance Co., I.L.R. 7 Cal. 594 : 6 Ind. Jur. 85 : 10 C.L.R. 561 and Kuvarbai widow of Bomanji *v.* Mir Alam Khan, I.L.R. 7 Bom. 170.

in character, when they find that any person has acted to his detriment on solemn promises made by the State Government of its authorities concerned.[1]

In the case of *K. R. Shivadatta* v. *Government Medical College*,[2] after passing the Pre-university examination of the Mysore University held in March-April, 1971, asked for admission into the Pre-professional Course leading to MBBS in one of the Medical Colleges in the State. He claimed one of the seats reserved for political sufferers under the appropriate rules. His claim for the reserved seat was admitted by the Selection Committee and the petitioner was duly intimated that he had been provisionally selected for admission. The petitioner was directed to joint the College on or before a prescribed date. The petitioner had then joined the 1st year B.Sc. Degree Course in a College of Mysore. On receipt of the intimation, he obtained his discharge from the College after paying the full-term fee and on the same day he paid the requisite fee and obtained admission in the Medical College. Three days thereafter he was communicated cancellation of admission by the Selection Committee on the ground that the marks obtained by the petitioner in the qualifying subjects were less than of one who had been left out of consideration. Accordingly, the other candidate was given the seat and the petitioner's name was transferred to the waiting list for the political sufferers category. Thereupon, he approached the High Court. The Court repelled the contention that the provision of the General Clauses Act that one who makes a selection can unmake it did apply and held that the Selection Committee after having made the selection became *functus officio*. It had no power to cancel a selection.

In *Ikop Lidakol Fishing Co-operative Society Ltd.* v. *State of Manipur*,[3] after the Government extended the lease of the petitioner-society, the latter changed its position to its prejudice by depositing the revenue and incurring expenditure in making fishing arrangements. It was held that the former may be bound by the primary estoppel.

On the basis of addition of marks given by the Tabulators petitioners were declared to have passed the Annual B.A. Examination. The Principal of the College as agent of the University issued the certificates and mark-sheets. On the basis of such certificates each of the petitioners took further steps for securing seats for higher study and/or registering himself for employment. Within about a little more than two weeks from the date of publication of the results by a fresh notification each of the petitioners was declared to have failed.

It was held that the initial notification holding that the petitioners had been successful at the Annual B.A. Examination must be sustained.[4]

In the present case the Appellate Court has found that the mark-sheet issued to the plaintiff was genuine and that it was in conformity with the Tabulation Chart maintained by the respondent-University. It was further found that in the admission of the plaintiff to the B.Sc. Part II Final Examination the plaintiff was guilty neither of misrepresentation nor of any collusion. On the representation therefore, as conveyed through the aforesaid mark-sheet that the plaintiff has passed the B.Sc. Part I Examination he applied for and was admitted to the aforesaid examination and in pursuance thereof he also appeared at the said examination. Further, because of the representation made by the University, the

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1. Shree Krishna Gyannoday Sugar Ltd. Messrs *v.* State of Bihar, A.I.R. 1975 Pat. 123 at p. 129.
2. A.I.R. 1972 Mys. 135 followed in Pratima Das *v.* State of Orissa, A.I.R. 1975 Orissa 155-158.
3. A.I.R. 1982 Gau. 14 at p. 17.
4. Rajkishore Senpati *v.* Utkal University, A.I.R. 1982 Orissa 188 at pp. 189, 191.

plaintiff did not re-appear at the B.Sc. Part I Examination. Lastly, like the case reported in *Shree Krishnan* v. *Kurukshetra University*[1] the appellant-University had the opportunity of checking its records before admitting the plaintfif to the said examination and they were hence in a position to discover the mistake, if there was any. Not having done that the Univserity is clearly estopped on the ratio of the decision reported in *Shree Krishnan* v. *Kurukshetra University*[2] from withholding the plaintiff result.[3]

121. Estoppel by representation—Change of position brought about by it.—A party is not precluded from showing that the representation was due to a mistake and that it cannot operate as an estoppel, unless and until the opposite-party was able to establish that he had acted on that representation and his position had been prejudiced.[4] If a tenant does no more than think he has an adverse title, the bare belief can avail him nothing, unless he can show that it was intentionally induced by the owner so as to bring Sec. 115 into operation.[5] There is a distinction between acquiescence in an act while it is still in progress and mere submission to it when it has been completed.[6] In the first case it may operate as an estoppel, if it has induced action infringing a right.[7] In the second case, submission cannot change the past, and the right of the action, once vested, cannot, at all events as a general rule, be divested without accord and satisfaction or release under seal.[8]

Equitable estoppel against the landlord; onus of tenant.

In order to raise an equitable estoppel against the landlord, it is incumbent upon the tenant to show that, in spending money, in erecting the *pucca* buildings, he was acting under an honest belief that he had a permament right in the land, and that the landlord, knowing that he was acting under such belief, stood by and allowed him to go on with the construction of the buildings.[9]

The rule of law enunciated in *Pickard* v. *Sears*,[10] and which is embodied in Sec. 115, requires that a declaration, act or omission, which is to operate by way of estoppel, had led another person to believe a thing to be true and act upon such belief.[11]

Estoppel by representation.

For an estoppel by representation to come into operation there must be a deception which has led the person claiming the estoppel to entertain a false belief about a question of fact and which has also led him on the faith of that belief to change his legal position.[12]

In order to raise an estoppel against the landlord, it must be shown that the landlord had purposely allowed or encouraged the tenant to build, knowing that the tenant was building on the mistaken notion that he had rights beyond those of a mere tenant from year to year.[13]

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1. A.I.R. 1976 SC 376.
2. *Ibid.*
3. Bundelkhand University *v.* Laxmi Narain Yadava, A.I.R. 1983 All. 378 at pp. 378, 380, 381.
4. Thakur Das *v.* Jai Kishen Das, A.I.R. 1938 Lah. 448 at p. 450.
5. 5 Bom. L.R. 274 at p. 291.
6. *Ibid.* at p. 283; *see* also Jamnadas Shankarlal and Virijbhukhan Shankarlal *v.* Atmaram Harijivan, I.L.R. 2 Bom. 133 at p. 137 : 2 Ind. Jur. 257.
7. 5 Bom. L.R. 274 at p. 283; *see* also Rajeev Alwa *v.* K.S.R.T. Corporation, Bangalore, 1982, Lab-I-C, 401.
8. *Ibid.*
9. 4 C.W.N. 210 at p. 223.
10. 45 R.R. 538.
11. 4 C.W.N. 283 at p. 286.
12. Mohammad Musa *v.* Qasim Hussain, A.I.R. 1935 All. 739 at p. 740 : 1935 A.L.J. 964 : 155 I.C. 1063.
13. 5 C.W.N. 846.

Where the question was as to whether a person, though not in fact a partner, did, by his acts and conduct, hold himself out to strangers as such, so as to become liable by estoppel, *held* that, want of knowledge on his part of the effect of his acts and conduct would not absolve him from liability, if his acts and conduct were such as would induce a reasonable man to believe that he was a partner and to act upon such belief.[1] Conduct to create an estoppel must be found to mislead.

Acts of acquiescence.

Mere acts of acquiescence will not constitute an estoppel when the plaintiff has not acted on the strength of any representation, but on an error common to himself and the opposite party.[2]

What Sec. 115 mainly regards is the position of the person who was induced to act.[3] Unless the representation of the party to be estopped has been really acted upon, the other party acting differently from the way in which he would otherwise have acted, no estoppel arises.[4] The law will not undertake, in favour of a wrong-doer, to separate the various inducements presented and ascertain how much weight should be given to the representation relied on.[5] But, in the words of the section, the person deceived must not only believe the thing to be true, but he must also act upon such belief "so as to alter his own previous position".[6]

Suit for the recovery of rent.

In a suit for eviction under the Mysore House Rent and Accommodation Control Act the mortgage sought a decree for eviction, and, in his application he asserted that what was payable under the lease-deed was really rent. This assertion made by the mortgagee was not repudiated by the mortgagor, who, on the contrary, affirmed it. His assertion was also to the effect that there was no independent lease and that the lease was a concomitant part of the mortgage transaction of assuring to the mortgagee the payment of the interest. The decision in that proceeding by the Munsif was that there was no lease and that what was payable was only interest. So, an order for eviction was refused.

Held that it was not possible for the mortgagor to change her front and contend in the suit instituted by the mortgagees' legal representatives that they should institute a separate suit for the recovery of rent and that they could not claim interest on the principal sum due under the mortgage. They cannot be allowed to approbate and reprobate in that way.[7]

122. Approbation and reprobation.—The doctrine of approbation and reprobation of estoppel is based on the principle that a party by a representation is made to charge or alter his position.[8] It is well settled that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent. This doctrine applies not only to successive stages of the same suit, but also to another suit, other than the one in which the position is taken up, provided that the second suit grows out of its judgment in the first suit.[9]

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1. 10 C.W.N. 313.
2. Sankaran Nambi *v.* Nangeeli Amma, A.I.R., 1935 Mad. 1062 at p. 1065 : 42 M.L.W. 725 : 1935 M.W.N. 1265 Contra; *see* MIS Benaras Electric Lights and Power Company Ltd. *v.* Collector, Varanasi District, Varanasi, 1981 All. L.J. 303.
3. 2 N.L.R. 34 at p. 38; Sarat Chunder Dey *v.* Gopal Chunder Laha, I.L.R. 20 Cal. 296 (P.C.) : 19 I.A. 203 : 6 Sar. P.C.J. 224.
4. 2 N.L.R. 34 at p. 39.
5. *Ibid.*, citing Bigelow.
6. Pickard *v.* Sears, 2 N.L.R. 34 at p. 39 : 45 R.R. 538.
7. Puttananjamma *v.* P.M. Channabasavanna, A.I.R. 1967 Mys. 41 at p. 43.
8. State of Punjab *v.* Giani Bir Singh, A.I.R. 1968 Punj. 479 at p. 485.
9. *Vide* Dwijendra Narain Roy *v.* Joges Chandra, A.I.R. 1924 Cal. 600; Hemantha Kumari Devi *v.* Prasonna Kumar, A.I.R. 1930 Cal. 32 and Nagubai Ammal *v.* Shama Rao, A.I.R. 1956 S.C. 593; Official Receiver Kurnool *v.* Vale Pedda Mounamma, A.I.R. 1968 A.P. 336 at p. 344.

It is well settled that a party cannot be allowed to approbate and reprobate. This principle is based on the maxim "*Allegans contraria non est audiendus*. It means he shall not be heard who says things contradictory to each other. The maxim applies to proceedings in Court. It creates a sort of estoppel.[1]

In *Kala Chand Banerji* v. *Jagannath Marwari*[2] there a party sought to be impleaded but was refused and accordingly the decision was not binding on him. If, however, the prayer for being impleaded had been granted, the decision would have been binding.[3]

Where a person with full knowledge of the facts admitted the *wakf* nature of a house he cannot subsequently be allowed to resile from the position.[4]

When the plaintiff has elected to proceed in some other manner than for specific performance he cannot ask for the latter relief.[5]

The maxim that a person cannot approbate and reprobate is only one application of the doctrine of election. Its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto.[6]

This is what Scrutton, L.J., said in *Dexters Limited* v. *Hill Crest Oil Com. Breadford Ltd.*[7]

> "So in my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad."

This illustrates the rule that a party cannot approbate and reprobate at the same time.

The principle of election of which the doctrine of approbation and reprobation is an aspect, could only apply to orders passed with or without consent of parties by a court of competent jurisdiction. Where there is an initial total lack of jurisdiction, the orders passed will be *ab initio* void, and no validity could be attached to them by reason of the consent of parties.[8]

When two Courts have jurisdiction.

Where one of the two Courts would have the necessary jurisdiction, a person cannot be heard to contend in one Court that the other Court alone had the requisite jurisdiction and to contend precisely to the opposite effect in the other Court.[9]

If the parties have taken up a particular position before the Court at one stage of the litigation, it is not open to them to approbate and reprobate and to resile from that position. This principle has been laid down in a number of cases, and was discussed in the ruling of the Calcutta High Court reported in *Dwijendra Narain* v. *Joges Chandra De.*[10]

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1. B.S. Lall *v.* Sardar Mal Lalwani A.I.R. 1964 M.P. 124 at p. 125 : 1963 M.P.L.J. 79 : 1963 J.L.J. 181; *see* also Lakshmidevamma *v.* Kesavarso, A.I.R. 1935 Mad. 1066 : 159 I.C. 943; Ram Sarup, *v.* Ram Saran, A.I.R. 1926 Lah. 650.
2. A.I.R. 1927 P.C. 108.
3. Rameshwar Dayal *v.* Board of Revenue, M.P. Gwalior, 1967 M.P.L.J. 165 at pp. 168- 169.
4. Mst. Bibi Kundo *v.* Onkar Nath, A.I.R. 1939 Lah. 63 at p. 65: 41 P.L.R. 342; Jaidayal *v.* Ramsaran Das, 1938 Lah. 686 : I.L.R. (1938) Lah. 704 : 40 P.L.R. 954 ; *see* also Mobin Khan *v.* Channu Khan, 1981 All. L.J. 402.
5. Ramesh Chandra Chandiok *v.* Chunni Lal Sabharwal, A.I.R. 1971 S.C. 1238 at p. 1243.
6. Jiwan Das *v.* Smt. Sarla Devi, A.I.R. 1976 All. 216 at p. 219.
7. (1926) 1 K.B. 348 at p. 358.
8. K.R. Sankar *v.* M.A. Buvanambal Ammal, A.I.R. 1971 Mad. 368 at p. 370.
9. Controller of Insurance Simla *v.* Vanguard Insurance Co. Ltd., A.I.R. 1966 Mad. 437 at p. 438.
10. A.I.R. 1924 Cal. 600 : 79 I.C. 520 : 39 C.L.J. 40.

The principle has been applied in the Allahabad High Court even in cases where the question involved was one of jurisdiction. *See* the case in *Ram Khelawan Singh* v. *Maharajah of Benares*,[1] where a Bench ruled that the party upon whose objection an appeal was returned by the Commissioner for presentation to the proper Court was estopped from raising the question of jurisdiction later.[2]

On assuming inconsistent position in the Court.

The substance of the undernoted rulings[3] is that a party litigant cannot be permitted to assume inconsistent position in Court, and that this wholesome doctrine applied in not only in the successive stages of the same suit but also in another suit other than the one in which the position was taken up.[4]

The rule of approbation and reprobation means that before the doctrine will apply there has to be estoppel in one form or the other. If there is no estoppel there would be no question of the rule coming into operation and this is borne by all undernoted authorities.[5]

The plaintiffs filed suits against the defendants for a declaration that they were the owners of the land in dispute by adverse possession. These suits were contested by the defendants. They raised the plea that the plaintiffs in those suits were tenants, and, therefore, their possession was permissive and there was no question of their becoming the owners by adverse possession. The suits failed. Subsequently the then defendants filed suit for possession of the land on the ground that the defendants were trespassers and not entitled to hold possession of land. The present defendants raised the plea that they were the tenants of the land in dispute.

Held that the plea that the defendants were the tenants of the plaintiffs was not open to them because in the earlier litigation they took up a clear stand that they were the owners of the land in dispute by adverse possession. If at all the rule of estoppel would surely apply so far as the defendants were concerned.[6]

Doctrine of "approbate and reprobate".

The doctrine of "approbate and reprobate" is only a species of estoppel : it applies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine.[7]

The question of approbation and reprobation has been dealt with on page 171 of Halsbury's Laws of England, 3rd Ed., vol. 15, and it is observed :

> "On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*. The principle that a person may not approbate and reprobate expresses two propositions, first, that the person

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1. A.I.R. 1930 All. 15 : 120 I.C. 125.
2. Udrej Singh *v.* Ram Bahal Singh, A.I.R. 1946 All. 436 at p. 437 : I.L.R. (1946) All. 549 : 1946 A.L.J. 234 : 1946 A.W.R. (H.C.) 209 : 224 I.C. 278.
3. Ramsaran *v.* Iswar, A.I.R. 1936 Pat. 10; Dwijendra Narain Row *v.* Joges Chandra, A.I.R. 1924 Cal. 600 ; Hemanta Kumari Devi *v.* Prosanna Kumar, A.I.R. 1939 Cal. 22 and Indermal *v.* Subordinate Judge, Secunderabad, A.I.R. 1958 A.P. 779.
4. Gopal Pema *v.* Bondar Biradaji, 1962 M.P.L.J. 203 at p. 207.
5. Nagubai Ammal *v.* B. Shama Rao, A.I.R. 1956 S.C. 593 at p. 602 : Samudra Vijayam Chettiar *v.* Srinivasa Alwar, A.I.R. 1956 Mad. 302 at p. 304; Kuppunna Goundar *v.* Peruma Gounder, A.I.R., 1961 Mad. 511 at p. 516 (F.B.); Pishori Lal *v.* Pooran Chand, I.L.R. (1964) 2 Punj. 5.
6. Rulhu Ram *v.* Than Singh, A.I.R. 1967 Punj. 328 at pp. 328-29.
7. Commissioner of Income-tax, Madras *v.* I.V.M.R.P. Firm, Muar, A.I.R. 1965 S.C. 1216 at p. 1221 : (1965) 1 M.L.J. (S.C.) 142 : (1965) 1 S.C.J. 734.

in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and second, that he will not be regarded in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first purused and with which his subsequent conduct is inconsistent".

The above observations were quoted with approval by their Lordships of the Supreme Court in the case of *Nagubai Ammal* v. *B. Shama Rao*,[1] and it was held that the operation of the maxim that a person cannot "approbate" and "reprobate" should be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto.[2]

Whether a party can approbate and reprobate ?

It is a well accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honeyman, J. in *Smith* v. *Baker*[3] at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage. In the present case in the former suit, it was the specific plea of the tenant that in accordance with rent deed dated 8th October, 1974 the tenancy should be terminated by the end of the 7th day and vacant possession should be demanded on the 8th of the month. On that basis, the Court held that there was no valid notice terminating the tenancy and dismissed the suit. It cannot admit of any doubt that the tenant obtained an advantage based on that plea. Thus it was not open to the appellant (tenant) to contend that the notice was not in accordance with law, or was not sufficient to terminate the tenancy evidence by rent deed. The appellant cannot approbate and reprobate or play fast and loose or adopt inconsistent positions which is not permissible in law.[4]

The fact situation in the instant case is that, petitioner did participate in the interview that was held by the selection committee/BOA. After participating in the selection process and since he failed in his attempt in getting selected and appointed as a Professor. *Held*, at this stage, he cannot question the constitution of the Selection Committee/BOA. The challenge to the validity of the constitution of selection committee must be made as soon as the candidate comes to know about infirmity in such constitution. If the petitioner does not dispute the validity of constitution at the time of selection process and appears for the interview and then, only because the result of the interview was not acceptable to him, cannot turn round and contend that the selection committee was not properly constituted, such conduct amounts to approbation and reprobation and would disentitle him to any relief.[5]

Rule.

The rule that a party cannot both approbate and reprobate, though a species of the law of estoppel, is different from it, in the case of an estoppel, the representee should have altered his position to his detriment; for the rule of approbate and reprobate to apply the representor must have obtained an advantage by the representation made or the stand taken by him. In *Verchures Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd.*,[6] Scrutton, L.J., observed at page 611 :

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1. A.I.R. 1956 S.C. 593.
2. Umrao Singh *v.* Man Singh, A.I.R. 1972 Delhi 1 at p. 4.
3. (1873) 8 C.P. 350.
4. Krishnan Nair Sreedharan Nair *v.* Commommen Abraham, A.I.R. 1984 Ker. 164 at pp. 177,169.
5. **Ekanath Ekbote *v.* Gulbarga University, 2001 (5) Kar. L.J. 374 at p. 384.**
6. 1921 2 K.B. 608.

> A plaintiff is not permitted to approbate and reprobate. The phrase is apparently borrowed from the Scotch law where it is used to express the principle embodied in our doctrine of election, namely that no party can accept and reject the same instrument.[1] The doctrine of election is not however confined to instrument. A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction."

English law.

The various observations reproduced above lend support to the conclusion that the appellant having successfuly resisted the suit for his ejectment from the land in suit on the ground that Ranjit Singh was not a bhumidhar and the suit for ejectment was not maintainable in a revenue Court cannot now take up inconsistent stand in subsequent suit relating to the same land brought by the successors-in-interest of Ranjit Singh and contend that Ranjit Singh was a bhumidhar and the suit for ejectment should have been filed in a revenue court. The appellant having already taken advantage of his pleas about the statutes of Ranjit Singh and the maintainability of a suit in a revenue Court by the dismissal of the earlier suit cannot now turn round and take the stand that Ranjit Singh was a bhumidhar and the suit was triable in a revenue Court.[2]

This rule was subject to a more detailed examination in *Lissenden* v. *Bosch Ltd.*[3]

Lissenden v. Bosch Ltd.

Lord Atkin, referring to the subject of approbate and reprobate, observed at page 429 :

> "In this country I do not think it expresses any formal legal concepts. I regard it as a descriptive phrase equivalent to 'blowing hot and cold'. I find great difficulty in placing such phrases in any legal category, though they may be applied correctly in defining what is meant by election whether at common law or in equity. In case where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other."

Blowing hot and cold.

Where the petitioner has taken a chance of having a favourable report from the interview board and having done that the petitioner cannot now be heard to say that the interview board was biased, in particular, the Chairman, Gramin Bank, the petitioner ought not to be allowed to blow hot and cold at the same time and the doctrine of waiver has also its due application in the facts of the case under consideration.[4]

Nobody shall be allowed to blow hot and cold at the same time.

The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceeding preclude such a party from contending that the proceedings were without jurisidiction.[5]

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1. Ker. *v.* Wanchope, (1819) 1 Bli. 1 at p. 21 : Douglas Menziez *v.* Umphelbly, 1908 A.C. 224 at p. 232.
2. Umrao Singh *v.* Man Singh, A.I.R. 1972 Delhi 1 at p. 4.
3. (1940) A.C. 412.
4. Md. Baharuzzaman *v.* Nadia Gramin Bank, 1988 Lab. I.C. 1757, at pp. 1759, 1760 (Cal.).
5. Prasun Roy *v.* Calcutta Metropolitan Development Authority, A.I.R. 1988 S.C. 205 at p. 207.

In Broom's *Legal Maxims*, 10th Ed., while discussing the maxim *allegans contraria non est audiendus* (he is not to be heard who alleges things contradictory to each other), it is stated at page 103 :

> "We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to 'blow hot and cold' with reference to the same transaction or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest."

Supreme Court view.

The principle variously known as approbate and reprobate, blowing hot and cold or as the equitable principle of election was referred to by the Supreme Court in *Nagu Bai* v. *Shama Rao*,[1] where it was observed that the maxim that a person cannot approbate and reprobate was only one application of the doctrine of election and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto.

Essential elements of election.

The two essential elements of an election are : (1) that the person who is electing should have a choice between two alternative courses; and (2) he should derive an advantage by such choice. A plaintiff who makes an erroneous statement of value of the subject-matter, has certainly the choice between telling the truth and untruth; but where an erroneous statement is not made with the object of having a forum of his choice, the principle cannot apply. A defendant adopting the valuation made by the plaintiff for the purpose of filing an appeal (without more) could not be said to have a choice in the matter as he is generally bound to adopt the valuation made by the opposite-party.[2]

Case-law : will.

In *Smt. Shuhashini Dasi* v. *Ahi Bhusan De*,[3] the question was whether an administrator of a will can be allowed to turn round and say that the person who made that will had no capacity to make the disposition by that will. The question was answered in the negative. Such an administrator cannot be allowed to approbate and reprobate the will and blow hot and cold. He cannot first take the position of an administrator and beneficiary under the will and then challenge the testator's capcacity of disposition of property by the will.

No estoppel when the Court's order is without jurisdiction or against statute.

It is true that a person cannot be allowed to approbate and reprobate but there cannot be any estoppel when the order of a tribunal is without jurisdiction and contrary to the express words of a statute.[4] One can usefully refer to a decision of the Patna High Court in *Raghuraj Prasad Singh* v. *Basudeo Singh*,[5] where it was observed as follows :

> "....This is a case in which the want of jurisdiction appeared on the face of the proceedings and the question of approbating and reprobating does not at all arise and, therefore, according to the view taken by their Lordships of the Judicial Committee in *Ledgard* v. *Bull*[6] and *Minakshi Naidoo* v. *Subramaniya Sastri*[7] no amount of consent by the plaintiff-landlord could confer upon the Commissioner the jurisdiction which he never possessed."

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1. 1956 S.C.A. 959 : 1956 S.C.J. 665 : 1956 S.C.R. 451 : 1956 Andh. L.T. 1029 : A.I.R. 1956 S.C. 593.
2. Kuppanna Gounder *v.* Peruma Gounder, A.I.R. 1961 Mad. 511 at p. 515-16.
3. A.I.R. 1963 Cal. 520 at pp. 523-24.
4. Arun Kumar Sinha *v.* Union of India, A.I.R. 1964 Pat. 338 at p. 344.
5. A.I.R. 1950 Pat. 318 : I.L.R. 29 Pat. 318.
6. 13 I.A. 134 : I.L.R. 9 All. 191 (P.C.).
7. 14 I.A. 160 : I.L.R. 11 Mad. 26 (P.C.).

Estoppel and right of appeal.

The principle of approbate and reprobate cannot be made applicable to the rights of a litigant to an appeal either from a judgment or from an award.[1]

In *Dhanpat Mal* v. *Agent, B.B. & C. I. Ry. Co.*,[2] notice of claim was sent to N.W. Ry. and was forwarded by them to the B.B. & C.I. Ry. The B.B. & C.I. Ry. made enquiries into the matter and sent a reply to the plaintiff. *Held* B.B. & C.I. Ry. Co. was estopped from pleading absence of a notice as a bar to plaintiff's suit against them.

Knowledge of facts.

A petitioner cannot approbate and reprobate with knowledge of the facts, and if he or she once deliberately affirms the marriage, then the second petition for nullity may be objected to.[3]

A lessee cannot blow hot and cold.[4]

Where the plaintiffs by their conduct allowed the defendants to remain in exclusive possession of lands in suit on payment of the entire rent for the areas allotted to them and the plaintiffs in their turn came in possession of different lands for which they were paying their own rent, the doctrine of estoppel by conduct must be attracted in the aforesaid facts and circumstances.[5]

If a lessee erects any building not in a mistaken belief of his rights in regard to the land, but in assertion of right, which he correctly believes to be his, but which ultimately turns to be unfounded in law, he cannot claim compensation.[6]

If a particular action which is impugned falls beyond the purview of statutory provisions, the action which falls outside the statutory provisions is *non est*, and is not existent in eye of law and if one cannot acquiesce in an action which falls outside the purview of law and can also be not estopped on the ground, it is difficult to see how in such a situation the principle of approbation and reprobation could apply.[7]

There cannot be estoppel against a statute and the doctrine of approbate and reprobate also cannot apply. It applies only to the conduct of the parties, and the conduct of the parties is immaterial when the question of the legality of a document is concerned.[8]

Supreme Court on approbation and reprobation.

The Supreme Court in *Bhau Ram* v. *Baij Nath Singh*[9] have laid down that the doctrine of approbation and reprobation, which has a Scottish origin and is akin to the law of election and estoppel applies to those cases where a person has elected to take benefit otherwise than on merits of the claim in the litigation under an order to which benefit he could not have been entitled except for the order. Another criterion

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1. Dr. C.S. Krishnaswamy Ayyar *v.* Mohanlal Binjani, A.I.R. 1949 Mad. 535 at p. 541 : I.L.R. (1949) Mad. 657 : (1948) 2 M.L.J. 559 : 1949 M.W.N. 329 : 63 L.W. 42.
2. A.I.R. 1928 Lah. 438 at pp. 439-40 : 110 I.C. 718.
3. H. *v.* H., A.I.R. 1928 Bom. 279 at p. 281 : 110 I.C. 266 : 30 Bom. L.R. 523.
4. Periaswami Pillai *v.* Sri Arunjadeswaraswami Temple at Tirumpanandal, A.I.R. 1967 Mad. 257 at p. 259.
5. Janki Missir *v.* Dharamraj Missir, A.I.R. 1974 Pat. 254 at p. 259.
6. G.H.C. Ariff *v.* Jadunath Majumdar, 60 M.L.J. 538 at p. 546 : A.I.R. 1931 P.C. 79 at p. 81.
7. Ambala Goods Carriers Pvt. Ltd. Ambala Messrs *v.* Regional Transport Authority, A.I.R. 1977 H.P. 46 at p. 50.
8. Ganesh Shankarbhat Sadalgekar *v.* Gangabai Shambhubhat Sadalgekar, A.I.R. 1939 Bom. 114 at p. 115 : 41 Bom. L.R. 170 : 181 I.C. 618.
9. A.I.R. 1961 S.C. 1327.

which their Lordships have laid down to the applicability of the doctrine is that the person receiving a benefit under the order must have a choice between two rights and that after the exercise of the choice, restitution was impossible or inequitable.[1]

Estoppel and advantage of an order.

It is well-settled that where a person takes advantage of an order and tries to obtain an order founded thereon, he cannot turn round and say that the order was one without jurisdiction.[2]

It was held that the plaintiff has precluded himself from attesting the amendment.

This matter has been settled by a number of decisions of the Revision Court. A Division Bench of the Punjab High Court in *Prithivi Singh Azad* v. *Ajaib Singh Sindhu*,[3] observed :

> "Where, however, the amendment of election petition was allowed by the Tribunal on payment of costs which were duly received by the respondent, the costs having been accepted, the amendment of the petition is no longer open to be challenged by him in appeal against dismissal of election petition".

In *Ghulam Qadar* v. *Musammat Fateh Bano*,[4] Agha Haider, J. observed that when amendment had been allowed subject to payment of costs to the defendant, who accepted the amount, he could not turn round and attack the amendment.

A Division Bench of the Nagpur High Court in *Baliram Narayan* v. *Bapurao Walalaji*,[5] took the same view and observed that as the defendant accepted the costs, it was not open to him to object to the amendment.

In the Supreme Court decision in *Nagubai Ammal* v. *B. Shama Rao*[6] the learned Judges at page 602 approved para 512 of Halsbury's Laws of England, vol. 13, p. 454 where it was stated :

> "On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set aside or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded, nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it.".

Sir James Addison, J., in *S. Burden and Company* v. *Army Canteen Board, India, Simla*,[7] held :

> "Where an order setting aside in *ex parte* decree has been passed and the plaintiff accepts costs and his pleader appears in court thereafter, the plaintiff should be deemed to have accepted the order setting aside decree and the order will not be interfered with in revision."

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1. Sri Prafulla Chandra Sinha *v.* Chota Nagpur Banking Association Ltd., A.I.R. 1965 Pat. 502 at p. 504 : 1965 B.L.J.R. 558.
2. Benaras Ice Factory, Ltd. *v.* Sukhlal Amarchand Vadnagara, A.I.R. 1961 Cal. 422 at p. 430.
3. A.I.R. 1965 Punj. 463.
4. 156 I.C. 342 : A.I.R. 1934 Lah. 974.
5. A.I.R. 1955 Nag. 222.
6. A.I.R. 1956 S.C. 593.
7. A.I.R. 1926 Lah. 637.

Similar view was taken by the same learned Judge in *Firm Rup Chand Prithi Chand* v. *Hardayal Mal*,[1] and Bhide, J., in *Sohan Lal* v. *Dhari Mal Ishar Das*.[2]

A Division Bench of the Patna High Court in *Ramcharan Mahto* v. *Custodian of Evacuee Property Bihar*,[3] observed :

> "Where an amendment to the written statement was allowed by the Trial Court two years after the original written statement was filed and the plaintiff withdrew the cost that was given as a condition precedent for allowing the amendment".

Held in an appeal challenging the order of the Trial Court, that the plaintiff could not raise any objection against the amendment as he accepted the cost allowed by the Court in that respect. The plaintiff having availed the benefit of the cost awarded must be taken to have admitted that the order allowing the amendment was within the jurisdiction of the court below."[4]

In *Madan Mohan* v. *Hari Anandilal*,[5] the stand taken by the respondent in the proceeding under Order XXI, rule 97 throughout was that he was not the judgment-debtor or a representative of the original judgment-debtors.

Held that it was not open to the respondent to contend now that he was in fact a representative of the judgment-debtors, and as such the only remedy open to the appellants lay in execution.

Adoption of one part and repudiation of another part of order.

When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. According to Halsbury, this rule is an application of the doctrine "that a person may not approbate and reprobate".[6] In Brooms *Legal Maxims*, it is treated as an illustration of the maxim :

"that no man shall be permitted to blow hot and cold with reference to the same transaction (Ed. 9, p. 118)".

In other words, to allow a party, who takes a benefit under an order, to complain against it, would be to permit a breach of faith. From this statement, it is clear that if a party receives the benefit reserving his right to object to the order, he will not in that case be precluded from attacking it.[7]

In *Ramanuja Jeer* v. *Sami Nadar*,[8] the defendants after the plaints had been filed in the Small Cause side of the District Munsif's Court raised a question of title by the defence. The plaints were returned for represenation to the proper Court and were accordingly presented to the original side of the District Munsif's Court. The plaintiff did not take any objection to the jurisdiction at the hearing on the original side. It was also not raised in his grounds of appeal to the High Court. *Held* that it was too late to take that objection at a later stage.

The same question seems to have arisen in *Subbiah* v. *Rajah of Venkatagiri*,[9] where the appellant asked that the case should be sent back for retrial on the Small

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1. A.I.R. 1927 Lah. 55.
2. A.I.R. 1928 Lah. 813 (2).
3. A.I.R. 1964 Pat. 275.
4. Dr. Sewak Parshad *v.* Gram Panchayat Raipur Rani, A.I.R. 1972 Punj. 272 at p. 273.
5. A.I.R. 1959 Bom. 269 at pp. 270-71 : I.L.R. (1959) Bom. 256 : 1958 Bom. L.R. 829 : 1958 N.L.J. 442.
6. 13 Halsbury, para. 508.
7. Venkatarayudu *v.* Rama Krishnayya, A.I.R. 1930 Mad. 268 at p. 270 : 58 M.L.J. 137 : 37 M.L.W. 30 : 1930 M.W.N. 50 : 123 I.C. 337.
8. A.I.R. 1929 Mad. 525 at p. 525-26 : 119 I.C. 386.
9. A.I.R. 1922 Mad. 352 : 42 M.L.J. 118 : 14 M.L.W. 319 : 66 I.C. 207.

Cause side as the original side ought not to have tried it and the learned Judges refused to interfere.

It would be absurd to suggest that an involuntary act done by a person in pursuance of an order of the Court should operate as an estoppel against him and prevent him from enforcing the remedy given to him by law.[1]

It has been held by the Privy Council in *Ambu Nair* v. *Kelu Nair*,[2] that a party cannot say at one time that the transaction is a valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid; and at another say it is void for the purpose of securing some further advantage.[3]

On this principle the defendant cannot be allowed to say at one time that the question between him and the auction-purchaser as to adverse possession is not necessary to be decided in the suit and thereby induce the Court to refrain from deciding it; and at another time say that because that question was not decided between him and the auction-purchaser, the auction-purchaser's claim is barred by adverse possession. Even if he is not estopped, the principle of approbation and reprobation will apply, and he cannot be allowed to take this standpoint.[4]

Where an order is passed by the consent of the appellants on the assumption that the creditors had become owners of the property before 1st May, 1900, they cannot be allowed to say that very foundation of that order was erroneous.[5]

Where the defendant in a suit for rent had denied the plaintiff's title and claimed to hold under a third party, it was held that in a suit for ejectment by the landlord the defendant was debarred from pleading his tenancy.[6]

Where the defendant 2 asked to be joined as a party more than a year after the suit was brought under Sec. 9 (new Sec. 6 of the Act 47 of 1963), Specific Relief Act, he cannot avoid decree by pleading limitation.[7]

A consent order raises an estoppel as much as a decree passed *in invitum*.[8]

Consent order.

When a party invites the Court to adopt a procedure which is not contemplated by the Civil Procedure Code he cannot turn round and say that the

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1. Ishar Das Dharam Chand *v.* Buta Mal Durga Das, A.I.R. 1929 Lah. 42 at p. 44 : 115 I.C. 67.
2. A.I.R. 1933 P.C. 167 : 143 I.C. 433 : 60 I.A. 266 : I.L.R. 56 Mad. 737 (P.C.).
3. Subbaramma Ayyar *v.* Chinnaswami Thanjirayar, A.I.R. 1935 Mad. 295 at p. 296 : 41 M.L.W. 192 : 1935 M.W.N. 200 : 156 I.C. 492, Ambu Nair *v.* Kelu Nair, A.I.R. 1933 P.C. 167 : 143 I.C. 433 : 60 I.A. 266 : I.L.R. 56 Mad. 737; Somasundaram Chetty *v.* Subramaniam Chetty, A.I.R. 1929 P.C. 136 : 1926 M.W.N. 832 : 25 M.L.W. 163 : 99 I.C. 742.
4. Chidambargauda Ramchandragauda Desai *v.* Channappa Mahalingappa, A.I.R. 1934 Bom. 329 at p. 333 : 36 Bom. L.R. 694 : 153 I.C. 637.
5. Mst. Umrao Bibi *v.* Ram Kisen, A.I.R. 1932 Lah. 281 at p. 288; *In re* South American and Mexican Co., *Ex parte* Bank of England, (1895) 1 Ch. 37; Secretary of State *v.* Attenpranath Das, I.L.R. 63 Cal. 550 at p. 558; Bhai Shanker Nanabhai *v.* Morarji Keshavji, I.L.R. 36 Bom. 283 and Raja Kumara Venkata Perumal Raja Bahadur *v.* Thatha Ramasami Chetty, I.L.R. 35 Mad. 75; Sailendra Narain Bhanja Das *v.* State of Orissa, A.I.R. 1956 S.C. 346 : 1956 S.C.A. 87 : 1956 S.C.J. 449 : 1956 S.C.R. 72.
6. Hatimullah *v.* Mahamad Abju Choudhury, A.I.R. 1928 Cal. 312 at p. 315.
7. Bhaudin Baba Shaikasan *v.* Ibrahim Allisaheb Shaikasan, A.I.R. 1928 Bom. 526 at p. 526 : 30 Bom. L.R. 1405 : 112 I.C. 786.
8. Deo Lal Jha *v.* Bindeshwari Narayan Singh, A.I.R. 1929 Pat. 440 at p. 443 : Bhai Shankar Nanabhai *v.* Morarji Keshavji, I.L.R. (1911) 36 Bom. 283 : 12 I.C. 535 : 13 Bom. L.R. 950, followed in Rameshwar Singh *v.* Hitendra Singh, A.I.R. 1921 Pat. 131.

Court is to blame for adopting the very procedure which he invited the Court to follow. The doctrine of estoppel would apply to a party who attempts to blow hot and cold in this fashion.[1] As was held in *Burgees* v. *Morton*,[2] where with the acquiescence of the parties the Judge departed from the ordinary course of procedure and decided upon a question of fact, it was incompetent for the parties afterwards to contend that they have an alternative mode of proceedings with the trial as if it had been heard in due course.

Prayer for amendment in plaint.

In *Mani Lal* v. *Harendra Lal Roy*,[3] The plaintiff was granted leave to amend the plaint on payment of Rs. 150 as costs to the defendant. The plaint was amended, costs paid to and received by the defendant. The learned Judges held that having accepted the costs paid under the order of the Court the defendant is ordinarily precluded from questioning that order. But as in the case before their Lordships the defendant had accepted the costs under protest they allowed him to argue against the validity and legality of the order of the Court below.

Under these circumstances in another case the defendant-appellant could not be allowed to agitate against the order of the lower Appellate Court allowing the amendment of the plaint. Even though he received the costs under protest.[4]

Effect of a party taking legal steps in a proceeding.

When a party claiming to be a proper party to a legal proceeding, takes steps for purpose of securing some relief from the Court in that capacity, he really becomes estopped from afterwards setting up that he was not a party.[5]

Order to produce further evidence; effect, when party fails to do so.

In *Fazar Banoo* v. *Rahim Bux*,[6] an application was made by the appellant to adduce further evidence in support of his contention that *A* was son of *M*. The respondents applied for leave to adduce further evidence to rebut the appellants' contention. *Held* that it was not open to the respondents to complain that this additional evidence was given by the appellants.

Mere application by respondent in appeal for security for costs has not the effect of estopping him from contending that the Court had no jurisdiction to entertain the appeal.[7]

Question of jurisdiction.

In the matter of jurisdiction there cannot be any estoppel simply because the plaintiff under-valued his suit.[8]

Where plaintiffs have accepted the benefit of the auction-sale by receiving part of the surplus money, they cannot attack it.[9]

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1. S.E. Makudam Mahommad *v.* T.V. Mahommad Sheik Abdul Kadir, A.I.R. 1936 Mad. 856 at p. 857 : 1936 M.W.N. 740 : 71 M.L.J. 281 : 44 M.L.W. 351 : 164 I.C. 611.
2. (1896) A.C. 136 : 65 L.J.Q.B. 321 : 73 L.T. 713.
3. (1910) 12 C.L.J. 556 : 8 I.C. 79.
4. Baba Padam Gir Chela (Disciple) of Baba Chaudish Gir *v.* Murti (Deity) Shri Paras Digamber Jain, 1981 Cur. L.J. (Civil) 411 at p. 413.
5. Sutharsana Chariar *v.* S. Samarapuri Chettiar, A.I.R. 1928 Mad. 690 at p. 693 : 1928 M.W.N. 634 : 110 I.C. 837.
6. A.I.R. 1929 Cal. 26 at pp. 26-27.
7. Kuppaswamy Chetty *v.* Ayyammai Ammal, A.I.R. 1935 Mad. 723 at p. 724 : 1935 M.W.N. 552 : 156 I.C. 916.
8. Hazari Singh *v.* Jhunna Singh, A.I.R. 1931 All. 21 at p. 22 : 1930 A.L.J. 1254 : 130 I.C. 13.
9. Lal Somnath Singh *v.* Ambika Prasad, A.I.R. 1950 All. 121 at p. 131.

It is manifestly contrary to the general principle of estoppel to allow a person to plead want of jurisdiction in a Court to pass the decree in the proceeding which he himself instituted in that Court.[1]

The observation of their Lordships of the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Laha*,[2] is to the effect that the law enacted in Sec. 115, Evidence Act, does not differ from the English law on that subject, of which the general principle is stated in *Cairncross* v. *Lorimer*,[3] that the main question in determining whether estoppel has been occasioned is whether the representation has caused the person to whom it has been made to act on the faith of it; and that the existence of estoppel does not depend on the motive or on the knowledge of the matter on the part of the person making the representation.

Estoppel : how to determine it.

Where a plaintiff represented to the Court of the First Class Subordinate Judge, that it had jurisdiction and obtained a decree upon that representation subsequently he cannot urge that the Court had no jurisdiction.[4]

As a matter of principle a party denying the jurisdiction of a particular Tribunal and succeeding in that plea cannot deny the truth of that plea in subsequent proceedings before another Tribunal.[5]

Denial of truth of a plea subsequently.

The general rule of estoppel is stated in Bigelow on *Estoppel*, 6th Ed., in the following words :

> "It may accordingly be laid down as broad a proposition that one who, without mistake induced by the opposite-party, has taken a particular position deliberately in the course of a litigation must act consistently with it ; one cannot play fast and loose."

Broad proposition.

At another place in the same book the learned author makes the following observation :

> "It is laid down that a defendant who obtains judgment upon an allegation that a particular obstacle exists cannot in a subsequent suit based upon such allegation deny its truth."

Where the judgment passed by the Board of Revenue upheld the plea of the defendant that the Court of Revenue had no jurisdiction to entertain the suit the defendant cannot deny the truth of his plea raised in the Revenue Court when the plea has compelled the plaintiff to put his plaint before the Civil Court.[6] In the High Court of Allahabad the view was taken in the cases of *Abdul Qayum* v. *Fida Husain*[7] and *Kali Charan* v. *Bholi Bakhsh*.[8]

Where the judgment-debtors obtained stay of the sale in execution proceedings in order that they might have an opportunity of paying the decretal amount they cannot say that the decree could not be executed against them personally.[9]

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1. K.B. Walker *v.* Mrs. Gladys P. Walker, A.I.R. 1935 Rang. 284 at p. 287.
2. I.L.R. 20 Cal. 296 : 19 I.A. 203 : 6 Sar. 224 (P.C.).
3. 3 Macq. H.L. 827.
4. Kondi Ravji Fadtare *v.* Chunilal Rupchand, A.I.R. 1929 Bom. 1 at p. 6 : 30 Bom. L.R. 1539 : I.L.R. 53 Bom. 75 : 113 I.C. 229.
5. Hakim Syed Shah Khurshed Ali *v.* Commissioner of Tirhut Division, A.I.R. 1955 Pat. 198 at p. 198 ; *see*, for instance, Mahadeo Singh *v.* Pudai Singh, A.I.R. 1931 Oudh 123 : I.L.R. 5 Luck 645 : Bhagirath Dass *v.* Baleshwar Bagarti, A.I.R. 1914 Cal. 143 : I.L.R. 41 Cal. 69.
6. Malhadeo Singh *v.* Pudai Singh, A.I.R. 1931 Oudh 123 at pp. 123-24 ; Bhagirathi Dassi *v.* Baleshwar Bagarti, I.L.R. 41 Cal. 69 ; Umesh Chand *v.* Mahendra Prasad, 11 I.C. 280.
7. (1915) 30 I.C. 551.
8. (1927) 11 R.D. 279.
9. Fateh Kumar Singh *v.* Kishen Chand Kachar, A.I.R. 1935 Cal. 816 at p. 817 : 160 I.C. 86.

Where a plaintiff comes in under Sec. 47, C.P.C., the defendant successfully maintaining that section does not apply cannot in a subsequent suit urge bar of Sec. 47.[1]

Where the defendants have taken advantage of the order which directed the payment of their costs they are precluded from appealing against that order. This principle falls under the well-known rule that a party cannot be allowed both to approbate and reprobate.[2] A party could not, after he had enjoyed a benefit under the order, contend that it was valid for one purpose and invalid for another and that he must be considered to have acquiesced in the order passed by the Court.[3]

Accepting liability to pay.

Where the plaintiff cannot seek a declaration to the effect that the defendants are liable to pay Rs. 23 as under-proprietary rent when his own liability for the payment of that sum admitted before the Assistant Settlement Officer by him through his general agent.[4]

Plea once taken cannot be changed.

A person opposing appeal on the ground that the case was governed by the new Tenancy Act and that an appeal should really had been filed in the High Court cannot urge that the case is governed by the old law and that no appeal lies to the High Court.[5]

In *Federal India Assurance Co. Ltd.* v. *Anandrao Pandurangarao,*[6] the Lower Court passed the order setting aside the *ex parte* decree. The costs directed by the order were received by the plaintiff company's advocate. Plaintiff company's advocate had not been authorized to accept the costs and conclude the plaintiff company's right of filing an application for revision. *Held* that the mere fact of his receiving costs would not have the effect of concluding the plaintiff company.

Where a person gets a certain portion of the *kha* schedule lands on the basis of the compromise it is not open to him to raise the contention that the compromise is not binding because all the necessary parties interested in the *kha* schedule properties were not parties to the compromise.[7]

In the case reported as *Puran Chand Hari Parshad* v. *Mangal Nanak Saini,*[8] the landlord had himself claimed that the amount of interest payable by the tenant up to the date of first hearing was Rs. 10 and the tenant did in fact acting on the said representation deposit nothing less than Rs. 10 as interest in the Court on the first date of hearing. *Held* that the landlord could not be allowed to approbate and reprobate even if on the basis of some calculation it could be found that the sum of Rs. 10 was deficient by some paise from the exact amount of interest which was payable.

Where in the appeal arising out of a suit for eviction by the landlord against the tenant the argument of the defendant was that the courts below had rightly not decided the question of title and that their observations with regard to the

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1. Uttam Chand *v.* Saligram, A.I.R. 1929 Nag. 79 at p. 80.
2. *See* Banku Chandra Bose *v.* Marium Begum, A.I.R. 1917 Cal. 546 : 21 C.W.N. 232 : Ramaswami Chettiar *v.* Chidambaram Chettiar, A.I.R. 1927 Mad. 1009 ; Venkatarayadu *v.* Kamakrishnayya, A.I.R. 1930 Mad. 268 : 58 M.L.J. 137 : 31 M.L.W. 30 : 1930 M.W.N. 50 : 123 I.C. 337.
3. Puvada Satyanarayamurthy *v.* Gadepalli Sundara Rao, A.I.R. 1938 Mad. 603 at pp. 603-4 : 1938 M.W.N. 383 : 181 I.C. 913.
4. Manzoor Hussain *v.* Dawar Ali, A.I.R. 1935 Oudh 409 at p. 410.
5. Ram Khelawan Singh *v.* Maharajah of Benaras, A.I.R. 1930 All. 15 at p. 16 : 1930 A.L.J. 224 : 120 I.C. 125.
6. A.I.R. 1944 Nag. 161 at pp. 161, 62 : I.L.R. (1944) Nag. 436 : 1944 N.L.J. 134 : 216 I.C. 184.
7. Akbar Ali *v.* Mst. Adar Bibi, A.I.R. 1931 Cal. 155 at p. 156 : 34 C.W.N. 996 : I.L.R. 58 Cal. 366 : 139 I.C. 873.
8. A.I.R. 1969 Punj. 367 at p. 372.

existence of title in the plaintiff were merely casual it would be ridiculous if the defendant is allowed to turn round and say in the appeal from the decree passed on remand that the court below should have decided the question of title. The tenant is estopped from doing so.[1]

On setting of *ex parte* decree, etc.

In *Puttu Singh* v. *Vidya Ram*,[2] the defendants made an application for setting aside of the *ex parte* decree and for a rehearing of the suit.

Amendment of election petitions.

Where the election petitioner himself has obtained an order in his favour to amend the petition he cannot say that the amendments must be ignored and the petition read in the form in which it stood before the Election Commission.[3]

"Those who took their chance at elections and failed should not now be allowed to challenge the elections of their opponents on the ground that electoral rolls were defective, the plea is in substance one of estoppel. There can be no question of estoppel because it cannot be said that the position of the other side has in any way altered by reasons of something done or not done by the petitioners."[4]

Similarly in *Raghuni Nayak* v. *District Magistrate, Darbhanga*[5] it was laid down that where persons having knowledge of the illegality in the election proceedings participated in it, they should be precluded from challenging the validity of the election.[6]

123. Decree passed by the consent of the parties.—In *Biraj Mohini Dasi* v. *Smt. Chintamoni Dasi*,[7] it was said that the decree was passed by consent of parties. The question as to whether or not the compromise decree was valid, could not be gone into on an appeal against that decree. After the final decree was made, the defendants applied for a review and that application was dismissed. The defendants thereafter appealed against the preliminary as well as the final decrees in the partition suit. The compromise that was sanctioned by the Court was on behalf of some minors and a decree was made in terms of that compromise. It was said by Maclean, C.J. : "They cannot, upon the present appeal, go into the question of whether or not the consent decree is or is not binding upon the parties".

A compromise decree, it is true, is not a decision of the Court. It is the acceptance by the Court of something to which the parties had agreed. It is in that

Judgment by consent or default.

sense that compromise or consent decrees have been described as contract between the parties to which is superimposed the command of the Court. The Court merely sets its seal on the agreement entered into between the parties. It is, therefore, not a decision of the Court on an application of its mind and the statutory bar of *res judicata* under Sec. 11 of the Code of Civil Procedure is not attracted. But at the same time, it is equally well-established that a judgment by consent or default is as effective an estoppel between the parties as the judgment whereby the Court exercises its mind on a contested case. Even though the matter may have passed from the stage of representation into an agreement, there are cases where the Courts are entitled to entertain a plea of estoppel in order to prevent fraud or circuity of action.[8]

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1. Rameshwar Lal Sharma *v.* Sardar Amrik Singh, A.I.R. 1974 Pat. 195 at p. 199.
2. A.I.R. 1934 All. 10 at p. 11 : 153 I.C. 999.
3. Baburao Tatyaji Bosle *v.* Madho Shri Hari Aney, A.I.R. 1961 Bom. 29 at p. 39.
4. Ramgulam Shri Baijnath Prasad *v.* Collector District Guna, A.I.R. 1975 M.P. 145 at p. 150.
5. 1958 B.L.J.R. 177 : A.I.R. 1959 Pat. 7.
6. Deosaran Yadav *v.* State of Bihar, A.I.R. 1972 Pat. 439 at p. 440.
7. 5 C.W.N. 177.
8. Garaj Narain Singh *v.* Babulal Khemka, A.I.R. 1975 Pat. 58 at p. 62.

Banerjee, J., in *Biraj Mohini Dasi's* case,[1] referred to the case of *Birojo Durlav* v. *Rama Nath Ghose*,[2] in support of the observation.[3]

The order in the case reported in *Sitaram Sawhney* v. *Kundanlal Sahni*,[4] was an order of the Court accompanied by consent and submission to order by the parties. *Held*, that the order could not be attacked on a question of law.

A judgment by consent of default is as effective an estoppel between the parties as a judgment obtained from the Court after due contest on merits. Hence, the consent decree operates as estoppel by judgment.[5]

124. Four modes in which estoppel may arise.—In *Carr.* v. *London and North-Western Railway Company*,[6] four recognized propositions of an estoppel *in pais* were enunciated by the Court, which said :

"One such proposition is if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

First.

"Another recognized proposition seems to be that if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

Second.

"And another proposition is that, if a man, whatever his real meaning may be, *so conducts himself that a reasonable man would take his conduct to mean a certain representation* of facts, and that it was true representation and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented."

Third.

"There is yet another proposition as to estoppel. If in the transaction itself, which is in dispute, one has *led another into the belief of a certain state of facts by conduct of culpable negligence*, calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

Fourth.

Basis of above propositions.

The two first propositions in *Carr* v. *London and North-Western Railway Company*[7] are included in *Declaration* ; the third in *act*, and the fourth in *omission*.

In *Swan* v. *N.B. Australasian Company*,[8] Blackburn, J., said that the neglect must be in the transaction itself, and be the proximate cause of leading the party

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1. 5 C.W.N. 877.
2. 1 C.W.N. 597.
3. *Ibid*.
4. Baburao Tatyaji Bhosle *v.* Madho Shri Hari Aney, A.I.R. 1961 Bom. 29 at p. 39.
5. Indira Bai Patel *v.* B.A. Patel, A.I.R. 1974 A.P. 303 at p. 305.
6. (1875) L.R. 10 C.P. 307.
7. (1875) L.R. 10 C.P. 307.
8. 2 H. & C. 175.

into that mistake; and also, it must be the neglect of some duty that is owing to the person led into that belief.

The dictum of Blackburn, J. is important on the question of estoppel by *omission* or *negligence*.

In case of *Carr* v. *London and North-Western Railway Company*,[1] Bratt, J. (afterwards Lord Justice Esher) states that the representation made by the man by words or conduct will amount to a wilful endeavour on his part to cause another to believe in a certain state of things which he *knows to be false*.

This underlined (here italicised) portion has not been accepted as good law for estoppel would still operate even if the man making the representation does not know that the statement that he is making is false.[2]

Where a tenant enjoys full benefit of the trial after the case is remanded by the Appellate Authority, he would be estopped to challenge the legality of the order of remand in subsequent proceedings.[3]

125. Estoppel *"in pais"*.—The instance given by Lord Coke of estoppels *in pais* are : by matter *in pais*, as by Liverie, by entry, by acceptance of rent, by partition, and by acceptance of an estate. *In pais* means "in the country" , "before the public". Trial *in pais* is trial *by the country*, i.e. by a jury. Conveyances *in pais* are ordinary conveyances between two or more persons *in the country*, i.e. upon the land to be transferred. The inclination of the Courts has been to extend the principle of *estoppel in pais*, more especially in mercantile transactions. The principle was thus stated by Lord Denman in *Pickard* v. *Sears*[4]: "The rule of law is clear, that where one by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that behalf, so as to alter his own previous position, the former is concluded from averring against the later a different state of things as existing at the same time". In *Freeman* v. *Cook*,[5] Baron Parke said that the rule laid down in *Pickard* v. *Sears*[6] "was to be considered as established; but that by the term 'wilfully' in that rule must be understood, if not that the party represents that to be the truth which he knows to be untrue at least, that he means his representation to be acted upon and that it is acted upon accordingly. "If a man," writes Mr. Justice Story, "having a title to an estate, which is offered for sale, and, knowing his title, stands by and encourages the sale or does not forbid it and thereby another person is induced to purchase the estate under the supposition that the title is good, the former so standing by and being silent will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase. So, if a man should stand by, and see another person as grantor execute a deed-of-conveyance of land belonging to himself and knowing the facts should sign his name as a witness, he would in equity be bound by the conveyance. So, if a party having a title to an estate should stand by and allow an innocent purchaser to expend money upon the estate without giving him

Pais—Defined.

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1. (1875) L.R. 10 C.P. 307 at p. 316.
2. Satibhusan Mukherjee *v.* Corporation of Calcutta, A.I.R. 1949 Cal. 20 at p. 22.
3. Brij Lal Puri *v.* Smt. Muni Tandon, A.I.R. 1979 Punj. 132 at p. 137.
4. 6 Adolphus and Elli's Reports, 475.
5. 2 Ex. Ch. 654—As to the effect of substituting, in the section of the Indian Evidence Act, "intentionally" for "wilfully", *see* the observations in Eranjoli Illath Vishnu Nambudri *v.* Eranjoli Illath Krishnan Nambudri I.L.R. 7 Mad. 8, which however were dissented from by their Lordships of the Privy Council in Sarat Chunder Dey *v.* Gopal Chunder Laha, L.R. 19 I.A. 203 : *see* post.
6. 6 Adolphus and Ellis's Reports, 475.

notice he would not be permitted by a Court of equity to assert that title against such purchaser, at least not without fully indemnifying him for all his expenditure.

Basis of estoppel *in pais.*

Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes of this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon, J.[1] put it in these words :

> "The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations."

The principle is not limited to an assumption of fact but includes an assumption of fact or law, present or future. At any rate, it applies to an assumption of ownership or absence of ownership. This, gives rise to what may be called proprietary estoppel. There are many cases where the true owner of goods or of land has led another to believe that he is not the owner, or, at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing. In such cases it has been held repeatedly that the owner is not to be allowed to go back on what he has led the other to believe. So much so that his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct—what he has led the other to believe—even though he never intended it.[2]

Pleading not essential.

An estoppel *in pais* need not be pleaded, in order to make it obligatory.[3] With the Indian system of pleading, a party's statement, in a judicial proceeding, cannot be excluded like allegations in bills in equity and pleading at common law.[4] But mere statements for the purpose of a particular judicial proceeding can only be conclusive evidence in another proceeding, as to such material facts embodied therein as must have been found affirmatively to warrant the judgment of Court upon the issues joined.[5]

Proof.

Estoppel *in pais* is a rule of evidence, and the circumstances giving rise to an estoppel may be proved by evidence of any kind.[6]

Rule.

The whole law of estoppel *in pais* is not laid down in this section, a familiar rule is that there cannot be estopel against statute, but that rule is not to be found on the four corners of the section.[7]

126. Family arrangement.—The existence of a family dispute is not essential to the validity of a family arrangement.[8]

In 1982 A.L.J. 563 (*Ram Pal* v. *Deputy Director of Consolidation, Jaunpur*, 1982 All. L.J. 563 at p. 568) genuineness and *bona fide* character of the family settlement was not doubted by the Deputy Director of the Consolidation. The names were

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1. Grundt *v.* Great Boulder Pty Gold Mines Ltd., (1937) 59 C.L.R. 641 at p. 674.
2. Moorgate Mercantile Co. Ltd. *v.* Twitchings, (1975) 3 All E.R. 314 at p. 323.
3. 2 M.H.C.R. 31.
4. *Ibid.*
5. *Ibid.*
6. R.M.A.R.L. Chettyar Firm *v.* Maung Po Kyaw, A.I.R. 1935 Rang. 279 at p. 280.
7. Satibhusan Mukherjee *v.* Corporation of Calcutta, A.I.R. 1949 Cal. 20, at p. 23.
8. Ram Charan Das *v.* Mst. Girjanandani Devi, A.I.R. 1959 All. 473 at p. 481 : 1959 A.W.R. 85.

also mutated in the revenue records on the basis of family settlement. It was held that the family arrangement being binding on the parties clearly operates as estoppel so as to preclude them from revoking or challenging the same.[1]

Settlement of dispute by arbitration

A partition or a settlement of a dispute of doubtful claim by arbitrators appointed by the parties is a valid and binding arrangement if it has been acted upon by them for sometime and the parties are not permitted to deny, ignore, or resile from them on equitable principles. The cases bearing upon the point and the requisites of such a partition or family arrangement will be found discussed in the judgment of Mukherjee, J., in *Helan Dasi* v. *Durga Das Mandal*[2] and *Upendra Nath* v. *Bindeshari*.[3] An antecedent family settlement of disputed claims, if fairly arrived at without fraud or concealment would be binding on the parties and cannot be re-opened, especially if it had been acted upon. *See* the judgment of Kanhaiya Lal, J., in *Baldeo Singh* v. *Udal Singh*,[4] in which a very large number of authorities was cited and discussed. For other cases, *see Bahadur Singh* v. *Ram Bahadur*,[5] *Kanti* v. *Gajraj*[6] and *Kanhai Lal* v. *Brij Lal*.[7] In order to be binding the settlement must be of a claim which was made honestly and in good faith.[8]

Claim to *stridhan* property on wife's death from father-in-law, etc.

Where a person on the death of his wife laid a claim to certain property which had been given to the wife by her mother and thereupon the mother and the surviving sister of the wife in order to avoid litigation relinquished a substantial portion of the property to him; *held* that the so-called family settlement was not valid as regards the minor reversioners at the time; there must be a *bona fide* family dispute, to be binding.[9] The principle is applicable where some of the members of the family are minors or where the settlement was effected by qualified owner, whose acts in these respects would bind the reversioner.[10] In the case of limited owners it appears from *Khunni Lal* v. *Govind*,[11] upon which reliance was placed in *Kusum Kumary* v. *Dasurathi*,[12] that the test to be applied to the transaction was whether the alleged alienees derived their title from the limited owners. In the case of a daughter's sons seeking to set aside a family arrangement entered into by the daughter and for declaration of the title to the estate of their maternal grandfather, it was held that the arrangement was binding upon them.[13] Merely because one of the parties is a minor, a *bona fide* family arrangement cannot be re-opened.[14] The principle is not applicable to a case where the party does not assert that there was a compromise to put an end to a dispute and to terminate or avoid litigation and the consideration of the compromise

Test.

On re-opening of *bona fide* family arrangement.

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1. Ram Charan Das *v.* Mst. Girjanandani Devi, A.I.R. 1959 All. 473 at p. 481 : 1959 A.W.R. 85.
2. 3 C.L.J. 323.
3. 20 C.W.N. 210 : 22 C.L.J. 452.
4. I.L.R. 43 All. 1.
5. I.L.R. 45 All. 277.
6. I.L.R. 47 All. 847.
7. I.L.R. 40 All. 487 (P.C.) : 22 C.W.N. 414.
8. Krishna Chandra *v.* Hamaja, 22 C.W.N. 463; Satis *v.* Kali Dasi, 34 C.L.J. 529.
9. Himmat Bahadur *v.* Dhanpat, I.L.R. 38 All. 385.
10. Kusum Kumary *v.* Dasurathi, 34 C.L.J. 323, relying on Syam Sunder *v.* Achan Kuwar, 25 I.A. 183 : I.L.R. 21 All. 71, and other cases.
11. I.L.R. 33 All. 356 (P.C.).
12. 34 C.L.J. 323.
13. Rajendra *v.* Nibaran, 25 C.W.N. 859.
14. Keramat Ullah *v.* Keramat Ullah, 23 C.W.N. 118; *see* also Bhagwati *v.* Jugdam, 62 I.C. 933 (Pat); Venkata Row *v.* Tuljaram Row, 35 I.C. 270 (Mad.).

was not the sacrifice of a right, but the abandonment of a claim.[1] Unbroken usage with regard to the service of a temple under a family arrangement for a period of 19 years, was held to be conclusive evidence of the family arrangement, to which a court is bound to give effect.[2] A Hindu died leaving a widow and three daughters some of whom had sons. The widow claiming absolute title to certain properties belonging to her husband entered into arrangement with her daughters and grandsons for dividing up the properties between them in absolute right and one of the daughters conveyed one item of the property to *X*. The plaintiff's another daughter after the death of her other sisters sued *X*'s successor to recover the property; *held*, that the plaintiff could not be allowed to repudiate the arrangement and to impeach a sale made on the faith of it.[3]

Contract and family arrangement.

A family arrangement stands on a different footing from an ordinary contract. A settlement of doubtful claims without litigation might itself be sufficient "consideration" for such an arrangement. The fact that it transferred the property to a person without any right is not, therefore, a sufficient ground for setting aside a family arrangement.[4]

The only requisite to make a valid family arrangement is that it should be—

Requisite of a valid family arrangement.

"a transaction between members of the same family which for the benefit of the family generally."

It is not necessary for the validity of the family settlement that there should have been a dispute existing between the parties at the time of the family settlement.[5]

Doubtful claim.

The existence of a doubtful claim is essential for a family settlement but the existence of a dispute or controversy in *Praesenti* is not. A family settlement may be supported on the ground of maintaining peace and goodwill amongst the members of the family, for the preservation of the family honour or of the family property and for the avoidance of disputes and litigation in future.[6]

Family agreement and not transfer.

Where several members of a family arrive at a settlement each one relinquishing his claim in respect of the property not falling to his share and recognizing the rights of the others to the portions allotted to them respectively, the transaction should be looked upon as a family arrangement.[7]

What is valid family agreement.

In order to have a valid family settlement it is not necessary that there must be a dispute in existence at the time when such settlement is arrived at. If in order to prevent the arising of anticipated disputes and to secure peace and happiness in the family they arrive at a settlement such settlement must be deemed to be

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1. Mariam Bibi *v.* Shaikh Muhammad Ibrahim, *per* Mukherjee, J., in 28 C.L.J. 306.
2. Ramanathan Chetty *v.* Murugappa Chetti, 10 C.W.N. 825.
3. Mst. Hardei *v.* Bhagwan Singh, 24 C.W.N. 105 (P.C.).
4. *Cf.* Ram Niranjan Singh *v.* Prayag Singh, I.L.R. 8 Cal. 138 : 10 C.L.R. 66 and Sec. 136, Hindu Code (Ed. 2) by Gour and the commentary at pp. 676-77; Mst. Ichhnun *v.* Banwari Lal, A.I.R. 1929 Lah. 16 at p. 18 : 114 I.C. 711.
5. Pokhar Singh *v.* Mst. Dulari Kunwar, A.I.R. 1930 All. 687 at p. 696 : 1930 A.L.J. 688 : I.L.R. 52 All. 716 : 125 I.C. 1.
6. Raghubir Datt Pande *v.* Narain Datt Pande, A.I.R. 1930 All. 498 (2) at p. 502.
7. *Per* Lindsay, J.C., in Dilapat Singh *v.* Kashi Nath, 17 O.C. 108 : Ameer Husain *v.* Muhammad Ejaz Hussain, A.I.R. 1929 Oudh 134 at p. 142.

valid.[1] In *Gandharp Singh* v. *Nirmal Singh*,[2] it was held that to avoid a possible litigation and the consequent preservation of the family property is to be deemed a sufficient consideration for a family settlement.

Case-law.

It cannot be disputed that a partition or a settlement of a disputed or doubtful claim is a valid and binding arrangement and the parties themselves or those that claim under or through them are not permitted to deny, ignore or resile therefrom. On equitable principles such partition or settlement is also binding on other persons, who, have acted upon it or have derived some benefit from it. The principles governing such cases have been explained in a long series of decisions of the Judicial Committee.[3]

Then, as pointed out by Turner, L.J., in *Lucy's* case,[4] the compromise should be an honest settlement of an existing dispute which must not be manifestly *ultra vires* of the parties to settle.[5]

Requirements of family settlement.

The requirements of a valid family settlement differ accordingly as it is sought to bind the actual parties to the settlement or stranger to it. The parties to a family settlement are bound by it if there is some consideration apart from natural love and affection. This consideration need not consist in the existence of a family dispute or of a doubtful claim based on the allegation of an antecedent title. It is enough if the arrangement is for the benefit of the family or for the maintenance of peace and harmony and the avoidance of future discord or for preservation of the property.[6] Even if *bona fide* disputes, present or possible, which may not involve legal claims are settled by a *bona fide* family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.[7]

Indian and English law.

In this respect the Indian law follows the English law, as laid down in the well-known case of *Williams* v. *Williams*,[8] and as summarised in Halsbury's *Laws of England*, Hailsham Ed., Vol. 15, p. 4.

View of the Allahabad High Court.

But when it is sought to bind the reversioners by a family arrangement entered into by a widow or other reversioner holding a limited interest in the estate the matter stands on a different footing. As stated in the case of *Mst. Dasodia* v. *Gaya Prasad*,[9] referred to above, by Dar, J. :

> "It will not be sufficient to find that the female received some consideration other than love and affection to uphold the transaction. And in such a case the question whether there was a *bona fide* dispute and whether there were

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1. *Per* Lindsay, J.C., in Dilapat Singh *v.* Kashi Nath, 17 O.C. 108 ; Ameer Husain *v.* Muhammad Ejaz Hussain, A.I.R. 1929 Oudh 134.
2. (1919) 22 O.C. 300 : 54 I.C. 325 : 6 O.L.J. 529.
3. Rajendra Narain *v.* Bijoy Gobind (1839) 2 M.I.A. 181 : 1 Sar. 175 (P.C.); Hetnarain *v.* Modenarain, (1959) 7 M.I.A. 311 : 3 W.R. 51 : 1 Suth 355 ; 1 Sar 678 (P.C.) : Gajapathi Radhika *v.* Gajapathi Nilamani, (1870) 13 M.I.A. 497 : 14 W.R. 33 : 2 Suth. 365 (P.C.); Mantappa *v.* Baswantarao, (1871) 14 M.I.A. 24 : 15 W.R. 32 : 2 Suth 407 : 2 Sar 648 (P.C.) ; Greender Chunder *v.* Troylukho Nath, I.L.R. (1892) 20 Cal. 373 : 21 I.A. 35 : 6 Sar. 267 (P.C.); Mohammad Imam Ali *v.* Hossein Khan, I.L.R. 26 Cal. 31 : 25 I.A. 161 : 2 C.W. 737 (P.C.) : Khuni Lal *v.* Gobinda Krishna, I.L.R. 83 All. 356 : 10 I.C. 477 : 38 I.A. 87 (P.C.).
4. (1853) 4 Deg. M. & G. 356 : 17 Jr. 1143 : 22 L.J. Ch. 732.
5. Khantamoyee Debi *v.* Hridayenanda Bhattacharjee, A.I.R. 1929 Cal. 149 at pp. 151-52 : 48 C.L.J. 489 : 118 I.C. 556.
6. *See* Mst. Dasodia *v.* Gaya Prasad, A.I.R. 1943 All. 101 : I.L.R. (1943) All 422 (F.B.); Helan Dasi *v.* Durga Das Mandal, 4 C.L.R. 323 and Satya Kumar *v.* Satya Kripal, 10 C.L.J. 503 : 3 I.C. 247.
7. Kale *v.* Deputy Director of Consolidation, A.I.R. 1976 S.C. 807 at p. 813.
8. (1867) 2 Ch. A. 294 : 36 L.J. Ch. 419.
9. A.I.R. 1943 All. 101 : I.L.R. (1943) All. 411 (F.B.).

doubtful claims and above all whether it was a claim on the basis of an antecedent title might be vital matters."

Arrangement which is not a *bona fide* settlement of a claim.

An arrangement, which is not a settlement of a dispute with regard to an antecedent title to the estate, or which is not for the benefit of the estate as a whole including the reversioners cannot bind the reversioners.[1]

127. Rule for applying estoppel in cases of doubt or mistake.—In applying the doctrine of estoppel where the parties may have been in doubt or under a mistake as to the law, the peculiar circumstances must be kept in mind in order to explain the conduct.[2]

Admissions which have been made under a mistake as to the true legal character of the estate will not operate to create an estoppel or acquiescence. There was "no representation, no acting on it, no misleading and no change of position on such representation." When all are under a mistake, there is neither estoppel nor waiver nor acquiescence.[3]

In the under-noted case the Supreme Court observed that those who had qualified beyond the cut-off date in the previous year have taken examination in terms of the prospectus of this year alongwith the new group. The mistake of the State in fixing a date beyond the cut-off date fixed by Supreme Court has obviously misled a group of candidates. In these circumstances, it is in the interest of all that the mistake committed by the State of Bihar should be condoned and on the basis of the result of the selection examination with 31st of May, 1989, as the cut-off date, admissions for this year should be permitted.[4]

In the under-noted case, if the petitioners had tried to find out the reason for the variance in the result as published in the printed booklet and that shown in the mark-sheet issued to them they could have found out the mark-sheets did not reflect the correct marks secured by them. In such circumstances, it cannot be said that the petitioners were in any way misled by the results published by the Board or even the mark-sheets initially issued to them. If the mistake was apparent right from the beginning and its basis could have been ascertained by the petitioners the principle of estoppel will not come to their assistance.[5]

Bank not permitted to take advantage of its mistake.

The Bank, having accepted the deposit and having made use of that amount for all these years, cannot now be permitted to say that it will not allow withdrawal of the deposit by the petitioners who are admittedly the nominees of the depositor, on the ground that he ought not to have nominated two persons instead of one person. Such a plea could have been taken only at the time of accepting the deposit. Having raised no such objection and having accepted the deposit, the Bank must be deemed to have waived its objection to the making of two nominees. Having accepted two nominations, the Bank cannot be permitted to take advantage of its own mistake.[6]

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1. *See* Khunni Lal *v.* Gobind Krishna Narain, I.L.R. 33 All. 356 : 38 I.A. 87 and Ram Sumaran Pd. *v.* Mst. Shyam Kumari, A.I.R. 1922 P.C. 356 : I.L.R. 1 Pat. 741 (P.C.); Chanderjit Das *v.* Debi Das, A.I.R. All 522 at p. 526.
2. Kaveriji *v.* Babai, I.L.R. 19 Bom. 374 at p. 384.
3. K. Kochunni *alias* Muppil Nayar *v.* K. Kuttanunni *alias* Elaya Nayar, A.I.R. 1948 P.C. 47 at p. 55 : 1948 A.L.J. 199 : I.L.R. (1948) Mad. 672 : (1948) 1 M.L.J. 181 : 61 L.W. 226.
4. State of Bihar *v.* Dr. Sanjay Kumar Sinha, A.I.R. 1990 S.C. 749 at p. 751.
5. Reetankali Pati, Miss. *v.* Board of Secondary Education, Orissa, A.I.R. 1990 Orissa 90 at p. 93.
6. Chandramma *v.* General Manager, State Bank of Hyderabad, 1988 (2) Civil L.J. 581 at pp. 582, 583 (A.P.).

It was contended in the instant case that the owners having got the presumptive rent determined and having accepted one month's rent and having delivered possession to the petitioner are estopped from challenging the order of allotment passed in favour of the petitioner. The fact that the information was not given in the application for allotment by the petitioner is apparent from the finding recorded by the learned Additional District Judge. The learned Additional District Judge has observed that the petitioner concealed the disqualification before the Prescribed Authority. From the material on record it does appear that initially the owners had no objection to the property in dispute being let out to the petitioner. However, when they acquired information of the fact that a decree for ejectment had been passed against the petitioner's father on the basis of default in payment of rent, they became reluctant to let out the property in favour of the petitioner. Since a statutory provision is there against allotment in favour of a person committing default in payment of rent, the opposite parties cannot be denied the right to place reliance upon the said provision.[1]

128. Subject-matter of this Chapter.—Chapter VIII of the Indian Evidence Act is concerned with estoppel of this class (i.e. *in pais*).[2] The principle which forms the subject-matter of this chapter is one which has long been recognized and acted upon by the Courts in India. English writers sometimes classify these estoppels as estoppels by statement, estoppels by conduct, and estoppels by negligence; and this classification has been substantially followed in Sec. 115.

129. Rule of evidence or substantive law.—In *Ganges Manufacturing Co.* v. *Surajmull*,[3] Garth, C.J., said : "Estoppels are by no means confined to the subjects which are dealt with in Secs. 115 to 117. A man may be estopped not only from giving particular evidence but from doing any act or relying upon any particular argument or contention, which the rules of equity and good conscience prevent him from using against his opponent." In *Municipal Corporation of Bombay* v. *Secretary of State.*,[4] Jenkins, C.J., observed : "The doctrine embodied in Sec. 115 of the Evidence Act is not a rule of equity but a rule of evidence."[5]

130. Who can invoke plea of estoppel.—It is not open to a person to raise the plea of estoppel, if he is a stranger to the estoppel, and there is no privity between him and party.[6]

A party is entitled to plead estoppel in his own individual character and not in his character as the representative of his assignee.[7]

131. Estoppel in pre-emption.—It is hardly necessary to point out that cases of pre-emption are no exception to the rule of estoppel to be found in Sec. 115, Evidence Act.

The pre-emptor, who, even if before an agreement of sale, assures the purchaser that the former will not pre-empt, is not making any representation about any fact except in so far as his intention at that time is a fact. But that is not

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1. Umesh Chandra Srivastava *v.* Sheo Murti Lal, 1983 All. L.J. 45, at pp. 47, 48.
2. Ganges Manufacturing Co. *v.* Surajmull, I.L.R. 5 Cal. 669.
3. I.L.R. 5 Cal. 669.
4. I.L.R. 29 Bom. 607.
5. *See* also Ganpatrao *v.* Vamanrao, 10 Bom. L.R. at p. 219; Barclay *v.* Syed Ali Hossein, 6 C.L.J. 601; Bashi *v.* Enayat, I.L.R. 20 Cal. 236; Bibi Amaratunnessa *v.* Harendra I.L.R. 35 Cal. 904 : 12 C.W.N. 721; Cassamally *v.* Curreembhoy, I.L.R. 36 Bom. 214; Bhai Shankar *v.* Morarji, I.L.R. 36 Bom. 283.
6. *See* Caspersz on *Estoppel*, 4th Ed. p. 72; Karimuddin *v.* Meherunnissa Begum, A.I.R. 1948 Nag. 19 at p. 19 : I.L.R. (1947) Nag. 341 : 1947 N.L.J. 230 : 230 I.C. 471.
7. Satibhusan Mukherjee *v.* Corporation of Calcutta, A.I.R. 1949 Cal. 20 at p. 22.

a fact essential for the enforcement of the right of pre-emption. There is no estoppel unless the relationship between the parties is such that the imputed truth of the representation is a necessary step in the constitution of the case of action.[1] The pre-emptor who assures the purchaser that he will not pre-empt but nevertheless subsequently seeks to exercise his right of pre-emption is not denying the truth of what he stated earlier but has merely changed his intention. But a representation of intention, true or false cannot give rise to estoppel. The reason is this. The pre-emptor's statement : "I will not pre-empt" is but a representation of present intention which is revocable. If the purchaser chooses to act on the faith of such a representation without taking care to reduce it to the form of a binding contract he is taking a chance of the pre-emptor changing his mind.

Representation of intention.

The matter may be viewed from another angle. When there is not even an agreement of sale between the vendor and the purchaser, the assurance of the pre-emptor that he will not pre-empt does not amount to any representation as to an existing fact. The pre-emptor is only stating what he will not do in the future. Such a statement or promise is outside the doctrine of estoppel.[2]

In a pre-emption suit all the concerned parties were Muslims. The plaint proceeded on the footing that the making of demands required to be met under Muslims Law was necessary and they were met. It was held that the plaintiff could not be permitted to plead at the second appellate stage that the law of pre-emption relied upon by him did not require the making of any demand. It was based on the appraisal of the evidence on record.[3]

There must be a concrete offer to purchase to the pre-emptor before a definite contract for sale has been concluded with another person.[4]

In the instant case, there was no such offer to the pre-emptors. Even the vendor had not been produced and no witness had stated that the vendor had made any offer to the pre-emptors to purchase the land before the contract of sale was concluded with the vendees. It was held that pre-emptors were not estopped by their conduct from brining the suit.

Person consenting to the transfer disqualifies himself from pre- empting and loses his right of pre-emption altogether. Having lost his right he cannot assert it as against the rival pre-emptor.[5]

Loss of right to pre-emption.

In *Anand Rao* v. *Kisan*,[6] Pollock, J., observed as follows :

> "Section 174 (3) does not state that there can be no estoppel without a written consent, and Grille, C.J., in *Vikrama* v. *Bhawarlal*[7] held that there is a waiver of a right to pre-empt if he would be pre-emptor has taken an active interest in the sale with the inevitable deduction that he permitted the sale with full knowledge of what he was doing. Dewan Bahadur Bhahama in his Commentary on the *Berar Land Revenue Code* at page 263 of the second edition has expressed the view that when the pre-emptor leads the vender to believe that he is agreeable to the purchase the pre-emptor

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1. *See* C. & D. Sugar Co. *v.* Canadian National Steamship, A.I.R. 1947 P.C. 40 : 228 I.C. 614.
2. Govinda Marotisa *v.* Ismail, A.I.R. 1950 Nag. 22 at p. 29 : I.L.R. (1949) Nag. 933 : 1950 N.L.J. 1.
3. Qudrat Ullah *v.* Mohammad Yasin, A.I.R. 1982 All. 98 at p. 102.
4. Rikhi Ram *v.* Virse Ram, A.I.R. 1977 Punj. 178 at p. 180.
5. Ram Dawan Shukul *v.* Ram Surat Shukul, A.I.R. 1929 All. 589 (1) p. 589 : 1929 A.L.J. 935 : 117 I.C. 345.
6. S.A. No. 584 of 1944 (Nag.).
7. S.A. No. 162 of 1944 (Nag.).

would be estopped, and has cited decisions in Lahore and Allahabad to that effect. I respectfully agree with this view and hold that where a co-occupant has encouraged a purchaser to buy and the purchaser acting on that encouragement has bought, it is not subsequently open to the co-occupant to pre-empt him."[1]

The interest in the Joint Hindu family property is created in favour of the coparcener by virtue of his birth in the family and, therefore, it cannot be said that the plaintiff had acquired his right through his father. In these circumstances notice of sale given to his father or uncle, could not come in the way of the plaintiff to file a suit for pre-emption. Waiver of the right to pre-empt by father does not disentitle the son to bring a suit for pre-emption.[2]

It is obvious that there can be no estoppel contrary to a statutory enactment.

Claim of pre-emption.

In order to claim pre-emption the plaintiff must show that a sale has taken place as defined in Sec. 4, sub-clause (1). Agra Pre-emption Act (11 of 1922), i.e. within the meaning of Sec. 54, Transfer of Property Act. Under the latter section the sale of tangible property of the value of Rs. 100 and upwards can be made only by a registered instrument. It follows, therefore, that no valid sale can take place merely because the name of the supposed vendee has been mutated in place of the name of the supposed vendor. In such a sale supposed vendor is not estopped from saying that the property has not been sold.[3]

It is now well settled that apart from the procedure laid down in Secs. 19 and 20 of the Pre-emption Act, the plaintiff-pre-emptor can waive his right or, by his conduct, may be estopped from seeking to enforce his right of pre-emption.[4]

In *Kanshi Ram Sharma* v. *Lahori Ram*,[5] a Division Bench had definitely mentioned that the right of the pre-emptor is that before a definite contract with another is entered into, an offer should be made. It will be extremely unworkable if, after entering into a contract with somebody, three months time had to be given to the person who has the right of pre-emption. If the subsequent sale is made within a reasonable time of the previous offer made to the pre-emptor, who has refused to accept that offer, that would amount to waiver.[6]

132. Compromise decree embodying an illegal term.—As stated by Gajendragadkar, J. (as he then was) in *Govind Waman* v. *Murlidhar Shrinivas*,[7] though the Court should examine lawfulness and validity of the terms of the proposed compromise, once that stage is passed and the Court has put its seal of approval to a compromise and made it a decree of the Court, then that decree is binding between the parties and must be enforced, unless it is set aside in a proper proceeding. Finality of decision is an important principle of law based on public policy. If a compromise decree of a competent Court, which has not been set aside, can be ignored on the ground of it embodying an illegal term there will be confusion and uncertainty.

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1. *See* also Maruti Mangaji *v.* Kishan Ukarda, A.I.R. 1951 Nag. 451 at p. 452 : I.L.R. (1951) Nag. 357 : 1951 N.L.J. 120.
2. Teeja Devi Smt. *v.* Noratmal, A.I.R. 1976 Raj. 95 at p. 98.
3. Bhagwan Singh *v.* Tasaduq Hussain, A.I.R. 1929 All. 549 at p. 550 : 1929 A.L.J. 889 : 115 I.C. 642.
4. Zila Ram *v.* Jhandu Ganga Ram, A.I.R. 1967 Punj. 448 at p. 448.
5. A.I.R. 1938 Lah. 273.
6. *See* also Ziela Ram *v.* Jhandu Ganga Ram, A.I.R. 1967 Punj. 448 at p. 449.
7. A.I.R. 1953 Bom. 412 : I.L.R. (1953) Bom. 948.

133. Estoppel against appeal.—A statutory right of appeal cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree.[1]

Failure to appeal against superseded order—No estoppel.

In proceedings under Sec. 6-A of the Essential Commodities Act the Collector, Etawah, without giving any notice to the applicant passed an order on 25th October, 1976 confiscating the truck in favour of the State. As soon as the applicant came to know of this order, it gave an application for its review, on the ground that the confiscation order was passed behind its back. The Collector, Etawah felt that injustice had been done to the applicant and he, therefore, reopened the matter. He heard the applicant and again on 22nd February, 1977 passed an order confiscating the truck in favour of the State. The applicant went up in appeal to the Court of Session against the order passed by the Collector. The Sessions Judge took the view that the applicant was estopped from assailing the impugned order dated 22nd February, 1977 as it did not file any appeal against the order dated 25th October, 1977 passed earlier by the Collector. *Held* as under :—

Obviously, order dated 25th October, 1976 stood superseded by order dated 22nd February, 1977. There was, therefore, no point in filing an appeal against the order dated 25th Ocotober, 1976. The order which held the field at that time was order dated 22nd February, 1977 and the appellant, therefore rightly filed an appeal against it in the Court of Session. The view taken by the learned Sessions Judge that the applicant was barred from assailing the order dated 22nd February, 1977 because it did not file any appeal against the order dated 25th October, 1976 is patently wrong.[2]

134. The doctrine of promissory estoppel is a principle evolved by Equity.—The guidelines relating to the principle and application of "promissory estoppel" are well settled by the decisions of the Supreme Court. The doctrine is a principle evolved by equity, to avoid injustice and though commonly named "promissory estoppel", it is neither in the realm of contract, nor in the realm of estoppel. The true principle of promissory estoppel is that where one party has by his words or conduct made to the other, a clear and unequivocal promise which is intended to create a legal relationship to arise in the future, knowing or intending that it would be acted upon the other party to whom the promise is made, and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if that would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and, this would be so irrespective of whether there is any pre-existing relationship between the parties or not. Though the doctrine has been variously described as "equitable estoppel". "quasi-estoppel" and "new estoppel", it is a doctrine evolved by equity in order to prevent injustice.[3]

The rule of promissory estoppel being an equitable doctrine, has to be moulded to suit the particular situation. It is not a hard and fast rule but an elastic one, the objective of which is to do justice between the parties and to extend an equitable treatment to them. If it is more just from the point of view of both promissor and promisee that the latter is compensated appropriately and allow

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1. Bhau Ram *v.* Baij Nath Singh, A.I.R. 1961 S.C. 1327 at p. 1330.
2. Sardar Finance Corporation, Messrs. *v.* State of Uttar Pradesh, 1978 All L.J. 118 at pp. 120, 121.
3. Intrans Systems Pvt. Ltd., M/S. *v.* State of Kerala, A.I.R. 1996 Ker. 161 at pp. 163-64.

the promissor to go back on his promise, that should be done; but if the Court is of the opinion that the interests of justice and equity demand that the promissor should not be allowed to resile from his representation in the facts and circumstances of that case, it will do so. This in our respectful opinion, is the proper way of understanding the words "promisee altering his position". Altering his position should mean such alteration in the position of the promisee as it makes it appear to the Court that holding the promissor to his representation is necessary to do justice between the parties. The doctrine should not be reduced to a rule of thumb. Being an equitable doctrine it should be kept elastic enough in the hands of the Court to do complete justice between the parties.[1]

The true principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties and this would be so irrespective of whether there is any pre-existing relationship between the parties or not. This being an equitable principle evolved by the Courts for doing justice, it is not inhibited by the same limitation as estoppel in the strict sense of the term.[2]

135. Appreciation of evidence in second appeal.—Once pleadings are permitted to be amended which bring into focus altogether new or fresh disputed questions of fact which have to be resolved on additional evidence that would be necessary to be led, the function is one of appreciation of evidence more appropriately to be undertaken by the Trial Court or at the most by the first Appellate Court but not the High Court hearing the second appeal.[3]

136. Letters Patent Appeal.—If a learned Single Judge refers a case, the Division Bench decides only a question of law and then remits the case to the learned Single Judge for deciding the other points arising in the case, the Letters Patent Bench, in an appeal against the final decision given by the learned Single Judge, cannot examine the correctness of the view of the earlier Division Bench on the aforesaid question of law.[4]

137. Admissibility of evidence may be challenged.—The admissibility of any evidence may be challenged at any stage even though it is not objected to at the time of admission.

The mode of proof, however, is a different matter.[5]

138. Government not bound by acf of its officers.—There is a clear distinction between an act done by an officer of Government and by Government. An officer of Government does not represent Government unless he is authorized to do so. In the case of *Ranshan Bapu* v. *Government of the Central Provinces*,[6] the facts were as below :

Case-law. In the *jamabandi* prepared in the settlement of 1922-23 for a certain village in zamindari in Chandra District, under the head of *siwai*

1. State of Himachal Pradesh *v.* Ganesh Wood Products, A.I.R. 1996 S.C. 149 at p. 165.
2. Mangalam Timber Products Ltd. *v.* State, A.I.R. 1996 Orissa 13 at p. 16.
3. Balai Chandra Hazra *v.* Shewdhari Jadav, A.I.R. 1978 S.C. 1062 at p. 1067.
4. Chanan Das *v.* Union of India, A.I.R. 1968 Punj. 529 at p. 545.
5. Hira Lal Chaudhury *v.* Ramanand Chaudhury, A.I.R. 1959 Pat. 515 at p. 516.
6. A.I.R. 1949 P.C. 140.

income, certain amount was shown as bazar dues and this was included in the total income upon which Government revenue was assessed. In 1935 Government disputed the claim of the zamindar to levy bazar dues as being in contravention of the terms of the *wajib-ul-arz*.

It was held by their Lordships of the Judicial Committee that the Government was not estopped from disputing the claim of the zamindar. It is not correct to say that admission in Government's affidavits filed in connection with certain earlier proceedings of similar nature and other admissions in Parliament on behalf of the Government hold that such admissions, which are mere expression of opinion limited to the context and also being rather vague hopes, not specific assurances, are binding on the Government to create an estoppel.[1]

In the case of *Sursingji Dajiraj* v. *Secretary of State*,[2] it was held that where *wanta* lands forming a part of the *talukdari* estate, liable to payment of *jama*, are by mistake recorded in papers as rent-free *wanta* lands, the lands do not become rent-free lands and such record does not operate as an estoppel against the Government.

In the case of *Attorney-General for Ceylon* v. *A.D. Silva*,[3] Crown property, consisting of certain naval war supplies in particular, a quantity of steel plates—lying on custom premises in Ceylon, was advertised for sale by public auction on 4th March, 1947, in the *Government Gazette* by the principal Collector of Customs who, by mistake had treated the goods as unclaimed and had obtained the sanction of the Chief Secretary to sell them. Some weeks before the sale, an officer of the Services Disposal Board in Ceylon, who had been appointed by the Ministry of Supply in England, who had taken over the goods in November, 1946, had contracted on 23rd January, 1947, to sell the goods to a firm in Ceylon. At the auction sale, the respondent had bought some steel plates and other goods and on the refusal of the principal collector, on becoming aware of the earlier contract, to deliver the goods to him the respondent claimed against the Attorney-General for Ceylon, as representing the Crown, damages for breach of contract. It was held that the principal Collector of Customs had no authority, actual or ostensible, to enter into a contract binding on the Crown for the sale of the goods to the respondent, and further that a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown, his right to act for the Crown in any particular matter must be established, by reference to statute or otherwise. The act of the Collector in advertising the goods for sale could not be said to be the act of the Crown and nothing done by the Collector or by the Chief Secretary amounted to a holding out by the Crown that the Collector had the right to enter into a contract to sell the goods. Where Government was not a party to the mutation proceedings mutation orders cannot have any binding force on it.[4]

139. Circumstances in which doctrine of estoppel would not apply to representation made by a Government agent.—A careful and analytical reading of the text books of administrative law and various cases noted therein would reveal that broadly speaking the principle that the administration is not stopped from denying the correctness of the prior advice, representation or assurance would apply in the following cases :

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1. Sethi P.C. *v.* Union of India, A.I.R. 1975 S.C. 2164 at p. 2172.
2. A.I.R. 1926 Bom. 590.
3. 1953 A.C. 461.
4. Rajkumar Rajendra Singh *v.* H.P. Administration, A.I.R. 1964 H.P. 19 at p. 25.

(1) When the effect of its application is to override the clear words of a statute, in other words equity should not be allowed to override law.

(2) Nor would it apply to criminal proceedings.

(3) It would also not apply if the result of it is to obtain powers in excess of those given to the authority by the statute. In other words, it cannot be used to give *de facto* validity to *ultra vires* administrative acts.

(4) The rule cannot validate an act prohibited by statutory authority.

(5) Nor can it be employed to enable a person to do a thing he is legally disabled from doing.

(6) Statutory powers cannot be fettered or bartered by estoppel.

(7) The administrative agency cannot be estopped by its inertia or acquiescence; and

(8) Doctrine of ostensible authority does not apply to Government servants deriving limited power from statute.[1]

Scope of plea of doctrine of promissory estoppel against the government.

Where the dealers in food grains imported rice/paddy from outside the State on the basis of statement of the Minister in charge of Food and Supply Department made in the meeting of Bihar Chambers of Commerce that the Council of Ministers of State of Bihar in its meeting took a decision that no levy shall be charged on rice and the paddy which is imported from other States. The State is not prevented from realising the levy on the principle of provisions of estoppel.

It would be viewed against public interest to bind down the Government on the basis of oral statements made by officers of the State, however high their position. It cannot be held that it would be inequitable if the Government is not bound down to the oral statement made by the Minister.[2]

140. Government can be estopped by acts of its numerous agents.—In India the law insists that where contracts or engagements are required to be in particular forms with particular officers of authority to sign them that must be strictly complied with in order to bind the Government. For obvious reasons the Government and the administration cannot like an ordinary person be estopped by the acts of its numerous agents and officers each performing his work in a limited sphere and with his specially limited authority imposed by his very nature of work.[3]

141. Delay would not bar the right to perpetual injunction.—In the case of *Vidal Dyes Syndicate Ltd.* v. *Lovinstein Ltd.*,[4] it has been stated by Fletcher Moulton, L.J., in the judgment to be settled law that a patentee need not attempt to stop an infringement when he first learns of it, but the greater the interval between the granting of the patent and the trial of the action, the more carefully must the evidence be looked into lest the Court be induced to take an erroneous view, either on the one side or the other, of the knowledge of the word at the critical date. In the later case of *Electrolux Ltd.* v. *Electric Ltd.*,[5] Jenkins, L.J., dealing with the question of delay, observed that the defendants were not entitled to assume that the plaintiffs accorded them their consent to the infringement merely because the plaintiffs, knowing of the defendant's use of "Electrix", did nothing to enforce

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1. Rachapudi Subrahmanyam *v.* District Collector, East Godavari, Kakinada, A.I.R. 1974 A.P. 55 at p. 61.
2. Sah Mahodeo Lal Mohan Lal *v.* State of Bihar, A.I.R. 1982 Pat. 158 at pp. 162, 163.
3. P.H. Avari *v.* State of West Bengal, A.I.R. 1958 Cal. 203 at p. 206 : 62 C.W.N. 278.
4. (1912) 29 R.P.C. 245 at p. 259.
5. (1953) 71 R.P.C. 23 at p. 40.

their right, and that if the defendants adopted the said mark on that assumption and without proper inquiry, they did not so at their own risk. The position therefore is that mere delay is no bar to the granting of relief by way of perpetual injunction at the hearing of the suit, unless there is something more than mere delay which has caused prejudice to the defendants.[1]

142. One cannot take advantage of his own illegality.—It is hardly permissible to a person to say that what was done by him in the year 1930 was against his law and therefore relief should be given to him against the illegal action. He cannot take advantage of his own illegality.[2]

Principle of estoppel—Earlier assertion—Whether a person is bound ?

Petitioner in the instant case, was already in possession of his matriculation certificate when he got the appointment. There is no doubt that he had produced the matriculation certificate when he secured the employment he would not have succeeded. Having obtained an advantage which was really not available the petitioner wants to obtain further benefit i.e. premature appointment and later retirement. It was also contended that having represented his date of birth as being 3rd December, 1924 at the time of securing the appointment, it is not open to the petitioner to now assert that the date of birth has been wrongly recorded and should be corrected in accordance with the matriculation certificate. Particularly in view of the position that, had the year of birth, as now claimed, been declared at the time of the appointment, the petitioner would not have secured his employment. Having once taken the advantage of a date of birth the petitioner is now precluded from questioning its correctness in order to secure further advantage. The petitioner was bound by his earlier assertion. There is therefore no hesitation in holding that the petitioner is bound by his assertion and cannot now take the plea of different date of birth to the one which he had indicated at the time of his appointment.[3]

The date of 1957 when the Government dispossessed the plaintiffs could not be the measure of damages. To hold that the plaintiffs were entitled only to the value as in 1957 was to allow the wrongdoer to take advantage of his own wrong. The Government would be enriching itself and impoverishing the subject. This was neither justice nor equity.

It was held that the taking was not in the accordance with the provisions of the Act. Taking itself was illegal, because the statutory procedure was not followed.[4]

143. Earlier Cement Control Order of 1961 fixing different ex-factory prices not challenged—Parties not estopped from challenging validity of Order of 1967.—Different ex-factory prices was fixed in the case of the 25 cement producers mentioned in the Schedule to the Cement Control Order, 1967, ranging from 90.50 to 129.75 per metric tonne. Even in the earlier Cement Control Order, 1961, different ex-factory prices were fixed in respect of each producer of cement and the petitioner was one of them, but no challenge was made to that order on the ground that the Order of 1961 was discriminatory, because it fixed different prices for the various producers of cement. *Held*, it was no doubt correct that the

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1. Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning a Corporation etc. *v.* Unichem Laboratories, A.I.R. 1969 Bom. 255 at p. 260.
2. Shriniwas Deorao *v.* Chandrabhagabai, A.I.R. 1958 Bom. 420 at p. 425 : I.L.R. (1959) Bom. 1404 : 60 Bom. L.R. 570 : 1958 N.L.J. 394.
3. Baidyanath Pd. Sinha *v.* State of Bihar, 1983 Lab. I.C. 162 at p. 163, 164.
4. Abdul Wahid *v.* Union of India, A.I.R. 1982 Delhi 290 at p. 294.

petitioner could not be estopped from challenging the validity of fixing different ex-factory prices in the impugned order merely because it failed to challenge the same contained in the previous Order of 1961, yet it must be said that this is a factor, which goes against the petitioner.[1]

In this connexion it would be useful to refer to the observations of their Lordships of the Supreme Court in *Bhagwati Saran* v. *State of Uttar Pradesh,*[2] wherein it was observed :

> "The fact that on that occasion no contention was urged challenging the validity of the notification as beyond the powers of the Controller, on the grounds now put forward clearly indicates, that the matters now urged never appeared then, as a possible source of grievance to a party situated similarly as the second appellant."

144. Absence of basis of classification in the advertisement does not result in estoppel.—It was urged that the advertisement issued by the Regional Manager of the Reserve Bank invited applications from every citizen of the country and without imposing any restriction on the minimum qualification possessed by the candidates. It was urged that as the advertisement was silent on those matters, the Reserve Bank is estopped from now contending that the candidates who have passed the qualifying examination from the Universities at other zones, are not eligible for consideration. The Court does not think that it could give rise to any rule of estoppel in this case. The advertisement may be silent about the basis of the classification, but there can be no objection as held by the Supreme Court in *Ram Krishna Dalmia* v. *S.R. Tendolkar,*[3] to the matters being brought to the notice of the Court by affidavit to show that there was a valid basis for excluding the petitioners.[4]

145. Acceptance of proposal when can be inferred.—In order that acceptance of the proposal be inferred, the acceptance of the consideration must be unconditional. Of course, if by any action on the part of the acceptee, the proposer cannot be restored to his former position, then the acceptee cannot be permitted to say that his acceptance should be treated as other than as per the original proposal. But in the absence of such estoppel being applicable, it is difficult to see how conditional acceptance can become absolute acceptance when there were no such words in Sec. 8 of the Contract Act.[5]

146. No person can be permitted to assail the withdrawl of exemption on the ground of promissory estoppel.—Entry 126 of 9th Schedule of the Constitution of India deals with the Essential Commodities Act, 1955 (Central Act 10 of 1955). Rice Levy Order, 1985 as well as its supplemental provisions of cl. 25 of the said Order, are issued under Essential Commodities Act. In view of the aforesaid reason, the validity of the levy Order, cannot be challenged on the ground of violation of Arts. 14 and 19 of the Constitution. Rice Levy Order, 1985 and its supplemental provisions are immune from challenge under Arts. 14 and 19 of the Constitution. Hence, any order for the implementation of the said order; *i.e.* procurement of levy on rice, too, cannot be challenged on the ground that it infringes, the provisions of Arts. 14 and 19 of the Constitution of India for the simple reason that the Rice Levy Order, 1985 has been issued on the basis of the

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1. Jaipur Udhyog Ltd. *v.* Union of India, A.I.R. 1969 Raj. 281 at p. 291.
2. A.I.R. 1961 S.C. 928.
3. A.I.R. 1958 S.C. 538 at p. 552.
4. Jasmine Amarjothi *v.* Union of India, (1976) 1 Kant. L.J. 391 at p. 397.
5. Union of India *v.* Messrs. Babulal Uttamchand Bhandari, A.I.R. 1968 Bom. 294 at p. 296.

statutory and legislative power under Sec. 3 of the Essential Commodities Act. Supplemental provisions issued under Cl. 25 of the Rice Levy Order, 1985 are also statutory piece of legislation for the simple reason that it was issued under an Order, which is statutory piece of legislation.[1]

Exemption Notification—Revocation or supression.

The supersession or revocation of an exemption notification, in the "public interest", is an exercise of the statutory power fo the State under the law itself as is obvious from the language of Sec. 25 of the Customs Act. Under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner. In order to invoke the doctrine of promissory estoppel, it is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. A notification issued under Sec. 25 of the Customs Act cannot be said to be holding out of any such unequivocal promise by the Government which was intended to create any legal relationship between the Government and the party drawing benefit flowing from the said notification. It is, therefore, futile to contend that even if the public interest so demanded and the Central Government was satisfied that the exemption did not require to be extended any further it could still not withdraw the exemption.[2]

It has now been authoritatively laid down by the Supreme Court that the plea of promissory estoppel is not available against the Government if it withdraws any exemption granted for a particular period before its expiry in public interest, because public interest must override any consideration of private loss or gain.[3]

Where the State Government was under no obligation to grant exemption and that the granting of tax exemption was only by way of a concession for encouraging entrepreneurs to start industries in rural and undeveloped areas and as such it was always open to the state Government to withdraw or revoke the concession. The power of revocation or withdrawal would be subject to one limitation, *viz.* the power cannot be exercised in violation of the rule of promissory estoppel. In other words, the Government can withdraw an exemption granted by it earlier if such withdrawl could be done without offending the rule of promissory estoppel and depriving an industry entitled to claim exemption from payment of tax under the said rule.[4]

The admission made by the appellant in the rent note and in his reply to the notice that he was sole proprietor of the firm operates as estoppel and he cannot be permitted to show that it was wrong.[5]

147. Defendants's own admission in an earlier litigation.—The defendants in the instant suit had in an earlier litigation admitted the valid registration of the society. The Income-tax officer, Agra, treating all the contributions made by Dayal Bagh Satsangis and all the properties which had been acquired from those

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1. Himalaya Rice Mill, Motinagar *v.* State, A.I.R. 1997 All. 155 at p. 157 (D.B.) : 1997 All. L.J. 605.
2. Kasinka Trading *v.* Union of India, A.I.R. 1995 S.C. 874 at pp. 881, 882; *see* also Arvind Industries *v.* State of Gujarat, A.I.R. 1995 S.C. 2477.
3. **Laxmi Udyog Rock Cement Pvt. Ltd., M/s. *v.* State of Orissa, A.I.R. 2001 Orissa 51 at p. 56 ;** *see* also Sales Tax Officer *v.* Shree Durga Oil Mills, A.I.R. 1998 S.C. 591.
4. Shri Bakur Oil Industries *v.* State of Gujarat, A.I.R. 1987 S.C. 142 at p. 147.
5. Bhajan Lal *v.* Madan Lal Bajaj, A.I.R. 1983 Delhi 555 at p. 558.

contributions as also of the income which arose out of such properties as the personal property of Shri Sahabji Maharaj started proceedings against him for assessment of income. The Sabha filed Suit No. 4 of 1937 against the Secretary of State for India in Council and also impleaded Shri Sahabji Maharaj as a defendant. It was alleged in para. 1 of the plaint that the plaintiff Sabha was a validly registered society under Act No. 21 of 1860. Shri Sahabji Maharaj filed a written statement on 14th April 1937, admitting paras. 1 to 11 of the plaint. Shri Sahabji Maharaj died during the pendency of the suit and one Prem Swarup and both the defendants of this suit were impleaded as his heirs. *Held* that it was clear from the statement made by Shanti Swarup (defendant No. 2) that he and the other heirs of Shri Sahabji Maharaj had adopted the same written statement which had been filed by Shri Sahabji Maharaj. The defendant's own admission could be regarded as evidence of the fact that the plaintiff Sabha had been duly registered under Act No. 21 of 1860.[1]

Incorrect statement in the judgment—Whether the party can be deprived of its due share ?

Erroneous admission on question of law never binds a party. In the present case it appears that on the findings recorded by the appellate authority and the revisional Court the claim of the contesting opposite parties in Khata No. 117, has been correctly determined and they cannot be deprived of their due share on the basis of a statement in the judgment of the consolidation officer which has been challenged in appeal at the earliest occasion.[2]

148. Document received in evidence.—The best way of determining the true market value of land acquired is to ascertain the prices paid for similar land in the vicinity in the course of normal sales (the word "normal" postulating a genuine transaction between a willing buyer and a willing seller as also the absence of any special circumstances) at or about the same time. And if there have been such sales of the very property acquired, so much the better. When this method fails (or is not dependable without independent confirmation) owing to insufficient data, a resort is usually had to capitalizing the net annual income from the property at so many years, purchase, the multiple tranditionally adopted being round about 30 having regard to the income yielded by gilt-edged securities. Whichever method is adopted, the opinion of experts (in turn based on wide consideration) might be often valuable, sometimes necessary. But in the case of land, such evidence is most often required where there are structures or other improvements that have to be paid for on the basis of what they would actually cost because they cannot be bought or sold, or because they yield no income, by themselves. When market-value is determined on the basis of sales of similar property at or about the same time, what is relevant (under Sec. 9 or Sec. 11 of the Evidence Act) is not whether there was a valid transfer of title but the price actually paid for the property. Proof of due execution of the sale-deed by the owner of the property sold would be proof of the transfer of title ; but that would be no more relevant for Court purposes than proof of due execution of a gift deed.

Substantive evidence of the price paid would be the testimony of persons who have actual personal knowledge of the matter (usually the buyer or the seller), and the recitals in a document can be evidence of the matter only if they are relevant as admissions or under Sec. 32 of the Evidence Act. Of course, a forged sale-deed or a bogus sale-deed not embodying a real transaction would not be

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1. Shanti Sarup *v.* Radhaswami Satsang Sabha, Dayalbagh, Agra, A.I.R. 1969 All. 248 at p. 256.
2. Ram Lakhan (deceased by L.Rs.) *v.* Deputy Director of Consolidation, Basti, 1983 All. L.J. 865 at p. 867.

admissible at all, but ordinarily, the due execution of registered document would not be disputed in cases like this. That no objection was taken to the reception of the documents in evidence cannot be regarded as tantamount to an admission by the plaintiffs that the prices mentioned in the documents were the prices really paid though, of course, it was open to them to have admitted that and dispensed with proof thereof.[1]

149. Objection to jurisdiction.—If objection to jurisdiction of arbitrator is to be taken it must be taken at the earliest possible opportunity or at any rate, at an early stage of the proceedings.[2] Reference may in this connection be made to Russell on *Arbitration*, 17th Ed., at pp. 174 and 352. Failure to object at early stage acts as an estoppel.

It was observed by Mookerjee, J., in *Gurdeo Singh* v. *Chandrika Singh*[3] :

> "....It is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment is rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction ; in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of jurisdiction is first claimed...."

Petitioner surrendering to the jurisdiction of the District Magistrate—He cannot challenge jurisdiction of the District Magistrate.

Where the petitioner surrenders to the jurisdiction of the District Magistrate and prays repeatedly for time for giving it an opportunity of hearing on question of propriety as to the shifting of bus stand from the present site he cannot challenge the jurisdiction of the District Magistrate to decide the question or take other steps for shifting the bus stand. The petitioner's remedy, even if there was any, is clearly barred by the rule of estoppel.[4]

Voluntary submission to jurisdiction.

Where the appellants had voluntarily submitted to the jurisdiction of the Revisional Authority and of the High Court on the question of law regarding validity of Explanation II to Sec. 2 (*b*) of the U.P. Sales-tax Act; *Held* that having submitted to the jurisdiction and having taken the chance of judgment in its favour, it is not right that the appellants should take exception to the jurisdiction of the High Court when the judgment has gone against it.[5]

When the jurisdiction of a Court or a tribunal is dependent on the existence of a certain provision in law, any representation by one party to another about the position in law cannot confer jurisdiction on the Court or the Tribunal where it has none.[6]

An initial want of jurisdiction cannot be cured by acquiescence. Hence, where the point involves the question of jurisdiction of the arbitrator it can be allowed to be taken even at the belated stage of civil revision to the High Court. The mere fact that the defendants had appeared before the arbitrator at earlier

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1. State of Kerala *v.* Mariamma Abraham, A.I.R. 1969 Ker. 265 at p. 269.
2. New India Assurance Co. Ltd. *v.* Dalmia Iron and Steel Ltd., A.I.R. 1965 Cal. 42 at p. 45.
3. I.L.R. 36 Cal. 103 at p. 208.
4. Nadia District Bus Owners' Association *v.* District Magistrate, Nadia, A.I.R. 1969 Cal. 458 at p. 460.
5. Messrs. Tikaram and Sons Ltd. *v.* Commissioner of Sales-tax, U.P., A.I.R. 1968 S.C. 1286 at p. 1292.
6. Air India *v.* R. M. Investment, 1994 (1) Cal. L.T. 433 at pp. 458, 459.

stages of the proccedings and had filed their objections against the claim of the plaintiff would not operate as estoppel against the defendants in challenging the jurisdiction of the arbitrator to give an award.[1]

150. Estoppel as to proper value for the purpose of jurisdiction.—Where the plaintiff never corrected or sought to correct the valuation or raised the question of valuation in the Trial Court at proper stage, he is not entitled and urge that the appeal lies to the High Court and not to the Court of the Senior Sub-Judge.[2]

151. Change of stand.—A suit was brought for damage against the owner of the truck and the insurance company with which the truck was insured. Both the defendant, were in agreement in stating unequivocally that the insurance company was not liable towards the palintiff at all.

Held that when the owner has been found liable for a particular sum he cannot change his stand that it should be decreed against the insurance company also.[3]

Civil Courts trying domestic litigations ought to be very slow in accepting the case of litigant, who is prepared to change his stand like a chameleon and bolster up theories according to convenience. It is fundamental that in a case where a plaintiff abandons her case at any stage of the conduct of her own suit and practically accepts the opponent's case, since it is more convenient and suitable to her than it would be unjust and indeed unusual to allow the plaintiff to choose a different plan of action and practically claim the relief on the facts pleaded and proved by the opponent. She cannot approbate and reprobate and compel the Court to accept her case after an open exhibition of her inconsistence. It is not open to the plaintiff as a party to the litigation to allege one set of facts as against the other side and after being confronted with a denial of such facts by the opponent make a *volte-face* and attempt to sustain the case of the plaintiff on the facts alleged by the opponent and seek for relief on such an inconsistent stand.[4]

Abatement of appeal.

In the case of *Union of India* v. *Shree Ram*,[5] the Supreme Court held that the Union of India itself having applied for setting aside abatement of appeal arising out of the death of Bilas Rai, it (the Union of India) could not urge that there had been no abatement of the appeal against the heirs and legal representatives of late Bilas Rai.

In the case of *Hanuman Prasad Chowkhan* v. *Devendra Chandra Paul*,[6] an application was made by the appellants for bringing on record the representatives of the deceased Ananta Paul on setting aside the abatement arising out of his death.

Held that is it too late in the day for the appellants to urge that Devendra Paul having been described in the written statement as the karta of the Hindu undivided family comprising all the three defendants. Devendra Paul represented the entire family and as such the question of abatement on the death of Ananta Paul does not arise.

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1. Jagannath Kapoor *v.* Premier Credit and Instalment Corporation (P) Ltd., A.I.R. 1973 All. 49 at pp. 52, 53.
2. Smt. Koshalya Wanti *v.* Shri Shiv Narain, A.I.R. 1963 Punj. 400 at p. 401 : 65 Punj. L.R. 664.
3. Roshan Lal Bhalla *v.* Sudesh Kumar, A.I.R. 1968 J. & K. 2 at p. 5.
4. P. Saraswathi Ammal *v.* Lakshmi Ammal, A.I.R. 1978 Mad. 361 at p. 365.
5. A.I.R. 1965 S.C. 1531.
6. A.I.R. 1972 Gau. 77 at p. 79.

In the case reported in *Dr. (Miss) Binapani Devi* v. *State of Orissa*,[1] the order of the Government retiring the petitioner as Assistant Director of Health Services (Maternity and Child Welfare), Government of Orissa, prematurely was quashed by the High Court. The State Government in the application for leave to Supreme Court averred that the petitioner would continue as of right till she attained 58th year and would get a benefit of more than Rs. 20,000 by such continuance. The appeal by the State Government against the judgment of the High Court was dismissed. In the subsequent writ petition the petitioner contended that the Government is estopped from terminating her services in view of the averment in the leave application in the Supreme Court appeal.

Held that there was no change of jural relationship by the statement made by the State. The contention was wholly inadmissible in view of the fact that ultimately the Supreme Court appeal filed by the State was dismissed. The State, therefore, derived no advantage by such statement and no detriment was caused to the petitioner. The contention that the State was barred by principle of estoppel in terminating the services of the petitioner was misconceived.

Principle of promissory estoppel is available only where the person concerned has changed or altered his position. Taking of steps like application for admission in higher course or seeking of job or registration with employment exchange would not amount to change or alteration of position.[2]

Before the operation of the doctrine of estoppel/promissory estoppel, the essential conditions will have to be satisfied. One of the essential requirements is that one party by his word or conduct made to the other makes a clear and unequivocal promise or representation which is intended to create legal relations or effect a legal relationship to arise in the future...having regard to the dealings which have been taken place between the parties.[3]

152. New plea.—In *State of Uttar Pradesh* v. *Buland Sugar Co. Ltd., Rampur*,[4] the assessing authority issued notice under the Sec. 16(4) of the U.P. Agricultural Income-tax Act to a company for furnishing return of their agricultural income. The Company submitted its return. Apart from submitting the return their only plea in the earlier writ petition before the High Court was that the lands did not satisfy the requirements of the provisions of the U.P. Agricultural Income-tax Act in that they were not assessed to land revenue in the United Provinces nor were they subject to local rate or cess. This plea was accepted and the High Court remanded it for determination whether the land was assessed to land revenue or was subject to local rate or cess. The plea that the assessment proceedings ought to have been taken against the firm was not taken. It was held that this new plea could not be allowed to be taken in proceedings after remand.

153. Property other than that of lunatic.—In *R. P. David* v. *M. Thiagarajan*,[5] the non-lunatic sister consented to the sale of her interests alongwith the lunatic's interests and the managers and the Court acted on such consent. *Held* that she will not now resile from the position. The attempt to extricate half the share of the sister of the lunatic must fail.

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1. A.I.R. 1971 Orissa 170 at pp. 171, 174.
2. Reeta, Miss *v.* Berhampur University, A.I.R. 1993 (Orissa) 27 at p. 31 (F.B.) ; *see* also R.K. Kawatra *v.* D.S.I.D.C., A.I.R. 1992 Delhi 28 at pp. 40, 41.
3. Ashwin Prafulla Pimpalwar *v.* State, A.I.R. 1992 Bom. 233 at p. 240 (F.B.) : 1992 (2) Bom. C.R. 280 (F.B.).
4. A.I.R. 1979 S.C. 1104 at p. 1108.
5. A.I.R. 1966 Mad. 89 at p. 96 : I.L.R. (1965) 1 Mad. 274

154. Estoppel in industrial dispute.—Once the employee has accepted the pension, he is not estopped from questioning the same before the Court. It is, therefore, open to the Union, who takes up the cause of the employees to raise the dispute by way of collective bargaining on their behalf. No question of estoppel arises in a case of this description.[1]

As pointed out by their Lordships of the Supreme Court in *Workmen of Subong Tea Estate* v. *Subong Tea Estate*,[2] technical plea of estoppel is out of the place in an industrial dispute. If the workmen were in a starving condition and were thus forced to accept retrenchment benefit, that should not be held as a ground for preventing them in an industrial dispute from challenging the legality of the retrenchment.[3]

Settlement arrived at in the course of conciliation proceeding and otherwise than in the course of conciliation proceedings.

Where a settlement arrived at by agreement between the employer and the workmen otherwise than in the course of conciliation proceeding is binding only on the parties to the agreement, a settlement arrived at in the course of conciliation proceeding under the act is binding not only on the parties to the industrial dispute but also on other persons specified in Cl. (b), (c) and (d) of sub-section (3) of Sec. 18 of the Industrial Disputes Act.[4]

State is not precluded from challenging the award of the Industrial Tribunal.

Learned counsel for the contesting respondents contended that the State could not ask for a writ against itself, and having taken the chance of a favourable order in the reference, it was precluded from saying that the reference was not a valid reference in law. But what the State wants in this case is the quashing of the award. The award has been given by a quasi-judicial Tribunal. The State is not precluded from challenging the award provided it makes good its contentions that the award is fit to be quashed in exercise of the writ jurisdiction of High Court.[5]

155. Estoppel when available against railway.—Once in a particular case the authorized officer makes the representation that the consignment has not arrived and on the basis of such representation the consignee acts, would not a plea of estoppel be available to the consignee against the railway administration ? The answer is obvious and in the affirmative.

In *B.N.W. Rly. Co. Ltd.* v. *Kameshwar Singh*,[6] the facts and circumstances were different and estoppel was found not to be available against the railway on the facts of the said case. In the present case, a clear case of estoppel is made out in relation to the non-receipt of the consignment until 17th January, 1961, and it is not open to the railway administration to establish that this very consignment had arrived earlier.[7]

156. Revocation of offer.—Law is now well settled that an officer is entitled to revoke his resignation or offer of retirement before its acceptance by the appropriate authority.[8]

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1. Namburnadi Tea Co. Ltd. *v.* Workmen of Namburnadi Tea Estate, A.I.R. 1968 Assam 39 at p. 40.
2. (1964) 1 Lab. L.J. 333 (S.C.).
3. Employers in relation to Messrs. Hind Strip Mining Corporation Ltd., Bermo *v.* Raj Kishore Prasad, A.I.R. 1967 Pat. 12 at pp. 15-16.
4. Tata Chemicals Ltd. Messrs *v.* Workmen employed under M/s. Tata Chemicals Ltd., A.I.R. 1978 S.C. 828 at p. 832.
5. State of Bihar *v.* Industrial Tribunal, Patna, (1977) 51 F.J.R. 371 at pp. 375, 376.
6. A.I.R. 1933 Pat. 45.
7. Union of India *v.* Rasul Ahmed, A.I.R. 1970 Orissa 157 at p. 161.
8. *See* Raj Kumar *v.* Union of India, A.I.R. 1969 S.C. 180.

In *Balmukund Oriya* v. *State*,[1] the petitoner had applied for leave on private affairs. That leave was not granted. Even though leave was granted subsequently, the petitioner could not avail of the same, as no reliever was available. It was at that stage that the petitioner exercised his option to retire and asked for leave preparatory to retirement. The petitioner was granted leave and was permitted to retire on the expiry of his leave as requested by him. *Held* that the petitioner could not revoke his offer of retirement even before the final order accepting his offer to retire was passed. In the above noted case Misra, C.J., observed as follows :

> "The grant of leave preparatory to retirement is integrally interwined with the exercise of the option to retire...The petitioner cannot retract from the obligation and exercise the right integrally connected with the performance of that obligation. He cannot be allowed to approbate and reprobate."

157. Estoppel—Sole office of.—Estoppel has no operation or efficacy whatsoever except as a bar to testimony. Its sole office is either to place an obstacle in the way of a case which otherwise might succeed, or to remove an impediment out of the way of a case which might otherwise fail. Emphatically it is not a cause of action in itself; nor does it create one. Estoppel merely operates as a bar to the suit; it does not extinguish the right.[2]

158. Award made after the expiry of the period.—The company having taken a willing part in the deliberations before the Arbitrator after the expiry of time limit specified for making the award in the order of reference without any objection, protest or the like, is estopped from challenging the validity of the award on the ground of its having been made after the expiry of the period.[3]

159. Educational matters—Application of principle of estoppel.—Where the regulations of the University did not lay down any minimum marks for admission to Engineering College, though eligibility of minimum marks in the qualifying examination has been laid down in the prospectus of the college, making the selection process flexible by taking other activities and achievements into consideration, the college authorities are estopped from cancelling the admission of certain candidates after their selection and intimation for admission.[4] When after considering all facts and circumstances and also the objections by the office to the admission of a candidiate, the Vice-Chancellor directs the admission of such a candidate, such admission could not be said to have been made through mistake. Assuming that the appellant was admitted through mistake, the appellant not being at fault, it is difficult to sustain the order withholding the admission of the appellant.[5]

Admissions.

In the present case the appellant while securing his admission in the Law College had admittedly submitted his mark-sheet alongwith the application for admission. The Law College had admitted him. He had pursued his studies for two years. The University had also granted him the admission card for the pre-Law and Intermediate Law examinations. He was permitted to appear in the said examinations. He was also admitted to the final year of the course. It is only

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1. A.I.R. 1970 Orissa 130.
2. Ram Niwas Gupta *v.* State of Haryana, A.I.R. 1970 P. & H. 462 at p. 467 : 1970 Cur. L.J. 276 : 72 Punj. L.R. 283 : I.L.R. (1970) 1 Punj. 689.
3. Messrs. Bokaro and Ramgur Ltd. *v.* Dr. Prasun Kumar Banerjee, A.I.R. 1960 Pat. 150 at p. 160; *see* also Hind Trading Company *v.* State of Uttar Pradesh, 1982, All. L.J. 572.
4. Ambika Prasad Mohanty *v.* Orissa Engineering College, A.I.R. 1989 Orissa 173 at p. 179.
5. Ashok Chand Singhvi *v.* University of Jodhpur, A.I.R. 1989 S.C. 823 at p. 826.

at the stage of the declaration of his results of the pre-Law and Inter-Law examinations that the University raised the objection to his so-called ineligibiltiy to be admitted to the Law course. The University is, therefore, clearly estopped from refusing to declare the results of the appellant's examination or from preventing him from pursuing his final year course.[1]

It is well settled that there can be no estoppel against law particularly where the legislative mandate is so clear and emphatic, namely, that no one admitted in contravention of the provisions of Sec. 28 of the U.P. State Universities Act shall be permitted to appear at the examination. At no point of time did the University which is the final authority in regard to the admissions and grant of permission to the students to appear at the examinations held by it, directly or by any act or omission or even by implication made by representation to the petitioners or led them to act to their detriment believing any such supposed representation so as to attract the principle of estoppel.[2]

In *Dilip Singh Yadav* v. *Pracharya and Adhikshak, Sri Lal Bahadur Shastri Smaraka Rajkiya Ayurved Maha Vidyalaya, Handia,*[3] it was urged for the petitioner that as a letter to admit him in BAMS course had been issued to him, the respondents are estopped from denying admission to him. There is no reason to agree with this, submission, inasmuch as since the petitioner did not possess essential qualifications required for admission in BAMS, admission could be denied. The condition precedent for admitting him was that he must have passed Intermediate Examination of the U.P. Board or equivalent examination in Sanskrit. This is the requirement of law. There is no estoppel against law.

In the undernoted case on the assurance of the respondents contained in the mark-sheet the petitioner has secured admission and passed in future classes also. The process cannot be reversed nor after a lapse of many years. It was held that Court cannot be oblivious to the principles of equities which are in favour of the petitioner. Had the University done its part or the petitioner had been guilty in any manner, she should not be permitted to rely on promissory estoppel. But in view of the conduct of the University it is a fit case in which the principles of promissory estoppel should he applied to the respondents because it is at their instance that the petitioner has improved her position and has put in many years in her studies which now cannot be allowed to go waste.[4]

In *Dinesh* v. *State,*[5] it was held that the cancellation of the petitioner's admission was neither illegal nor without jurisdiction nor the respondents are estopped from cancelling their admission because the principle of equitable and promissory estoppel does not operate in this case.

In the instant case, the petitioner had appeared in M.Sc. Part 1 and in one of the papers, she secured lesser marks, she had applied for appearing in the Improvement Test in the said paper. Simultaneously, the petitioner was permitted to joint M.Sc. part II and she appeared in M.Sc. Part II examination also. The petitioner was successful in the Improvement Test examination and has secured higher marks than the earlier examination for which she wanted to appear in the Improvement Test. Since the petitioner had appeared in final M.Sc. also, she

Examinations.

1. Sanatan Gauda *v.* Berhampur University, A.I.R. 1990 S.C. 1075 at pp. 1078, 1079.
2. Achey Lal *v.* Vice Chancellor, Gorakhpur University, A.I.R. 1985 All. 1 at pp. 4, 5.
3. A.I.R. 1986 All. 158 at p. 159.
4. Maxey Charan *v.* Rohilkhand Universtiy, Bareilly, A.I.R. 1992 All. 122 at p. 126.
5. A.I.R. 1993 Raj. 187 at pp. 193, 194.

claimed that her result of M.Sc. final was also to be declared taking into consideration the marks obtained in the Improvement Test in the said subject.[1]

The respondent-University had declined to declare the result of the petitioner's M.Sc. final examination on account that according to a resolution of the meeting held on 9th January, 1992, a candidate was not permitted to appear in two tests *i.e.* the Improvement Test, as well as the final class for which a person claimed to have been permitted.[2]

Held, the respondents are directed to declare the result of the petitioner of M.Sc. final (Physics), taking into account the marks obtained in the Improvement Test for which the petitioner had appeared simultaneously prior to appearing in M.Sc. final examination. The result be declared within a period of two weeks from the date of presentation of a certified copy of the order.[3]

Unless requisite marks have been obtained, an examinee is not entitled to be declared passed. Any declaration of result of an examinee who has not actually passed, as passed, is an illegality against which no plea of estoppel can be pressed.[4]

After prescribing the percentage of the minimum qualifying marks for M.B.B.S./B.D.S. course and issuing the notice for holding the competitve entrance examination, the Government is not estopped from reducing the percentage of qualifying marks for scheduled castes and scheduled tribes candidates if the required number of such candidates are not available.[5]

Acceptance of application form for competitive examination for admission into medical course amounts to promise intended to be acted upon and after the declaration of the result the college authorities cannot be allowed to plead that the applicant was not entitled to a seat in the medical course on the ground of being under age.[6] When the petitioner had no means of knowing that he had failed in the B.A. examination and no material is forthcoming from which it can at least be said that he must have known about his failure, and when admittedly the University gave him the mark-sheet through the College, wherein he was shown to have passed, and the College also supplied him the College Leaving Certificate wherein he was shown to have passed, and more than five years elapsed during which period he has been treated to have passed the B.A. examination, the rule of estoppel would apply and accordingly, the Court would conclude that the University is estopped from taking the plea that the petitioner has, in fact, failed.[7]

A mere reading of the rules 1, 2(*a*) would reveal the inherent absurdity in expecting a commerce graduate to offer subjects like Physics, Chemistry, Sanskrit, Persian or Mathematics or Botany or History or Political Science. Although they have been described as rules, but they are not better than mere executive instructions and these executive instructions cannot be allowed to have an overriding effect on the statutory provisions as incorporated in the University Ordinance.[8]

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1. Ruchira Chauhan *v.* Rohilkhand University, Bareilly, A.I.R. 1996 All. 12 at pp. 12, 13 : 1996 All. L.J. 167.
2. *Ibid*.
3. *Ibid* ; *see* also, Maria Shaw *v.* Martin Fernandez, A.I.R. 1996 Bom. 116.
4. Gajendra Patra *v.* Utkal University 1989 (31) O.J.D. 588 at p. 590 (Civil).
5. Arti Gupta *v.* State of Punjab, A.I.R. 1988 S.C. 481 at p. 484.
6. K. Narmada *v.* Secretary, Medical and Health Department, State of Andhra Pradesh, Hyderabad, A.I.R. 1988 A.P. 2 at pp. 4, 9.
7. Basanta Kumar Mohanty *v.* Utkal University, A.I.R. 1990 Orissa 10 at p. 13.
8. Shyamlal Shrungi *v.* State of M.P., A.I.R. 1990 M.P. 15 at p. 17.

In the instant case the University was precluded or estopped from the issuance of the correction slip connecting the examination results of the petitioners and others similarly situated arising on account of grave mistake which occurred in the Tabulators misreading the Grade Marks Rules of the University under the rules of equitable estoppel. It was held that the University has acted most expeditiously and it has not allowed any time to lapse by negligence or otherwise and, therefore, the impugned correction slip issued by the University and intimations issued by the College can neither be assailed nor nullified as those issued in violation of the rule of equitable estopple.[1]

If any information has been circulated later on the petitioner was not bound by it. The petitioner having been admitted to the examination and having been allotted roll number, cannot be declared to be not eligible.[2]

Candidate once admitted and passed cannot be declared not eligible.

The plaintiff having been granted admission at the Special Final Examination of B.Sc. Part II on the strength of his own document issued by the University to him, the University must be held to be estopped from contending that the plaintiff was wrongly admitted to the B.Sc. Part II examination because he had, in fact, failed at the B.Sc. Part I examination. The defendant appellant was estopped from withholding the plaintiff's result.[3]

Where the irregularity in the terms has not been noticed at the time when the admission form is accepted, and it comes to the light after a student goes through the examination, even then on such an infirmity being found, his name is deemed to be cancelled from the list of candidates for the examination. In the present case the petitioner had not completed the examination since he was still to appear at the practical examination and, therefore, it cannot be contended that on account of the omission on the part of the authorities to take proper care in the matter of the petitioner having not kept regular terms and by the acceptance of the application form for admission and allotment of the seat number and consequent appearance of the petitioner in Theory Examination the University is estopped by acquiescence in cancelling the name of the petitioner from the list of the candidates permitted to appear in the examination.[4]

Opportunity of interview.

In the under-noted case, it was held that having known everything fully well, when the Commission accepted the application form of the petitioner, issued admit card, permitted her to appear in the written examination and declared her successful in the written examination it was estopped under the law to prohibit the petitioner from appearing in the interview and therefore, the Courts of equity would not permit such actions of the Commission to be made an instrument of grave injustice.[5]

The rule of estoppel does not operate against the Statutes. If the rules do not postulate any such conversion, a mere declaration by the College of its intention to convert Diploma Course into Degree Course would not bind the authorities concerned specially when no such document had been issued by any of the authorities prior to the publication of the advertisement in the brochure.

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1. N.E. Krishna Murthy *v.* University of Mysore, A.I.R. 1991 Kant. 35 at pp. 38, 39.
2. Manoj Kumar Gupta *v.* Co-ordinator, Admission Committee, Motilal Nehru Regional Engineering College, Allahabad, A.I.R. 1985 All. 257 at p. 258.
3. Bundelkhand University *v.* Laxmi Narain Yadava, A.I.R. 1983 All. 378 at p. 380.
4. Pradip Rasiklal Shukla *v.* Gujarat University, A.I.R. 1985 Guj. 99 at pp. 102, 103.
5. Alpana *v.* U.P.P.S.C. 1993 A.W.C. 1275 at p. 1280.

One fact of which the Court cannot lose sight of is that the College is in existence for more than 22 years now. It has been imparting professional education of the Diploma Course for all this period under the recognition of the State and the Central Council, is not disputed. It has a hospital, and other infrastructures for imparting education of such course and even for starting the Degree Course is also not disputed.[1]

160. Direction for payments of costs—Whether estoppel applies.—The principle of estoppel which precludes a party from assailing an order allowing a petition, subject to payment of costs where the other party has accepted the costs in pursuance of the said order applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the petition being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequence of being deprived of the right to challenge the order on merits. The said principle would not apply to a case where the direction for payment of costs is not a condition on which the petition is allowed and costs have been awarded independently in exercise of the discretionary power of the Court to award costs because in such a case the party who has been awarded costs no opportunity to waive his right to question the validity or correctness of the order.[2]

161. Liens.—Lien is not a word of art. It just connotes the right of a civil servant to hold the post substantively to which he is appointed. Generally when a person with a lien against a post is appointed substantively to another post he acquires a lien against the latter post. Then the lien against his previous post automatically disappears. The principle being that no Government servant can have simultaneously two liens against two posts in two different cadres. It is a well accepted principle of service jurisprudence.[3]

Probate of will.

A Mohammedan took out probate of a will, and it was held that this did not estop his heirs from disputing the will.[4]

162. Other instances of estoppel.—If a man grants a lease of land in which he has no legal interest he cannot afterwards deny the validity of this lease if he comes to have an interest in the land, and the lease will take effect accordingly. If the lessor, at the time of making the lease, have an interest, it is a rule of English Common Law that such interest only will pass, and the lease will have no further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant.[5] Where a person having a limited interest, namely, a sub-lease, granted a perpetual lease on consideration and afterwards acquired the proprietary right, he was held to be estopped from disputing the perpetual lease.[6] Where a person, having a mortgage of certain property, assisted the owner thereof in borrowing money on the security of the same property, as if it were unencumbered, and, neither during the negotiations nor at the time of paying over the money so borrowed, communicated the fact of

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1. Varinder Singh *v.* State of Punjab, A.I.R. 1998 P. & H. 42 at pp. 56-57 (F.B.).
2. Bijendra Nath Srivastava *v.* Mayank Srivastava, A.I.R. 1994 S.C. 2562 at pp. 2572-73 : (1994) 6 S.C.C. 117.
3. Ramlal Khurana *v.* State of Punjab, A.I.R. 1989 S.C. 1985 at p. 1987.
4. Muhammad Madan *v.* Khudizunissa *alias* Khuki, W.R. 181.
5. *See* Williams on the *Law of Real property*, 6th Ed., p. 358; Story's *Equity Jurisprudence*, Sec. 387, and following paragraphs and Amir Ali *v.* Hira Singh, 20 W.R. 21.
6. Kuru Chaubi *v.* Janki Prasad, 1 N.W.P. Rep. 165.

his own lien, was held that by such conduct he lost the priority which his mortgage otherwise would have had.[1]

Bill-of-lading.

The master of a vessel signed a bill-of-lading which stated that four casks were marked with the word "Calcutta" as the port of destination. It was held that the master was estopped from saying that they were not marked with the word "Calcutta".[2] When the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade mark it was held that the plaintiffs were estopped from denying the defendant's right to use the trademark.[3] A zamindar who accepts rent from the vendee of his former tenants is estopped by his conduct from treating them as trespassers.[4] *A* contracted to buy from B. & Co. 180,000 gunny bags for cash on delivery. Subsequently, *C* agreed with *A* to advance Rs. 15,000 against 87,500 bags. B. & Co. gave delivery orders to *A*, although the goods remained unpaid for. *A* gave a delivery order for 87,500 bags to *C*, and on the faith of it *C* advanced Rs. 15,000 to *A*, B & Co. then delivered 50,000 bags to *C*, which were sold for Rs. 10,000 but they refused to deliver the remaining 37,000 bags. *C* accordingly sued B & Co. for the sum of Rs. 5,000 by which he was out of pocket. It was held that B. & Co. were estopped from denying that they held the goods at the disposal of *A*.[5] The same principle was followed in *Anglo-India Jute Mills Co.* v. *Omademull*.[6]

Right of easement.

Where a plaintiff had by his conduct permitted the defendants to believe that they would have the right of easement to take water upon the repair of a well and the latter spent money for the purpose, *held* that the plaintiff was estopped from denying the said right of the defendants.[7]

Usufructurary mortgage.

An occupancy *ryot* executed a usufructurary mortgage of his holding and placed the mortgagee *A* in possession; the landlord received rent and granted receipt to him in which it was stated that it had been paid through "*A* the mortgagee" ; *held* that this amounted to the recognition of the transfer and the landlord was precluded from suing to eject the mortgagee as trespasser,[8] even in the case when the rent was received under protest.[9] It should be noted that the words *marfatdar* and *gujratdar* in rent receipts do not of themselves prove recognition of tenancy; each case depends on its own circumstances.[10]

Under Sec. 43 of the Transfer of Property Act a transferor cannot plead against the transferee subsequent title to the land transferred if he has induced the transferee to pay money for the transfer; this principle is an extension of the

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1. *See* Story's *Equity Jurisprudence*, Sec. 390: Sita Ram *v.* Kissen Das *alias* Kishnarain, 5 N.W.P. Rep. 402; with this case compare Salamat Ali *v.* Budh Singh I.L.R. 1 All. 303; *see* also Sakhiuddin *v.* Sonaullah, 22 C.W.N. 641.
2. Madhab Chandra De *v.* Law, 13 B.L.R. 394.
3. Lavergne *v.* Her, I.L.R. 8 Mad. 149.
4. Durga *v.* Jhinguri, I.L.R. 7 All. 511 at p. 578.
5. Ganges Manufacturing Co. *v.* Suraj Mal, I.L.R. 5 Cal. 669 : 5 C.L.R. 533.
6. I.L.R 38 Cal. 127.
7. Ananta *v.* Ganu, I.L.R. 45 Bom. 80.
8. Baroda Charan Dutta *v.* Hemlata Dasi, 10 C.L.J. 610.
9. Matookdhari *v.* Jugdip, 19 C.W.N. 1319.
10. Probhabati Dasi *v.* Jaibatunessa, 19 C.L.J. 62.

rule of estoppel;[1] the principle of this section is a principle of law generally known as "feeding the grant by estoppel".[2]

Treating one as adopted son in a bond.

In *Yashvant Puttu Shenvi* v. *Radhabai*,[3] one *P* had been described in a mortgage-bond as the adopted son of *R*. It was held that it did not operate as an estoppel.

Bill-of-lading and endorsee.

Where the plaintiff as endorsee of the bill-of-lading produced it as entitling him to the goods and took delivery of the goods on the strength of it he cannot be heard to say that he is not bound by its terms.[4]

In *Glyn* v. *East and West India Dock Co.*,[5] Lord Selborne said :

Assignee.

"Every one claiming as assignee under a bill-of-lading must be bound by its terms and by the contract between the shipper of the goods and the ship-owner therein expressed....."

The right to realize cess accrues periodically and, if the person entitled to cess for any particular period chooses to accept in satisfaction of his dues less than he is entitled to, his act will not estop him from claiming his full dues for a subsequent period.

The realization for a particular period of a lesser amount than is due will not prevent the person entitled from realizing by suit so much of his legal dues as have not been paid.[6]

A promise to withdraw a caveat and to get certain money from the executor, if the will is proved is in no way contrary to public policy. Though a breach of that promise may sound in damages, it will be entirely wrong to say in a probate case that a man's previous promise will stop him before decree from laying any fact before the Court with reference to the question whether a certain document was really executed as a will by the testatrix or not.[7]

Reference claim for compensation.

In *Tirthalal* v. *State of West Bengal*,[8] it is held that where a petitioner had already made an application for reference claiming increased compensation, he could not be permitted to challenge the acquisition itself and at the same time claim increased compensation.[9]

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1. Mokhada *v.* Umesh, 7 C.L.J. 381.
2. *See* Tilakdhari Lal *v.* Khedan Lal, I.L.R. 48 Cal. 1 (20) (P.C.) ; Mohan Singh *v.* Seoram, 75 I.C. 579 (Oudh) ; Krishna Chandra *v.* Rasik Lal, 21, C.W.N. 218, where the cases on the point are disccussed and it is pointed out that the principle is not inapplicable to a case where there was originally no title at all and is not confined to cases where there is an enlargement of existing interest. The principle is applicable to the cases of mortgage; Mokhada *v.* Umesh, 7 C.L.J. 381; Azizuddin *v.* Sheikh Budan, I.L.R. 18 Mad. 492 (lease) ; Protab *v.* Judisthir, 19 C.L.J. 408; Sulien *v.* Rajkrishna, 25 C.W.N. 402; exchange which stands on the same footing as sale; Bhairab *v.* Jiban, 33 C.L.J. 184: but not to the case of a compulsory sale; Alukmonee *v.* Banee Madhub, I.L.R. 4 Cal. 677; nor to a transfer prohibited by statute; Vaddadi *v.* Koduganti, I.L.R. 41 Mad. 418 (F.B.).
3. I.L.R. 14 Bom. 312.
4. J. Ezekeil *v.* British India Steam Navigation Co. Ltd., A.I.R. 1929 Cal. 260 at p. 262.
5. (1882) 7 A.C. 591 at p. 596 : 52 L.J. Q.B. 146 : 31 W.R. 201 : 47 L.T. 309.
6. Smt. Ramkumari Devi *v.* Hari Das Mukherji, A.I.R. 1952 Pat. 239 at p. 241: I.L.R. 13 Pat. 187.
7. Pashupati Mukherjee *v.* Shital Kumar Sarkar, A.I.R. 1931 Cal. 587 at p. 591 : I.L.R. 58 Cal. 699 : 133 P.C. 327.
8. 66 C.W.N. 115 at p. 121.
9. Mohammad Habibullah Sahib *v.* Special Deputy Collector for Land Acquistion, Madras, A.I.R. 1967 Mad. 118 at p. 121 : 79 M.L.W. 469.

In *Balgajan Rai* v. *Sukhu Rai*,[1] the following observations were made at page 290 :

"The defendants are estopped from contending that a person who had been substituted as the legal representative of a deceased plaintiff did not fully represent his estate."[2]

Substituted legal representative.

In order to exclude evidence in the second trial on the ground of issue of estoppel it must be shown that in the previous trial an issue was distinctly raised and decided.[3] In *Marz* v. *Queen*,[4] Dixon, C.J., observed as follows :

Estoppel in second trial on the same ground.

"The law which gives effect to issue estoppel is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel....It is enough that an issue or issues have been directly raised and found...."

The following observations made by Herron and Maguire, JJ., in *Brown* v. *Robinson*.[5] were also quoted :

"Before issue estoppel can succeed in a case such as this, there must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner...."

Their Lordships further quoted with approval the observations of Herron, J., in *R.* v. *Clift*.[6]

When a creditor does once accept the money on the debtor's condition, he is estopped from claiming more.[7]

Creditor's claim.

The Court will treat the plaintiff's admission in the plaints regarding valuation as a strong piece of evidence against them.

Where the actual value was given in the plaint the plaintiff cannot be heard to say that the valuation is erroneous.[8]

Where purchasers were prevented from making the necessary deposits as the High Court stayed all proceedings in furtherance of the sale in C.M.P. which was taken out by the palintiffs, the plaintiffs cannot now turn round and say that the sales shall be treated as *non est* by reason of the requisite deposits not having been made within the prescribed time.[9]

Where at the instance of the agent of a candidate the security is adjourned by the Returning Officer to the next day, it does not lie in the mouth of the candidate to call in question the act of the Returning Officer.[10]

Election; scrutiny.

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1. A.I.R. 1948 Pat. 288.
2. Meenatchi Achi *v.* Ananthanarayana Ayyar, I.L.R. 26 Mad. 224; Jaggernath Singh *v.* Narayan Sarogi, A.I.R. 1965 Pat. 300 at p. 302.
3. State *v.* Khetaram, A.I.R. 1965 Raj. 221 at p. 223 : 1965 R.L.W. 317.
4. (1956) 96 C.L.R. 62.
5. (1960) S.R. (N.S.W.) 297.
6. (1952) 52 S.R. (N.S.W.) 213.
7. Dipchand Golencha *v.* Messrs. M. Abhechand & Co., A.I.R. 1962 Cal. 166 at p. 168.
8. Budhi Panigrahi *v.* Bhagirathi Swain, A.I.R. 1962 Orissa 159 at p. 161.
9. Kalwa Devadattam *v.* Union of India, A.I.R. 1958 A.P. 131 at p. 140 : (1958) 1 Andh. W.R. 348 : 1957 Andh. L.T. 554.
10. Badrivishal Pillai *v.* J.V. Narsing Rao, A.I.R. 1959 A.P. 116 at p. 118 : I.L.R. (1958) A.P. 618 : 1959 Andh. W.R. 31 : 1958 Andh. L.T. 1078.

The petitioners in a case having participated in the election were estopped from challenging the validity of that election after having lost therein.[1]

But the bar of estoppel cannot be pleaded against a person challenging the election merely because he takes part in the said election by standing as a candidate or by exercise of his right of franchise therein especially when the impugned election is patently illegal and void *ab initio* due to the fact such as it being held pursuant to an *ultra vires* provision in a statute or the rules.[2]

Failure to raise objection against a candidate in an election.

Though legally there is no bar to the appellant raising the question in the election petition questioning the election of a elected candidate, his allegation that the elected candidate is not a member of the scheduled caste would be considerably weakened because of his failure to object at the time of the scrutiny of the nomination papers.[3]

In *Commissioner of Income-tax, Mysore* v. *Canara Bank Ltd.*,[4] the findings of the Income-tax Appellate Tribunal were not challenged on behalf of the Commissioner of Income-tax before the High Court.

Held that it is not premissible for the Commissioner of Income-tax at this stage of appeal before Supreme Court to go behind the two statements of the case and to challenge the findings of fact contained therein.

Banks.

Generally speaking, a bank owes a duty to its customer to maintain proper and accurate accounts of credit and debits. If a bank makes wrong entries of credit without knowing the fact at the time the entries were made, and intimates to its customer the credit entries and the customer acting upon the intimation of credit entries alters his position to his prejudice, the bank thereafter will be estopped from contending that the credit entires were wrongly made and that the amounts covered by them should be refunded to it by the customer.[5]

Acceptance of an amount.

Any acceptance of the amount determined by the Land Acquisition Officer cannot act as an estoppel against the right which accrues to the petitioner after the award itself has been given as also against the right to claim interest on the amount of compensation awarded.[6]

Party accepting benefit under an award is estopped from challenging it.

This is a petition to challenge the arbitration award of the East India Cotton Association Ltd. made pursuant to the rules of the said Association. The Counsel for the respondent contends that having accepted the payment under the decision of the Board of Directors of the said Association the petitioner is now estopped from challenging the award. He has cited a judgment of the Division Bench of Bomaby High Court consisting of Chagla, C.J. and Bhagwati, J. dated, the 28th August, 1952.[7] The next authority which is cited by him.[8]

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1. Raghuni Nayak *v.* District Magistrate, Darbhanga, A.I.R. 1959 Pat. 7 at p. 8 : 1958 B.L.J. 177.
2. Smt. Navuba Gokalji Chavda, Mehsana *v.* Returning Officer, A.I.R. 1982 Guj. 281 at p. 283.
3. Ganpat *v.* Presiding Officer, A.I.R. 1975 S.C. 420 at p. 421.
4. A.I.R. 1967 S.C. 417 at p. 419.
5. Oakley Bowden & Co., Madras *v.* Indian Bank Ltd., Madras, A.I.R. 1964 Mad. 202 at p. 203 : (1964) 2 M.L.J. 104 : 77 M.L.W. 74.
6. All-India Tea and Trading Co., Ltd. *v.* Sub-divisional Officer of Mangaldai, A.I.R. 1962 Assam 20 at p. 22.
7. Kantilal Jiwabhai *v.* Vedila Chunilal, Appeal No. 32 of 1952.
8. Lissenden *v.* C.A.V. Bosch Ltd., 1940 A.C. 412.

The principle that emerges from the two decisions is that it is possible in an appeal against decree or order of Court to confirm the same partly and set aside the same partly even though two parts may not be severable. Another thing to be noted in such a case is that when an appellant challenges a decree against him, the result of the appeal can only be adverse to the appellant to the extent of his challenge in case his challenge fails and if he succeeds only that part is set aside while the part of the decree which is not challenged remains untouched; therefore, the appellant when he receives the money or some other benefit under the decree under challenge always retains the benefit whether he wins or loses the appeal. This is not the position in the case of an award. Whenever an award is challenged on whatever ground it may be, the award has to be set aside *in toto* or if made in parts, the entire part challenged and thereafter there will not exist any basis for the person challenging the award to retain the benefit received by him under the award or the part of the award which is challenged. In Court's view this is an important distinction between an award and a decree or order of the Court.

Another case cited by the counsel was in *Dexters Ltd.* v. *Hill Crest Oil Company (Bradford) Ltd.*[1] In that case the umpire made three awards on different footings and then stated a special case having the Court to decide which award was right. The amounts in the first and the second awards which were in favour of the appellant were different, the amount in the second award being higher than the one in the first award. The third award was against the appellant in that case. The Court decided that the first award was the correct award. The appellant in whose favour the said first award was decided, demanded the amount and obtained payment and thereafter appealed from the decision of the Judge contending that the second award was the right one. It was held in that case that having demanded and accepted payment under the first award the appellant was precluded from contending that it was wrong. This case was decided on the same basis as the decision in the earlier cases and also on the basis that by accepting payment under the first award the appellant had precluded the respondent from challenging the second award and contending that the third award was the correct award. It appears clear from the aforesaid authorities that in the facts and circumstances of this case, the petitioner is estopped from challenging the award. Accordingly, the principle of estoppel applies and the petition is not maintainable.[2]

On conflict of jurisdiction of Courts.

There may be certain cases which may not be cognizable either by a civil court or a revenue court and in such cases if a matter is brought before a civil court after a finding by the Revenue Court that it has no jurisdiction to take cognizance of it the other party may urge that the Civil Court has also no jurisdiction to entertain the same.[3]

Facts undisclosed in sale.

In *K.T. Venkata Gowda* v. *Devamma*,[4] the respondent did not state in the sale proclamation in the previous execution that there was a recurring charge on the properties. What was stated was that the property was subject to a charge for the recovery of maintenance by the decree made in favour of the respondent. *Held* that the respondent was not estopped from bringing the properties purchased by him again for sale in execution of her decree.

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1. (1926) 1 K.B. 348.
2. Govindji Jevat & Co., Messrs. *v.* Shree Saraswati Mills Ltd., A.I.R. 1982 Bom. 76 at pp. 76, 77, 78.
3. Jai Singh *v.* Mangtoo, A.I.R. 1962 H.P. 10 at p. 11.
4. A.I.R. 1964 Mys. 40.

Cost of the proceedings.

Costs are within the discretion of the Court. A party accepting costs cannot be deemed to have waived his right to question the legality of the order made.[1]

Consent of reversioner's necessity.

No consent or acceptance from the nearest reversioner is necessary for an act or surrender on the part of the widow.[2]

Neither the reversioners nor any person claiming through them can be stopped from challenging the surrender if it was void or voidable in law.[3]

Acceptance under protest.

Where the plaintiff has agreed to accept the new rate under protest he is not debarred from claiming the old controlled rate if found entitled to the same.[4]

Contract with Government.

A contract with the Union Government or the State Government made without complying with the formalities of Sec. 175(3) of the Government of India Act, 1935 or Art. 299(1) of the Constitution of India, is a void contract and not merely unenforceable.

There is no question of estoppel or ratification with regard to a contract of this description.[5]

Ratification of transaction.

The question of ratification can only arise in case of a voidable transaction but not in the case of a void contract. If a contract for transfer of interest in missing leasehold is void there will be little scope for there can be no plea of estoppel available to the transferee.[6]

Writ.

The fact that jurisdiction of the High Court to issue a writ to quash order passed by the Administrator, was not challenged by the respondents in the previous writ proceedings would not prevent them from raising their contention in subsequent writ proceedings.[7]

Writ of Mandamus where issued.

There is abundant authority in favour of the proposition that a writ of *mandamus* can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that *mandamus* may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.[8]

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1. J. Devaiah *v.* Nagappa, A.I.R. 1965 Mys. 102 at p. 105.
2. *See* Natwarlal *v.* Dadubhai, A.I.R. 1954 S.C. 61.
3. Ram Prasad Singh *v.* Sital Prasad Singh, A.I.R. 1965 Pat. 47 at p. 49.
4. Union of India *v.* Dwarkadas Radhakrishna, A.I.R. 1959 Pat. 39 at p. 45 : I.L.R. (1958) Pat. 468 : 1958 B.L.J. 504.
5. Hindustan Construction Co., Muzaffarpur *v.* State of Bihar, A.I.R. 1962 Pat. 336 at p. 338.
6. Sadhansu Kanta *v.* Manindra Nath A.I.R. 1965 Pat. 144 at p. 153 : 1965 B.L.J.R. 242.
7. Sheikriyammada Nalla Koya *v.* Administrator, Union Territory of Laccadive, Minicoy and Amindivi Islands, Kozhikode, A.I.R. 1967 Ker. 259 at p. 269.
8. *See* Lekhraj Satramdas Lalyani *v.* Deputy Custodian-cum-Managing Officer, (1966) 1 S.C.R. 120 : A.I.R. 1966 S.C. 334 ; Dr. Rai Shivendra Bahadur *v.* Governing Body of the Nalanda College, (1962) Supp. (2) S.C.R. 144 : A.I.R. 1962 S.C. 1210 and Dr. Umakant Saran *v.* State of Bihar, A.I.R. 1973 S.C. 964; Bihar Eastern Gangetic Fisherman Co-operative Society Ltd. *v.* Sipahi Singh, A.I.R. 1977 S.C. 2149 at p. 2154 ; Excise Commissioner of Allahabad *v.* Ram Kumar, A.I.R. 1976 S.C. 2237.

116. Estoppel of tenant; and of licensee of person in possession.—No tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

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1. Policy of the section.—The underlying policy of Sec. 116 of the Indian Evidence Act is that where a person has been brought into possession as a tenant by the landlord and if that tenant is permitted to question the title of the landlord at the time of the settlement, then that will give rise to extreme confusion in the matter of relationship of the landlord and tenant and so the equitable principle of estoppel has been incorporated by the Legislature in the said section.[1] In the case reported in *Krishna Prosad Lal* v. *Baraboni Coal Concern Ltd.*[2] their Lordships were dealing with the provisions contained under Sec. 116 of the Indian Evidence Act. Their Lordships held at page 255 as follows :

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1. Smt. Bhagwati Devi *v.* Surendrajit Singh, A.I.R. 1969 Pat. 257 at p. 262.
2. A.I.R. 1937 P.C. 251.

"...The section postulates that there is a tenancy still continuing, that it has its beginning at a given date from a given landlord. It provides that neither a tenant nor anyone claiming through a tenant shall be heard to deny that, that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise...the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease. The principle does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversions, though in such cases there may be other grounds of estoppel e.g., by attornment, acceptance of rent, etc. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessors has since come to an end..."

Principle of estoppel arising from contract of tenancy.

The principle of estoppel arising from the contract of tenancy is based upon a healthy and salutary principle of law and justice that a tenant who could not have got possession but for his contract of tenancy admitting the right of the landlord should not be allowed to launch his landlord in some inequitable situation taking undue advantage of the possession that he got and any probable defect in the title of his landlord. It is on account of such a contract of tenancy and as a result of the tenant's entry into possession on the admission of the landlord's title that the principle of estoppel is attracted. The consensus of judicial opinion, both of the courts of India as well as those of English courts, is that before surrendering or solemnly renouncing possession the tenant shall not be permitted to set up a title in a third person, or *jus tertii*. By so doing he would be challenging the title of the lessor on the date of the demise to settle for such time as the tenancy had not been determined. As the tenant in such cases has been inducted on the leasehold premises by the lessor on the strength of such a title enabling him to enter into a contract of tenancy, the tenant shall not be permitted to challenge such title before surrendering possession. In that sense, the principle underlying Sec. 116 of the Evidence Act may, also be said to be attracted. It has, therefore, been repeatedly held that possession must be surrendered before any such defect in the lessor's title is allowed to be proved.

The position in law is not different even after the notice to quit determining the tenancy has been served.[1]

Section 116 of the Evidence Act enumerates the principle of estoppel which is merely an extension of the principle that no person is allowed to approbate and reprobate at the same time. The principle laid down in this section is that having become a tenant and holding on to the property on the basis of the landlord's title, the tenant is not entitled to repudiate or dispute the title of the landlord. This does not mean that if he does so by way of a defence in a suit falling within the purview of the Rent Act, there should be a decree forthwith for eviction. This rule of estoppel only means that a defence of such nature ought to be shut out and rejected by the Court. In the instant case, after having noticed the defence, both the Courts below have, on the peculiar facts of the case rejected the defence and recorded a finding that the defendants were not joint tenants. It is on this footing that the Small Cause Court continued to have and exercised jurisdiction under the provisions of the Bombay Rent Act.[2]

2. English law relating to estoppel against tenant and licensee.—The estoppel in the opinion of the Judge arose because of Sec. 116 of the Evidence

1. Jaikaran Singh *v.* Sita Ram Agarwalla, A.I.R. 1974 Pat. 364 at p. 368.
2. Lena Pareira *v.* Mary Boracho, A.I.R. 1992 Bom. 93 at pp. 97, 98.

Ordinance, 1950. This section is in the same terms, as and was clearly taken from, Sec. 116, of the Indian Evidence Act, 1872.

In *Terunnanse* v. *Terunnanse*,[1] the Board had to construe Sec. 116 of the Ceylon Evidence Ordinance, which is also in the same terms as the corresponding section in the Indian Act. Their Lordships pointed out that the Indian Evidence Act, 1872, which was drawn by Sir James Stephen, was intended to reproduce in a concise form the English law of evidence as it then existed and that its provisions should if possible be construed in a manner consistent with the English law. There is no doubt that under English law as it stood in 1872 and stands today there was and there is no difference as regards the matter in hand between a tenant and a licensee. Each is estopped from denying the title of the person from whom he accepted the tenancy or licence so long as he remains in possession under it but each is permitted to deny that title as from the time that he is no longer in possession under it. The person who is not permitted to deny his licensor's title is a person who came upon the land under the license and those words themselves suggest that he is still on the land.[2]

An examination of the Landlord and Tenant Act, 1954, shows that when the word "possession" is used it means the legal right to possession of land.[3]

3. Sections 116 and 117 are cases of estoppel by agreement.—Sections 116 and 117 mention certain well-known cases of estoppel by agreement, *viz.*, that of the tenant, the licensee, the bailee, and the acceptor of a bill of exchange.[4] The tenant and licensee and bailee obtaining possession are taken to accept it, upon the terms and that they will not dispute the title of him, who gave it to them, and without whose permission they would not have got it.[5] The act of acceptance of a bill amounts to an undertaking to pay to the order of the drawer.[6]

Examples of estoppel by agreement.

4. Admissions and estoppel.—Admission is an important piece of evidence. But it is open to the person who made the admission to prove that those admissions are not true. Admission is one thing, estoppel is another. Admission is a piece of evidence but estoppel creates title.[7]

5. Precise terms of estoppel vary according to the transaction.—Though all are instances of estoppel by agreement, the precise terms of the agreement and, therefore, of the estoppel may vary according to the nature of the particular transaction in each case.[8] Unless it can be proved that the person, against whom a *thak* or survey map is attempted to be used, expressly consented to the delineation or admitted the correctness of such maps, they have no binding effect.[9]

6. Section does not exhaust estoppels.—It is true that Sec. 116 of the Evidence Act rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he was not openly restored to possession by surrender[10] but in terms that section does not apply to prevent a tenant from

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1. (1968) 1 All E.R. 651 : (1968) A.C. 1086.
2. Government of the State of Penang *v.* Beng Hong Doon, (1971) 3 All E.R. 1163 at pp. 1168-69 (P.C.); *see* also Lawang Chand Sah *v.* Kidan Ram, A.I.R. 1984 Pat. 116.
3. Heath *v.* Drown, (1972) 2 All E.R. 561 at p. 573 (H.L.).
4. Rup Chand Ghosh *v.* Sarveswar Chandra, 10 I.L.R. 33 : Cal. 915 (922).
5. *Ibid.*
6. *Ibid.*
7. Dattatraya *v.* Rangnath, 1972, M.P.L.J. 336 at p. 340.
8. Rup Chand Ghosh *v.* Surveswar Chandra, 10 I.L.R. 33; Cal. 915 (922).
9. 3 C.W.N. 99.
10. *Cf.* Bilas Kunwar *v.* Desraj Ranjit Singh, 42 I.A. 202 : A.I.R. 1915 P.C. 96.

pleading that the title of the original lessor has since come to an end.[1] It is, however, equally true that Secs. 115 and 116 of the Evidence Act are not exhaustive and there may be rules of estoppel applicable in India other than what is contained in those statutory provisions.[2] It may be observed that the law is well settled that Sec. 116, Evidence Act, does not deal or profess to deal with all kinds of estoppel which may arise between landlord and tenant.[3]

As laid down by their Lordships of the Privy Council in *Krishna Prosad Lal* v. *Baraboni Coal Concern Ltd.*,[4] "It (Sec. 116) deals with one cardinal and simple estoppel and states it first as applicable between landlord and tenant and then as between licensor and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation".

In *Dah Chand* v. *Dadamchand*,[5] it was observed that Sec. 116 of the Evidence Act is not attracted into application in cases where the tenant denied the facts which had happened subsequent to the commencement of the tenancy.[6]

Sections 116 and 117 are not exhaustive of the doctrine of estoppel by agreement.[7]

Section 116 is not exhaustive of the law of estoppel. A tenant, in a transfer of title case, can attack the derivative title of the transferee-plaintiff but not on the ground that the transferor did not have the right to dispose of the property. Moreover, since the impediment in the way of a tenant to challenge the right of the landlord is confirmed to the state when the tenancy commenced, he is not forbidden to plead that subsequently the landlord lost his right. These exceptions, however, do not relieve the tenant of his duty to respect the title of the original landlord at the time of the beginning of the tenancy. Thus, it was held that the plaintiff were not entitled to get decree for possession on the ground of denial of title by the defendant and the decree was set aside.[8]

7. Scope.—A tenant cannot deny the title of the landlord during the continuance of the tenancy and till he has actually given up the possession and restored the same to the landlord.[9] In *Krishna Prosad Lal* v. *Baraboni Coal Concern Ltd.*,[10] Sir George Rankin laid down in unmistakable terms that Sec. 116 of the Evidence Act does not profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. Under the section, the various categories of persons mentioned are precluded from denying that the lessor had a title at the date of the lease and there is no exception even in respect of a case where the lease itself discloses the defect to title.[11]

This provision embodies the principle to estoppel arising from the contract of tenancy.

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1. *Cf.* Krishna Prosad Lal Singha Deo *v.* Baraboni Coal Concern Ltd., 64 I.A. 311 at p. 319 : A.I.R. 1937 P.C. 251 at p. 255.
2. Jaikaran Singh *v.* Sita Ram Agarwalla, A.I.R. 1974 Pat. 364 at p. 367.
3. Madanlal *v.* A. Manakchand, A.I.R. 1971 Raj. 55 at p. 57.
4. A.I.R. 1937 P.C. 251.
5. I.L.R. 13 Raj. 881 : A.I.R. 1963 Raj. 209.
6. Madanlal *v.* A. Manakchand, A.I.R. 1971 Raj. 55 at p. 57 : 1970 Raj. L.W. 250.
7. Rup Chand Ghosh *v.* Sarveswar Chandra, I.L.R. 33 Cal. 915 : 3 C.L.J. 629.
8. Gandabhai Ranchhodji Gandhi *v.* Noshir Ka Vasji Sabowala, A.I.R. 1994 Guj. 18 at pp. 24-25.
9. Kartar Singh *v.* Bachan Singh, A.I.R. 1972 Punj. 408 at p. 411.
10. A.I.R. 1937 P.C. 251.
11. Laxminarayan Gupta *v.* Durgadevi Thakurani, A.I.R. 1967 Orissa 92 at p. 94.

Application of this principle.

It may be noticed that for the application of this principle, all that is necessary to be established is that there was a contract of tenancy and that the tenant took possession of the land under the title or with the permission of the landlord or person then in possession. Possession and permission being established estoppel would bind the tenant during the continuance of the tenancy and until he does not surrender his possession. Evidently both the landlord and the persons in possession at the time of the contract are within the protection of this provision.

The tenant cannot challenge the title of the landlord under Sec. 116 of the Evidence Act. In *Sri Ram Pasricha* v. *Janannath*,[1] the Supreme Court has held that it is only the landlord who can terminate the tenancy and institute the suit for eviction. The tenant in such a suit is estopped from questioning the title of the landlord under Sec. 116 of the Evidence Act. The tenant cannot deny that the landlord had title to the premises at the commencement of the tenancy. Under the general law, in a suit between landlord and tenant the question of title to the leased property is irrelevant.[2]

Duration of estoppel in relation to landlord and tenant.

In *Guruswami Nadar* v. *Ranganathan*,[3] in interpreting Sec. 116 of the Evidence Act at page 514 it was held :

> "But it is now well-settled that the duration of the estoppel continues so long as the tenant has not openly restored possession by surrender to his landlord."

Estoppel available when derivative title devolving by virtue of decree.

When the title in the demised property devolves on a person by virtue of a lawful decree against the landlord, such derivative title cannot be questioned by the lessee so long as that decree stands as a valid decree.[4]

It is grounded rule of law that a tenant who has been let into possession cannot deny his landlord's title, however, defective it may be, so long as he has not openly restored possession by surrender to his landlord. This principle would also apply to the persons who enter into possession by leave or licence of the tenant on the land and they will be estopped under Sec. 116, Evidence Act, from denying the title of such tenant or the person is possession.[5]

Tenant's representatives.

This section applies to a tenant let into possession and also to his representatives. The section undoubtedly applies even between representatives of the landlord and the tenant or his representatives. The estoppel is confined to the title of the landlord at the beginning of the tenancy. It is now established that estoppel does not extend to the derivative title of the persons claiming through the landlord.[6]

Estoppel not available to derivative title.

But if once the derivative title is established the tenant cannot, even between himself and a person who claims the reversion, deny the title of the original

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1. A.I.R. 1976 S.C. 2335.
2. P.S. Bedi, Mrs. (Dr.) *v.* Project and Equipment Corporation of India Ltd., A.I.R. 1994 Delhi 255 at p. 262 ; *see* also, Atyam Veerraju *v.* Pechetti Venkanna, A.I.R. 1966 S.C. 629.
3. (1953) 2 M.L.J. 511 : I.L.R. (1954) Mad. 341 : A.I.R. 1954 Mad. 402.
4. Sudhir Chandra Guha *v.* Jogesh Chandra Das, A.I.R. 1970 Assam 102 at p. 110.
5. Rambilas Mohanlal Kabra *v.* Krishnabai Motilal Agarwal, A.I.R. 1973 Bom. 163 at pp. 169, 170.
6. *Vide* Krishna Prosad Lal *v.* Baraboni Coal Concern Ltd., A.I.R. 1937 P.C. 251 : I.L.R. (1938) 1 Cal. 1 (P.C.).

landlord at the commencement of the tenancy. The section restricts the estoppel to the period during which the tenancy continues. But it is now well settled that the duration of the estoppel continues so long as the tenant has not openly restored possession by surrender to his landlord.[1] The reason for this, as pointed out by Jessel, M.R., in *Shaw* v. *Ford*,[2] is that a person who took possession under a contract to pay rent as long as he held possession at the end of the term to the landlord should not be allowed to say that the man whose title he had admitted and under whose title he took possession has not a title. The basis of the estoppel is the contract.

Estoppel restricted to the period during which tenancy continues.

Of course, the real owner can always step in and recover possession of the property. But so far as the tenant is concerned he cannot defeat the right of the landlord as the possession of the tenant is rested on a contract whereunder he admitted the title of the landlord and obtained possession of the property. The extension, therefore, of the duration of estoppel is founded on a logical basis. The estoppel is also restricted to the denial of the title at the commencement of the tenancy. From this, the exception follows, that it is open to the tenant even without surrendering possession to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title-holder or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title-holder. Sir George Rankin in *Krishna Prosad Lal* v. *Baraboni Coal Concern Ltd.*,[3] examined the scope of estoppel under Sec. 116 of the Evidence Act and observed that it does not deal or profess to deal with all kinds of estoppels, which may arise between a landlord and his tenant, that it is confined only to one cardinal and simple estoppel.[4]

Tenant cannot defeat landlord's right.

In *Mohammad Hussain* v. *Abdul Gaffoor*,[5] it was held that the doctrine of estoppel under Sec.116 of the Evidence Act between landlord and a tenant has no application where the question of title arises not as landlord and tenant but as vendor and purchaser. This principle is stated by Lord Halsbury in his *Laws of England*, Vol. 13, 2nd Ed., p. 504 and is based upon the decision in *Nesbitt* v. *Mablethorpe Urban Dt. Council*,[6] a decision of Bailhace, J.

At page 579 the principle is thus stated by the learned Judge :

> "I will assume that the tenancy of a few yards of ground estops a tenant from denying his landlord's title to the surrounding acres held under the same title or claim of title but I think the doctrine of estoppel which operates between landlord and tenant has no application to the same parties even while the tenancy exist when the question of title arises between them, not in this relationship of landlord and tenant but of vendor and purchaser."

Question of title as between vendor and purchaser.

The observations of the learned Judge were intended to draw a distinction, between suits based upon tenancy and suits based upon title. If the suit is based upon the tenancy alone the question of title cannot be gone into in such an action and the estoppel operates.

Suit based upon tenancy.

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1. *Vide* Mst. Bilas Kunwar *v.* Ranjit Singh, A.I.R. 1915 P.C. 96 : I.L.R. 37 All. 557 (P.C.) and Bhaiganti Bewan *v.* Himmat Badyakar, A.I.R. 1917 Cal. 498 : 20 C.W.N. 1335.
2. (1877) 6 Ch. D. 1 at pp. 9 and 10.
3. A.I.R. 1937 P.C. 251.
4. K.S.M. Guruswami Nadar *v.* N.G. Ranganathan, A.I.R. 1954 Mad. 402 at pp. 404-5.
5. I.L.R. (1946) Mad. 44 : (1945) 1 M.L.J. 475 : 58 M.L.W. 200 : 1945 M.W.N. 242 : A.I.R. 1945 Mad. 321; *see* also P. Sella Pillai *v.* L. Balaraman, (1982) 2 M.L.J. 282.
6. (1917) 2 K.B. 568 at p. 579.

Suit based upon title.

But the position is totally different where the suit is based upon title In such a suit, of course, there is no room, when the relationship that was canvassed was that of vendor and purchaser, to invoke the doctrine of estoppel and to shut out the trial of the issue concerning title.

Exceptions.

This section has no application where the landlord's title has expired or been extinguished or where there has been a fraud on the part of the landlord in the execution of a lease, or where the tenant did not obtain or retain possession under the lease or by virtue of it, or where he has been evicted by title paramount. A person who is evicted by such a title is at liberty to deny his landlord's title. Even if a tenant is not actually evicted, but if a judgment of eviction has been passed against him, a tenant is justified in treating the relation of tenancy at an end and at liberty to give a new and rightful character to his possesion. In *Lunsford* v. *Turner*,[1] the Court observed :

Eviction of tenant and his denial of title.

> "....In this respect a judgment of eviction against the tenant would be as effectual as an actual eviction."

Where the tenant is under an apprehension that a suit of eviction might be brought by the paramount landlord that fact alone cannot justify the tenant in denying the title of the landlord and attorning to the paramount owner of the property.

Tenant to pay rent to landlord or his agent.

It is necessary that a tenant should pay the rent either to the landlord from whom he has obtained the lease or to an agent of the landlord or run the risk of having to pay the rent twice over. The payment or rent to the paramount landlord cannot have the effect of discharging the obligation which the tenant owed to the landlord.[2]

The tenant took the premises on rent from alleged landlord and once that is so, there is clearly a relationship of landlord and tenant between the parties and by virtue of Sec. 116 of the Indian Evidence Act, the tenant is estopped from disputing the ownership of his landlord. The rights of the parties have to be determined *vis-a-vis* relationship of landlord and tenant and if the tenant takes possession of the premises as such, he is bound to return possession to his landlord and cannot be allowed to set up a title in himself or in a third person.[3]

Defective landlord's title, tenants cannot deny it.

Section 116 of the Indian Evidence Act is perfectly clear that a tenant who had been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title. A failure to pay rent to the lessor during the period of the lease does not alone operate to create in favour of the lessee a title by adverse possession.

If a lessee holds over after the expiry of the lease and if no subsequent arrangement is arrived at between him and his lessor by which a new tenancy is created, time begins to run under Art. 67 of the Limitation Act, 1963, against the lessor from the date of the expiry of the lease.

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1. (1830) 20 Am. Dec. 248.
2. Shri Sain Dass Farngu *v.* Pt. Sant Ram Jaishi Ram, A.I.R. 1959 Punj. 564 at pp. 564-65 : I.L.R. (1959) Punj. 2183 : (1959) 61 Punj. L.R. 780.
3. Nirmal Singh *v.* Ram Sarup, 1993-2 (104) D.L.R. 483 at p. 484.

In such a case, the landlord's title can be extinguished only at the expiration of the period prescribed by Art. 67 of the Limitation Act, 1963 and under that article, such a period will commence to run only when the tenancy is determined.[1]

Period of limitation.

The law may be briefly stated thus :

"Section 116 of the Evidence Act prohibits a tenant from challenging the validity of the title of the landlord at the beginning of the tenancy. In other words, the estoppel in Sec. 116 of the Act refers to the title at the beginning of the tenancy. It does not debar a tenant from challenging the validity of the title of the landlord on the basis of the previous events which occurred before the tenant was inducted in the premises. Section 116 of the Act also does not debar a tenant from proving the subsequent events in relation to the title of the landlord. The bar imposed under Sec. 116 of the Act is that the tenant cannot challenge the defective title of the landlord at the beginning of the tenancy. In other words, the tenant is estopped from challenging the fact that the plaintiff obtained title to the suit property on the basis of mis-representation, fraud etc. Section 116 of the Act refers to the estoppel in respect of a defective title at the beginning of the tenancy. Section 116 does not estop the tenant from raising the plea that the landlord had no title to the suit property before he was inducted as tenant. In other words, the defendant-tenant cannot challenge the defective title of the landlord at the beginning of the tenancy. Such a plea is estopped by Sec. 116 of the Act."[2]

It is clear that the foundation underlying the doctrine of estoppel as embodied in Sec. 116 is that the possession of the property by the tenant is permissive. The question is whether Sec. 116 is attracted into application in cases where the tenant's denial relates to facts which have happened subsequent to the commencement of the tenancy. For an answer to this question reference may profitably be made to a few decided cases.

Tenant's possession is permissive.

In *Krishna Prosad Lal* v. *Baraboni Coal Concern Ltd.*,[3] their Lordships of the Privy Council observed :

"Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end."[4]

In *Luckman Chaplain* v. *Pearey Lal*,[5] it was held that the tenant's denial of his landlord's title is related to facts which have happened subsequent to the commencement of the tenancy, the bar of estoppel does not come into operation and it is open to the tenant to plead that the title of the landlord has passed to the Government so that he has no right to realize rent.

Denial of landlord's title based on facts happening subsequent to commencement of tenancy.

The same principle was applied in *Mohendra Nath* v. *Mohendra Nath*.[6]

Calcutta High Court view.

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1. Rampearylal Khandelwal *v.* Surajmal Marwari, A.I.R. 1959 Pat. 500 at p. 502 : 1959 Bh. L.J. 244.
2. Rajeshwar Prasad *v.* Sita Ram Marwari, A.I.R. 1977 Pat. 247 at p. 248.
3. A.I.R. 1937 P.C. 251 : 64 I.A. 311 : 1937 A.L.J. 1389 : 1937 A.W.R. 961 : 39 Bom. L.R. 1034 : I.L.R. (1938) 1 Cal. 1 : 41 C.W.N. 1253 : (1937) 2 M.L.J. 286 : 46 M.L.W. 201 : 169 I.C. 556.
4. *See* also Gajadhar Lodha *v.* Khas Mahtabiah Colliery Co., A.I.R. 1959 Pat. 562.
5. A.I.R. 1939 All. 670 : 1939 A.L.J. 913 : 186 I.C. 274.
6. A.I.R. 1944 Cal. 305 : 48 C.W.N. 571.

In *John Nadjarian* v. *E.F. Trust*,[1] it was held that when either through ignorance of title of the landlord or by fraud in the matter of execution of the *kabuliyat* the tenants had attorned to him, it was competent to the tenants to show that the landlord had no title at the date when the tenants attorned to him. Perhaps, this decision goes somewhat farther than the decisions referred to above.

Section 116 bars the tenant to deny the title of his landlord at the time of the creation of the tenancy :

Tenants purchasing landlord's co-sharer's share in tenancy.

Section 116 of the Evidence Act cannot be pleaded as a bar to the tenant purchasing by paying consideration the share of the co-sharer of his landlord and thus claiming title of a part of the property. It does not constitute a denial of the title of the landlord on the date of the tenancy.[2]

There is nothing in Sec. 116 which extends the rule of estoppel to a person who claims to be the representative of the landlord by assignment.

Proof of landlord-tenant relationship before section is applicable.

A landlord-tenant relationship will have to be established between the purchaser and the tenant before Sec. 116 can successfully be called in aid. If the tenant attorns to the purchaser, thereby recognizing him as his landlord, the provisions of Sec. 116 would unquestionably come into play. But in the absence of any manner of privity of contract between the purchaser and the tenant the former cannot rely upon Sec. 116 and seek to raise estoppel against a tenant from questioning his title.[3]

Whether a tenant can prove that the relationship of landlord and tenant never existed between parties?

Section 116 presupposes that the person affected by the estoppel is a tenant. It is open to the tenant to prove that the relationship of landlord and tenant did not subsist between him and the plaintiff at any time and that the sale-deed and the rent-note were executed in collusion with the plaintiff to defraud the creditors. He is not estopped from leading evidence to show that the sale-deed and the rent-note are fictitious documents for the obvious reason that the fraud in question was agreed to by both the parties and both parties have assisted each other in carrying out the fraud.[4]

Estoppel under Sec. 116 Evidence Act, is not available against any statute.

It is well settled that a tenant who was already in possession at the time of the execution of the lease will be as much estopped under Sec. 116 as the one who was let in by the landlord on the execution of the lease. The rule of estoppel enunciated in Sec. 116 is subject to the general proposition that it will not avail against any statute. Therefore, it will be open to the tenant to avoid the contract of tenancy if it is subject to any of the infirmities enumerated in Secs. 13 to 20 of the Contract Act. In *Mst. Bilas Kunwar* v. *Desraj Ranjit Singh*,[5] Sir George Farwell observed at p. 567 (of I.L.R. All) : (at p. 98 of A.I.R.) :

> "Section 116 of the Indian Evidence Act rests on the principle that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord."

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1. A.I.R. 1945 Bom. 399 : I.L.R. (1945) Bom. 343 : 47 Bom. L.R. 209.
2. Raman Chandra Dey *v.* Gour *alias* Gharbaran Gaur, A.I.R. 1962 Assam 137 at p. 140.
3. Kailash Kumar *v.* Banarsi Das Gupta, A.I.R. 1961 J. & K. 34 at p. 35.
4. Bhaboot Mal *v.* Seas Mal, A.I.R. 1973 Raj. 56 at p. 57 ; *see* also Aras Khan *v.* Alo Mian, A.I.R. 1985 Pat. 126.
5. I.L.R. 37 All. 557 : A.I.R. 1915 P.C. 96.

The learned counsel for the defendant-appellant has assailed the judgments of the courts below on the ground that the courts below have acted illegally in recognizing the title of the plaintiff in view of the provisions of Sec. 116 of the Indian Evidence Act. According to the learned counsel the lease deed in favour of the defendant was a void document in view of Sec. 156 of the U.P. Zamindari Abolition and Land Reforms Act, hence the defendant-appellant could not be estopped from challenging the title of the plaintiffs in the disputed land, yet the courts below have illegally held that the defendant-appellant was estopped from challenging the title of the plaintiffs to the disputed land. In this connection Court's attention has been drawn to the ruling reported in, *Shamsher Bahadur* v. *State of Uttar Pradesh*[1] wherein a learned single Judge of this Court has held that :

Estoppel in case of void lease.

> "If there is no legal sub-tenancy, the so-called sub-tenant cannot be estopped from challenging the status of the tenant."

Viewed from this angle it appears that the courts below have committed mistake in recognising the claim of the plaintiffs taking help from the provisions of Sec. 116 of the Indian Evidence Act.[2]

Estoppel is only a rule of evidence and cannot override the express provisions of a mandatory statute. Where on account of the happening of subsequent events the landlord comes to be deprived of his title, it will be open to the tenant to plead the subsequent loss of title on the part of the landlord, and Sec. 116 does not bar such a plea.[3] The plain terms of the section are clearly to this effect. In *Ganpat Rai* v. *Multan*,[4] a Division Bench of the Allahabad High Court stated :

When tenant can plead subsequent loss of landlord's title.

> "It seems to us quite clear that once a person is a tenant of another person he cannot be allowed to deny that the person whose tenant he was, was the owner when the tenancy was created ..The words 'at the beginning of the tenancy', are expressly inserted in the section to show that the tenant is not prevented from showing that after the tenancy commenced the estate of the landlord devolved on some other person."

Allahabad High Court view.

In *Krishna Prosad Lal* v. *Baraboni Coal Concern Ltd.*,[5] their Lordships of the Privy Council when dealing with the principle of estoppel under Sec. 116 of the Evidence Act observed :

> "Nor does the principle apply to prevent a tenant from pleading the title of the original lessor has since come to an end."

Section 116 of the Evidence Act will not preclude the tenant from showing that a person who claims to be the landlord in a suit has lost his title as landlord.[6] This section, in terms, no doubt refers to the title of the landlord at the commencement of the tenancy, but it is clear from the decision of the Privy Council in *Bilas Kunwar* v. *Desraj Ranjit Singh*,[7] that the rule of estoppel laid down in the section also applied to a tenant so long as he has not openly restored possession by surrender to his landlord.[8]

Tenant can show landlord's loss of title.

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1. A.I.R. 1964 All. 395.
2. Anant Ram *v.* Sheikh Mohammad Ishaq, 1981 All. L.J. 839 at p. 840.
3. Khalil Sufi *v.* Aziz Bhat, A.I.R. 1960 J. & K. 132 at pp. 134-35.
4. I.L.R. 38 All. 226 : A.I.R. 1916 All. 121.
5. A.I.R. 1937 P.C. 251 at p. 255 : 64 I.A. 311 : 1937 A.L.J. 1389 : 1937 A.L.R. 623 : 39 Bom. L.R. 1034 : I.L.R. (1938) 1 Cal. 1 : 41 C.W.N. 1253 : (1937) 2 M.L.J. 286 : 18 P.L.T. 739 : 169 I.C. 556.
6. Hanglem Ibotom Singh *v.* Khumbongmayum Krishna Singh, A.I.R. 1964 Manipur 33 at p. 35.
7. 42 Ind. App. 202 : A.I.R. 1915 P.C. 96.
8. Surajmal Marwari *v.* Rampeareylal Khandelwal, A.I.R. 1966 Pat. 8 at p. 10.

The rule of estoppel is always subject to the proviso that it never operates for the benefit of a person who was aware of the true facts and was not misled by any conduct of the party with whom he was dealing.[1]

Principle applies to sub-tenants *vis-a-vis* tenant.

The principle of Sec. 116 can also be applied to sub-tenants *vis-a-vis* their-principle (tenant) : but the words "during the continuance of the tenancy" make it clear that where there is no legal tenancy or sub-tenancy, the provisions of the section shall be inapplicable.[2]

Section 116 does not permit the tenant during the continuance of the tenancy, to deny that his landlord had, at the beginning of the tenancy, a title to the property. The rule is not confined in its application to cases where the original landlord brings an action for eviction. A transferee from such a landlord also can claim the benefit but that will be limited to the question of title of the original landlord at the time when the tenant was let in. It was also laid down that as far as the derivative title is concerned, a tenant is entitled to show that the plaintiff has not, as a matter of fact, secured a transfer from the original landlord or that the alleged transfer is ineffective for some other valid reason which renders the transfer to be non-existent in the eye of law.[3]

Once it is held that the defendant was inducted as a tenant in the house, then it is difficult to accept the contention that the suit for eviction filed on behalf of the plaintiff was not maintainable.[4]

In another case, the tenants being in possession in consequence of the tenancy created by opposite party No. 1 could not be allowed to question the title of the landlord opposite party No. 1 as long as they were in enjoyment of the tenancy.[5]

8. Tenant.—Once it is held that the defendants were allowed by the plaintiff to continue in possession of the portion of the suit house under their occupation as his tenants they will be estopped from challenging his title as long as they continue in possession of the same.[6] "No rule", says Mr. Smith in his note to the *Duchess of Kingston's* case, "can be more clearly settled than that a man shall not be permitted, during his possession of premises, to dispute the title of the landlord under whom he entered. The case of tenant cited for this is perhaps, *Doed Knight* v. *Lady Smythe*.[7] 'It has,' said Dampier, J., in that case, 'been ruled often that neither the tenant nor any one claiming by him can dispute the landlord's title ?....' This rule has been acknowledged and acted upon in India.[8] In the case of *Donzelle* v. *Kedarnath Chuckerbutty*,[9] *A* had executed a *kabuliyat* to *B*, the zamindar. *B* subsequently granted a *patni* lease to *C*, who sued *A* for rent upon the *kabuliyat* executed in favour of his superior landlord. *A* pleaded that *B* was not the real owner being merely a *benamidar* for her husband. It was held that the technical doctrine of estoppel had no application, and that it was open to *A* to prove his plea. This case was decided before the Indian Evidence Act came into

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1. Chhotey Lal *v.* Har Prasad, A.I.R. 1964 All. 82 at p. 83.
2. Shamsher Bahadur *v.* State of U.P., A.I.R. 1964 All. 395 at pp. 402- 3.
3. Santosh Kumar Jain *v.* Shambhulal Krishna Kumar Suhane, A.I.R. 1993 M.P. 46 at p. 48.
4. Mohammad Indris Mian *v.* Doman Sah, A.I.R. 1978 Pat. 82 at p. 86.
5. Surajbali Ram *v.* Dhani Ram, A.I.R. 1979 Orissa 101 at pp. 107, 108.
6. *See* Munnalal *v.* Balchand, 1961 I.L.J. 230; Pannalal *v.* Abdul Wahid, 1961 I.L.J. 1292 at p. 1295.
7. 4 M. & S. 387 ; *see* also Deen Dayal Ram Ratan *v.* Sita Ram, (1983) 2 Civil L.J. 52.
8. Jainarain Basu *v.* Kadambini Dasi, 7. B.L.R. 723, note.
9. 7 B.L.R. 720 : 16 W.R. 186 ; Kedarnath Chakerbutty *v.* Donzelle, 20 W.R. 352.

operation, but there is another case of the same effect,[1] which is of date subsequent to the passing of the Evidence Act. For instances of application of the principle contained in this section, see *Patel Kilabhai* v. *Hargovan*;[2] *Devi Das* v. *Sham Lal*.[3] In *Prabhat* v. *Bijoy Chand*,[4] it was held that the defendant having obtained possession of certain lands as tenant on the strength of the *kabuliyat*, was estopped to deny that title or seisin of his grantor in a suit for rent on the ground that he is merely a *benamidar* or some other person. It has however been held that for the purposes of this section the real owner rather than the *benamidar* is to be regarded as the landlord.[5] It has been decided in England, that where premises are let by the agent of an unnamed landlord, as such the tenant who has gone into possession is estopped from disputing the title of the unnamed landlord when disclosed.[6]

When agent admits tenant an unnamed landlord, tenant cannot deny his title.

It has further been decided that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment.[7]

Where a vacant site jointly owned by *B* and his brother *R* is given on rent to *S* by *B*, he as tenant cannot deny his title during the continuance of the tenancy and till he had actually given up the possession and restored the same to *B*. This would be apparent from Sec. 116 of the Indian Evidence Act.[8]

Estoppel when premises let out by one of joint owners.

It is strenuously submitted by the counsel for the appellant that unless the landlord is also the absolute owner of the premises, he cannot evict the tenant under Sec. 13(1)(*f*), West Bengal Premises Tenancy Act. Landlord means landlord under the appropriate General Clauses Act and, therefore, since there are other co-sharers, the plaintiff alone could not file the suit for eviction.

Tenant cannot raise plea of non-pleading of other co-sharers—He cannot have landlord's title.

There are two reasons for one not being able to accept the above submission. *Firstly*, the plea pertains to the domain of the frame of the suit as if the suit is bad for non-joinder of other plaintiffs. Such a plea should have been raised, for what it is worth at the earliest opportunity. It was not done. *Secondly*, the relation between the parties being that of landlord and tenant, only the landlord could terminate the tenancy and institute the suit for eviction. The tenant in such a suit is estopped from questioning the title of the landlord under Sec. 116 of the Evidence Act. The tenant cannot deny that the landlord had title to the premises at the commencement of the tenancy. Under the general law, in a suit between landlord and tenant the question of title to the leased property is irrelevant. It is, therefore, inconceivable to throw out the suit on account of non-pleading of other co-owners as such.[9]

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1. Indrabati Koer *v.* Mahbub Ali, 24 W.R. 44.
2. I.L.R. 19 Bom. 133.
3. 58 I.C. 595 (All.).
4. I.L.R. 50 Cal. 572.
5. Kuppu Koman *v.* Thiruganna, I.L.R. 31 Mad. 461.
6. Fleming *v.* Gooding, 4 M. & Scott. 455 : 10 Bing. 549.
7. Jamesdji Sorabji *v.* Lakshmiram Rajaram, I.L.R. 13 Bom. 323 : Maung Shawe Dyaw *v.* Ma Shwe Thet, 34 I.C. 71 (Bur.) ; Alimaddin *v.* Anaiddin, 38 I.C. 534 (Cal.).
8. Kartar Singh *v.* Bachan Singh, A.I.R. 1972 P. & H. 408 at p. 411.
9. Sri Ram Pasricha *v.* Jagannath, A.I.R. 1976 S.C. 2335 at p. 2337.

Case-law on estopping tenants from denying landlord's title

In *Venketa Chetty* v. *Aiyanna Goundan*,[1] it has been held by the majority of the Full Bench that a tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion.[2] A person who has come in by collusion with the tenant in possession is also precluded for denying the landlord's title.[3] Where a conveyance of a *patni taluk* expressly recited that certain resumed *chowkidari chakran* lands appertaining to the *patni taluk* were retained by the vendor; *held* that the vendee was not estopped from claiming the *chakran* lands under a subsequent settlement thereof from the zamindar.[4] By accepting a deed of conveyance in fee and going into possession a grantee is not estopped from denying the title of the seisin of the grantor unless he claims under the deed.[5]

When title can be challenged; case-law.

A person may challenge the title of the lessor notwithstanding that his predecessor attorned to him if such title rests upon some illegal transaction.[6] A lessee may plead non-liability to pay rent on the ground that the lessor's name had not been registered under Sec. 78 of the Land Registration Act.[7] Where in a suit for damages by a lessor against a lessee for a breach of a covenant contained in a registered lease purported to have been granted by the lessor as tenure-holder to the lessee as under-tenure-holder it was found that in fact the lessor was an occupancy *ryot*, *held* that the lessee was estopped for showing that the lease was void and that no interest passed to him.[8] The payment of the tax without protest for one year does not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year.[9] The tenant, in a suit for subsequent arrears of rent, would not be estopped from showing that he paid the former arrears under a mistake and the person to whom he had so paid had no title.[10] When the defendant in good faith and under a reasonable belief that the land held by him included in the estate of a third person attorned to him, *held* that Sec. 60 of the Bengal Tenancy Act did not estop the tenant from pleading that rent was due to a third person notwithstanding that the plaintiffs were registered proprietors.[11] In a suit for rent by a proprietor registered under the Land Registration Act the defendants are precluded by reason of Sec. 60 of the Bengal Tenancy Act from pleading that the rent is due under assignment from the plaintiff to a mortgagee whose name has not been registered under that Act.[12] In a suit for rent by a registered proprietor the defendant cannot plead that the plaintiff is a *benamidar*.[13] A tenant-defendant no doubt can show under Sec. 60 of the Bengal

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1. I.L.R. 40 Mad. 561 (F.B.).
2. *See* also Melaram *v.* Bholi, 76 I.C. 47 (Punj.) ; Makhan Singh *v.* Baisachi Ram, 50 I.C. 591 (Punj.).
3. Pasupati *v.* Narayana, I.L.R. 13 Mad. 335.
4. Bebin *v.* Tincourie, 13 C.L.J. 271 : 15 C.W.N. 976.
5. *Ibid.*, referring to Rupchand Ghosh *v.* Sarveswar, I.L.R. 33 Cal. 915 : 10 C.W.N. 741.
6. Madras Hindu Mutual Benefit Permanent Fund *v.* Raghava Chetty, I.L.R. 19 Mad. 200.
7. Abdul Aziz *v.* Kanthu Malik, I.L.R. 38 Cal. 512.
8. Baman Das *v.* Nilmadhab, 20 C.W.N. 1340 : I.L.R. 44 Cal. 771.
9. Pitamber Das *v.* Jambusar Town Municipality I.L.R. 17 Bom. 510.
10. Abdul Razak *v.* Promoda Sundari, 80 I.C. 22 (Cal.).
11. Durgadas Hazra *v.* Samash Akon, 4 C.W.N. 606.
12. Hem Chunder Misri *v.* Rajah Sourindra Mohan Tagore Bahadur, 5 C.W.N. 482 ; *see* also Mst. Nand Kuer *v.* Jodhan Mahton, 61 I.C. 386 (Pat.).
13. Sadhu *v.* Radhika, 8 C.W.N. 695 : 24 I.C. 118.

Tenancy Act that the title under which the plaintiff claims to hold has been held by a competent Court to be void and of no effect.[1]

In *Raghvendra Singh* v. *Mathu*,[2] the proprietor of village Durg leased out to the defendants by a document, the disputed *abadi* site for building there houses on the condition that they would deliver vacant possession of the site on fifteen days' notice. Thereafter by virtue of M.P. Abolition of Proprietary Right (Estate, Mahals, Alienated Lands) Act, 1951, all *abadi* sites save as determined provided in the Act vested in the State.

Held that the principle of Sec. 116, Evidence Act, did not apply to prevent the tenant from pleading that the title of the original leases lies since it came to an end.

Spencer Bower states in his treatise on *Estoppel* by Representation, (1923 Ed., pp. 254-55) :

> "Where a tenant, by such acts and conduct as have been already indicated, has conclusively acknowledged his landlord's title, he is estopped from afterwards disputing, as against such landlord, the subsistence and validity of an estate in him sufficient to warrant the demise. But this is the limit of his disability ; he is not further or otherwise estopped, because it is only a denial so limited which can result in that necessary contradiction or inconsistency between the original and the new position which, as has been already explained, is a condition of any valid estoppel by representation....."

In Halsbury's *Laws of England*, 3rd Ed., Vol. 15, para 459, the law is thus stated :

> "In the case of assignee of the lessor....the lessee is not estopped from showing that the lessor had no such title as he could pass to the assignee, or that the person claiming to be the assignee is not in fact the true assignee."

Whether a sitting tenant attorns to the transferees by paying rent to them, there does arise an estoppel though it might proceed upon a different ground. So in *Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern Ltd.*[3] the Judicial Committee observed :

> "Whether during the currency of a term the tenant by attronment to *A* who claims to have the reversion, or the landlord by acceptance of rent from *B* who claims to be entitled to the term is estopped from disputing the claim which he has once admitted are important questions, but they are instances of cases which are outside Sec. 116 altogether, and it may well be that as in English law the estoppel in such cases proceeds upon somewhat different grounds and is not wholly identical in character and in completeness with the case covered by the section."[4]

Section 116 of the Evidence Act came up for consideration in a series of decisions of the Privy Council. One of the leading authorities is to be found in *Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern Ltd.*,[5] where Sir George Rankin, in an indubitable language, gave a clear analysis of the scope of the section.

The decision clearly brings out the theory that neither Sec. 116 of the Evidence Act nor any analogous principle of estoppel stands in the way of the

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1. Girish Chandra *v.* Satish Chandra, 12 C.W.N. 622.
2. A.I.R. 1971 M.P. 142.
3. A.I.R. 1937 P.C. 251.
4. Raghvendra Singh *v.* Mathu, A.I.R. 1971 M.P. 142 at p. 144.
5. A.I.R. 1937 P.C. 251.

tenant to take up the plea that subsquent to the commencement of the tenancy, there has been extinction of title of the landlord.[1]

The expression "during the continuance of the tenancy" in pith and substance means, so long as the tenant has not surrendered possession of the tenancy into which he was indcuted. Doubtless, that is the construction consistently given to that expression. But such a theory has no application to a case where there has been extinction of the title of the landlord subsequent to the commencement of the tenancy. The proposition laid down by Privy Council directly militates against such a concept.[2]

Contract applicability of estoppel.

The estoppel applies to all matters connected with, or arising out of, the contract, by which the relation of landlord and tenant was created. The estoppel could not, however, extend further and affect matters quite beyond the contract.[3]

Though a tenant can never be estopped from claiming occupancy rights in respect of and in an estate by reason of the statute he will be estopped from saying that the land is in an estate if he has previously taken it on the footing that it is not an estate. It may be that the estoppel extends only to his surrendering vacant possession ; after he surrenders he may agitate any question he likes.[4] But he cannot keep the possession which he obtained by representing that he will not claim the land to be an estate.[5] The tenants were not estopped under Sec. 116, Evidence Act, from claiming under-proprietary rights as the claim for under-proprietary rights does not constitute a denial of the *talukdar* being the proprietor and the landlord.[6]

Mortgagor allowed as tenant-in-possesion.

Where the mortgage was indisputably with possession and the mortgagors duly executed and registered the lease, they cannot be allowed to plead that the lease that they executed should not be interpreted as a lease.[7]

If the tenant admits the contract of tenancy but denies the title of the landlord, the denial is not open to the tenant in the sense contemplated by Sec. 116 of the Evidence Act.[8]

9. Estoppel of tenant.—A tenant is only estopped from denying the subsistence and validity of an estate in the landlord sufficient to warrant the demise; he is not further estopped.[9] Where the existence of a tenancy is established by the fact of the tenant's payment of rent to his landlord or otherwise, the tenant cannot ordinarily dispute the title of his landlord, in a suit brought against him for recovery of possession. He must first give up possession, and then, if he has any title *aliunde*, that title may be tried.[10] The plaintiff sued to eject the defendant, his tenant, on the ground that he had failed to pay rent for three years. The defendant pleaded that he had paid rent, either to the plaintiff's co-sharer, or

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1. M. Hamid Ahmed *v.* Guhamani Behera, 35 Cut. L.T. 580 at pp. 582-83.
2. *Ibid*, at p. 584.
3. Madras Hindu Mutual Benefit Permanent Fund *v.* Ragava Chetti, I.L.R. 19 Mad. 200 at p. 207.
4. Cabbe on *Estoppel*, p. 25.
5. Ramalinga *v.* Ramasami, A.I.R. 1929 Mad. 529 at p. 536 : 29 M.L.W. 760 : 1929 M.W.N. 239 : 119 I.C. 577.
6. Ram Khelawan *v.* Raja Rampal Singh, A.I.R. 1937 Oudh 47 at p. 51 : 1936 O.W.N. 1057.
7. Asa Ram *v.* Kishan Chand, A.I.R. 1930 Lah. 386 at p. 387 : 120 I.C. 166.
8. Lekhraj Diddi *v.* Sawan Singh, A.I.R. 1971 M.P. 172 at p. 174.
9. Kailash Kumar *v.* Banarasi Das Gupta, A.I.R. 1961 J. & K. 34 at p. 36.
10. 8 B.H.C. (A.C.J.) 175 at p. 176 ; Cooper *v.* Balandy, 1 Bing, N.C. 45 ; Doe d. Marlow *v.* Wiggins, 4 Q.B. 367 and Deo d. Knight *v.* Lady Smythe, 4 M. & S. 347.

to the plaintiff and the co-sharer jointly. *Held* that it was not open to the defendant to set up such plea after taking a lease from the plaintiff alone.[1] In a suit for the possession of a house, on the ground that the *kabuliyat* had expired, the defendants denied the plaintiff's title. *Held* that the defendants, having passed the *kabuliyat*, could not be heard to deny the plaintiff's title.[2] The admission of the Government that they had paid rent for some years to the plaintiff, was held to be sufficient in law, to raise a *prima facie* presumption of title in his favour, and to throw the onus of proving, that the land belonged to them and that they had paid the rent under a mistake, on the Government.[3] Where the defendant-tenant denied the execution of the *kabuliyat* propounded by the plaintiff, and, when the denial was found to be false set up the title of a third person to the land, *held* that this was a change of position, which the defendant ought not to be allowed to make.[4]

In an ejectment suit in respect of a *jalkar* in a navigable river, the defendant, if he has paid rent to the plaintiff or his predecessors, is precluded from raising a defence that the plaintiff cannot have an exclusive right of fishery in a navigable river.[5] When a person is let into a possesion of a particular property by another claiming it to be his own, the former cannot contend, after the expiration of his tenancy, that the latter cannot acquire an adverse title against him as well as others by efflux of time.[6]

Suit for rent.

In a suit for rent, *held* that the tenant was not entitled to prove that the plaintiffs were not his landlords, although he had not been inducted into the land by the plaintiff.[7]

Tenant denying landlord's title after expiry of term.

In a suit to eject a tenant, holding over after the expiration of his lease, it is not competent to the tenant to set up that the zamindar, and not the plaintiff is entitled to the land.[8] A tenant, denying a landlord's claim to rent on the allegation that the relationship has terminated, is bound to prove his allegation.[9] A party, obtaining

Sub-tenant's claim of adverse title.

possession of premises, held by a tenant, by paying £ 20 to him could not set up his adverse title against the landlord, as a valid defence in an action of ejectment.[10] The principle is, that he came in by collusion with the tenant, who could not only deny the landlord's title.[11]

Suit for possession of land against lessee.

In a suit for possession of land against lessee and others, the lessee contended that the land was not the property of the plaintiff, but the property of Government from whom he had accepted *pattah* therefor. *Held*, a tenant is estopped from denying the title of the landlord who let him into possession.[12]

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1. Jamsedji Sorabji *v.* Lakshmiram Rajaram, I.L.R. 13 Bom. 323 at p. 325.
2. Patel Kilabhai Lallubhai *v.* Hargovan Mansukh, I.L.R. 19 Bom. 133 at p. 135.
3. Vithaldas Kanjishet *v.* Secretary of State for India, I.L.R. 26 Bom. 410 at p. 413 : 4 Bom. L.R. 28.
4. 4 C.L.R. 168, referred to in 7 C.W.N. 598.
5. 11 C.L.R. 9.
6. 3 C.W.N. 99 ; Kally Churn Sahoo *v.* Secretary of State of India, I.L.R. 6 Cal. 725 : 8 C.L.R. 90 : 4 Shome L.R. 95.
7. 7 C.W.N. 596 : 4 C.L.R. 168.
8. Marsh. 377 : 2 Hay. 473.
9. 21 W.R. 5.
10. Doe d. Bullen *v.* Mills, 2 A. & E. 17 ; Asupati *v.* Narayana, I.L.R. 13 Mad. 335 at pp. 337-38.
11. *Ibid.*
12. 15 M.L.J. 368 at p. 369.

Case-law.

A defendant, let into possession as tenant by the plaintiff, was held to be estopped from denying the latter's title without first surrendering possession.[1] The plaintiff's late *karnavan* let certain lands to the first defendant, who transferred his right to the second and third defendants. The lease having expired, the plaintff sued to recover the land. *Held*, that the third defendant could not oppose the plaintiff's claim, on any ground such as that the land belonged equally to the *tavazhi* of himself and of the plaintiff.[2] In a suit for rent, the tenant is estopped by Sec. 116, from raising a plea that the ostensible landlord was only a *benamidar* for somebody else.[3] Where it is proved that the occupation, by the defendant, of a house site, was by the permission of the plaintiff, the defendant is estopped, under Sec. 116, from denying the plaintiff's title.[4]

Suit against tenant during continuance of his tenancy—Effect.

The tenant is concluded for ever from filing a suit on his title if a suit is filed during the continuance of the tenancy and a decree is passed against him.[5] Section 116, Evidence Act, can only mean that if a tenant desires to challenge the title under which he is in occupatión he must quit the land.[6]

Action for use and occupation.

"In an action for use and occupation, it ought not to be permitted to a tenant, who occupies land by the licence of another, to call upon the other to show title under which he let the land...[7]

"The principle is that a tenant shall not contest his landlord's title, on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession."[8]

On denial of lessor's title.

The security of landlords would be infinitely endangered if such a proceeding were allowed."[9]

Estoppel to deny the title of the lessor continues to apply to the lessee until he has given possession to the lessor on determination of the tenancy.[10] This view gains support from *Mst. Billas Kunwar* v. *Desraj Ranjit Singh*.[11] In *M. Mujibur Rahman* v. *Isub Surati*,[12] it has been held that the tenant's estoppel operates even after the termination of the tenancy. The same view has been taken in *Smt. Charubala Basu* v. *German Gomes*.[13]

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1. Muthunaiyan *v.* Sinha Samavaiyan, 15 M.L.J. 419 : I.L.R. 28 Mad. 526.
2. 16 M.L.J. 351.
3. 144 P.R. 1906 : 23 P.W.R. 1907.
4. L.B.R. (1893-1900) 4.
5. J.A. Vertannes *v.* J.G. Robinson, A.I.R. 1928 Rang. 162 at p. 163.
6. *Per* Doyle, J, *ibid*.
7. *Per* Lord Kenyan in Coake *v.* Loxley, (1792) 2 R.R. 521.
8. *Per* Tindal, C.J., in Doe. d. Manton *v.* Austin, (1832) 9 Bing. 41.
9. *Per* Lord Ellenborough in Balls *v.* Westwood, (1809) 2 Camp. 12 ; *see* also Ketu Das *v.* Surendra Nath Sinha, 7 C.W.N. 596 ; Chandrika Prasad *v.* B.B. & C. I. Rly. Co., 39 C.W.N. 552 : 154 I.C. 945 : A.I.R. 1935 P.C. 59 ; J.A. Vertannes *v.* J.G. Robinson, A.I.R. 1927 P.C. 151 : 102 I.C. 639 : 54 I.A. 70 : 29 Bom. L.R. 1017 : 53 M.L.J. 71 : 1927 M.W.N. 492 : 39 M.L.T. 154 : 25 A.L.J. 713 ; B.K. Ghosh *v.* R.K. Joysurendra Singh, A.I.R. 1959 Manipur 27 at p. 28.
10. Gajadhar Lodha *v.* Khas Mahatadih Colliery Co., A.I.R. 1959 Pat. 562 at p. 568 : I.L.R. (1959) Pat. 806 : 1959 Bih. L.J. 376.
11. A.I.R. 1915 R.C. 96 : I.L.R. 37 All. 557; 42 I.C. 202 : 13 A.L.J. 991 : 17 Bom. L.R. 1006 : 22 C.L.J. 516 : 19 C.W.N. 1207 : 29 M.L.J. 335 : 18 M.L.T. 248 : 2 M.L.W. 830.
12. A.I.R. 1928 Cal. 546 : 32 C.W.N. 867 : 49 C.L.J. 1.
13. A.I.R. 1934 Cal. 449 : 59 C.L.J. 66 : 152 I.C. 212.

The bar of estoppel continues till the tenant has given up his possession.[1]

Bar of estoppel.

It is settled law that although a tenant who had been inducted on the land cannot say that his landlord had no title to the land at the time of setting, he can show that subsequent thereto his title to the land had come to an end either by transfer or otherwise.[2] The mere fact that the tenant had taken a lease from the Municipal Board cannot estop him from setting up his own title as against other person who was no party to that lease. If any estoppel arose it would have been only as between the lessor and the lessee.[3]

When there is an actual threat of eviction or an imminent danger of eviction, if a person denies the title of the landlord, that it will constitue an exception to Sec. 116 of the Indian Evidence Act.

Exception to section.

It is sufficient for the Court to say that in order to constitute an eviction by a person claiming under paramount title, it is not necessary that the tenant should be put out of possession or rejectment should be brought about, and a threat of eviction is sufficient, and if the tenant, in consequent of such threat, attorns to the claimant, he can set this up as an eviction by way of defence to an action for rent, subject to his proving the evictor's title, but there is no eviction if the tenant gives up possession voluntarily. If the true owner is armed with a legal process for eviction which cannot be lawfully resisted even though the tenant is not put out of possession, the threat to put him out of possession amounts in law of eviction. The threat by the third party as well as the submission to it by the tenant who attorns to him must be real and *bona fide*. For a threat of eviction by title paramount to constitute a good defence the party evicting must have good title and the tenant must have quitted against his will.[4]

10. Right of tenant to grant licence.—It is not only an owner who can grant a licence, but even a person, who can transfer his interest in the property, is also competent to grant the same. Section 53 of the Easements Act *inter alia* provides that a licence may be granted by any person who may transfer his interest in the property affected by the licence. It could not be disputed that the tenancy rights as such are transferable. It is a different matter that if the said rights are transferred without the consent of the landlord, in writing, the tenant may incur certain liability under the Act, but the person to whom such a licence is granted cannot take the plea that the tenant had not right to grant a licence in his favour.[5]

Where a tenant is indicted by an allottee of evacuee property before conveyance deed is granted in favour of the allottee the relationship of landlord and tenant comes into being by virtue of Sec. 116 of the Evidence Act and the tenant is estopped from disputing the title of the landlord.[6]

11. Encroachment made by tenant.—In *Kingsmill* v. *Millard*,[7] Parke, B. gave judgment in these terms :

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1. Bokka Sreeramulu *v.* Kalipatnapu Venkateswar Rao, A.I.R. 1959 A.P. 92 at p. 94 : (1959) 1 Andh. W.R. 148 : I.L.R. (1958) A.P. 836.
2. Mahendra Nath Sardar *v.* Mahendra Nath Haldar, A.I.R. 1948 Cal. 141 at p. 142 : 52 C.W.N. 1.
3. Tika Ram *v.* Moti Lal, A.I.R. 1930 All. 299 at p. 300 : 1930 A.L.J. 564 : 126 I.C. 29 : I.L.R. 52 All. 464.
4. P. Sella Pillai *v.* L. Balaraman, (1982) 2 M.L.J. 282 at pp. 285, 286.
5. Mohinder Singh *v.* Narain, A.I.R. 1982 Punj. 542 at pp. 543-544.
6. S. Tarlok Singh *v.* Naib Subedar Sewa Singh, A.I.R. 1982 Punj. 251 at p. 254.
7. (1855) 11 Exch. 313 at pp. 318, 319.

"It is laid down in all the cases—whether the inclosed land is part of the waste, or belongs to the landlord or a third-person—that the presumption is, that the tenant has inclosed it for the benefit of his landlord, unless he has done some act disclaiming the landlord's title. I am disposed to discard the definition, that the encroachment is made 'for the benefit of the landlord,' and to adopt that of Lord Campbell, *viz.* that the encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit. It is not necessary that the land inclosed should be adjacent to the demised premises; the same rule prevails when the encroachment is at a distance. That is now the law; and I must add, that even though at the time of making the encroachment there is nothing to rebut the presumption that the tenant intended to hold it as a portion of his farm, yet circumstances may afterwards occur by which it may be severed from the farm, for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding. But if the landlord is allowed to remain under the belief that the encroachment is part of the farm the tenant is estopped from denying it and must render it up at the end of the term as a portion of the holding."

It will be observed that in his judgment Parke, B. in terms states that the presumption that the tenant has inclosed for the benefit of the landlord applies, irrespective of whether the inclosed land is part of the waste or belongs to the landlord, and indeed he uses the word "encroachment" as appropriate in either case. He then goes on to state that in order to displace the presumption there must be communication to the landlord. That decision of high authority seems to be in accordance with justice and common sense, and the Court proposes to adopt and apply the principle laid down in *Kingsmill* v. *Millard*.[1]

12. Landlord.—In law even assuming that *K* not a contracting party had title to any extent in the suit property, the contract being one between the plaintiff and the defendant and actual possession being given by the plaintiff to the defenant in his own right, the plaintiff and not *K* must be regarded as the landlord for purposes of Sec. 116 of the Evidence Act.[2]

13. Estoppel of landlord.—Though the section does not refer to the landlord and his representatives, it undoubtedly applies even between representatives of the landlord and the tenant or his representatives. The plaintiffs, having received rents from the mortgagee, were held to be estopped from pleading the invalidity of the mortgage.[3] Where, upon the death of the last recorded tenant, some of his heirs had his name recorded in the landlord's office, but they held the land and went on paying the rent and obtained separate rent receipt for some years, until recently, when a rent suit was brought against two of them only, and the *jumma* was sold in execution of the decree, held that, after having accepted rent from all the heirs the landlord had no right to ignore some of them.[4]

14. Eviction by paramount title.—If a landlord lets a tenant into possession under a lease, then, so long as the tenant remains in possession undisturbed by any adverse claim—then the tenant cannot dispute the landlord's title. Suppose the tenant (not having been disturbed) goes out

English law.

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1. (1855) 11 Exch. 313 ; Smirk *v.* Lyndale Developments Ltd, (1974) 2 All. E.R. 8 at pp. 12, 13, 20.
2. Bokka Sreeramulu *v.* Kalipatnapu Venkateswar Rao, A.I.R. 1959 A.P. 92 at p. 94 : (1959) 1 Andh. W.R. 148 : I.L.R. (1958) A.P. 836.
3. 2 Agra 48 at p. 49.
4. 4 C.W.N. 608.

of possession and the landlord sues the tenant on the covenant for rent or for breach of covenant to repair or to yeild up in repair. The tenant cannot say to the landlord : "You are not the true owner of the property." Likewise, if the landlord, on the tenant's holding over, sues him for possession or for use and occupation or mesne profits, the tenant cannot defend himself by saying : "The property does not belong to you, but to another." But if the tenant is disturbed by being evicted by title paramount or the equivalent of it, then he can dispute the landlord's title.[1]

The rule of estoppel contained in Sec. 116 Evidence Act is not absolute. It is well settled by a catena of cases that where the true owner evicts the tenant, the tenant could attorn to the true owner and set up his title in answer to a suit for ejectment filed by the landlord who let him into possession. The only limitation is that so long as the tenancy is subsisting the tenant is not entitled to set up a *jus tertii* in a third person. But if the tenant is evicted from possession by the true owner, the tenancy comes to an end and there is nothing in law to prevent the tenant to attorn to the true owner. The eviction need not be by actual dispossession of the tenant. If the true owner is armed with a legal process for eviction, which cannot be lawfully resisted, even though the tenant is not put out of possession, the threat to put him out of possession would in law amount to eviction.[2]

On execution of the rent agreement the tenant is estopped from challenging the title of the landlord. The law as to the estoppel of a tenant under Sec. 116 of the Eviction Act, is a recognition, and statutory assimilation, of the equitable principles underlying estoppel in relation to tenants.[3]

The estoppel under Sec. 116 of the Evidence Act, is restricted to the denial of the title at the commencement of the tenancy. From this, the exception follows, that it is open to the tenant even without surrendering possession to show that since that date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title-holder or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title-holder. In order to constitute eviction by title paramount, it has been established by decisions in England and in India, that it is not necessary that the tenant should be dispossessed or even that there should be a suit in ejectment against him. It will be sufficient if there was threat of eviction and if the tenant as a result of such threat attorns to the real owner, he can set up such eviction by way of defence either to an action for rent or to a suit in ejectment. If the tenant, however, gives up possession voluntarily to the title-holder, he cannot claim the benefit of this rule. When the tenancy has been determined by eviction by title paramount, no question of estoppel arises under Sec. 116 of the Evidence Act.[4]

The law on the subject of eviction by title paramount has been summarized by Foa in his *General Law of Landlord and Tenant*, 8th Ed., p. 161, as follows :

Meaning of.

"Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term and the paramount title is the title paramount to the lessor which destroys the effect of the grant and with it the corresponding liability for payment of rent....

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1. Industrial Properties (Barton Hill) Ltd. *v.* Associated Electrical Industries Ltd. [Ward and Co. (Letters) Ltd. and others, third parties, Ward and Co. (Letters) Ltd., fourth party] (1977) 2 All. E.R. 293 at p. 301.
2. P. Krishnamurthy *v.* Thambaram Panchayat, (1970) M.L.J. 444 at p. 446.
3. Tej Bhan Madan *v.* II Addl. District Judge, (1988) 3 S.C.C. 137 at p. 141 : *see* also Pal Singh *v.* Sunder Singh, A.I.R. 1989 S.C. 758 at p. 763.
4. D. Satyanarayana *v.* P. Jagadish, (1987) 3 S.C.J. 537 at p. 541 : 1989 M.L.J. 1 at p. 4 (S.C.).

To constitute a good defence in this case three conditions must be fulfilled The eviction must have been from something actually forming part of the premises demised, the party evicting must have good title, superior to that of the lessor and that of the lessee; and the tenant must have quitted againt his will. Forcible exclusion, however, is not necessary, for it is sufficient if the tenant give up possession and the person claiming by title paramount enter here it is not necessary for the tenant actually to go out of possession, and if, upon a claim being made by a person with title paramount, he consents by an attornment to such person to change the title under which he holds or enter into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking.

When lessee can deny lessor's title.

The law, therefore, is perfectly clear that if there has been eviction by the title paramount, the lessee is not estopped from denying the title of his lessor.[1]

What is "eviction by title paramount".

In order to constitute eviction by title paramount, it is not necessary that the tenant should be dispossessed or even that there should be a suit in ejectment against him. It will be sufficient if there was threat of eviction and if the tenant as a result of such threat attorns to the real owner, he can set such eviction by way of defence either to an action for rent or to a suit in ejectment. If the tenant however gives up possession voluntarily to the title-holder, he cannot claim the benefit of this rule.[2]

What a tenant without surrendering possession can prove.

It is open to the tenant even without surrendering possession to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title-holder or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title-holder.[3]

As this section shows, a tenant is not estopped from showing that his landlord's title expired at a period subsequent to the date when the tenant was let into possession.[4] There is yet another exception to the rule enacted in Sec. 116. That exception is thus stated in the work just referred to :

> "A tenant may dispute his landlord's title, if he has been evicted by title paramount,...or if under threat of eviction by a party having a title paramount...he has attorned as tenant, pages 277 and 278."

This passage was quoted with approval by Spencer, J., in *Devarajulu* v. *Mohammad Jaffar Saheb.*[5]

The law on this point is stated clearly in Halsbury's *Laws of England*[6]:

English law.

> "Similarly, in order to constitute an eviction by a person claiming under paramount title, it is not necessary that the tenant should be put out of possession or ejectment should be brought. A threat of eviction is sufficient, and it the tenant, in consequence of

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1. Gajadhar Lodha *v.* Khas Mahatadih Colliery Co., A.I.R. 1959 Pat. 562 at p. 568 : I.L.R. (1959) Pat. 806 : 1959 Bih. L.J. 376 ; Banka Behari *v.* Madan Mohan, A.I.R. 1921 Cal. 532 : 26 C.W.N. 143 ; Ram Chandra *v.* Pramatha Nath, A.I.R. 1922 Cal. 237 : 35 C.L.J. 146.
2. *See* Halsbury's *Laws of England*, Vol. 20, 2nd Ed., at p. 176, para. 195 and Foa on *Landlord and Tenant*, 6th Ed., p. 194.
3. *See* Bobbili Gowresu *v.* Kottu Subhadramma, A.I.R. 1957 A.P. 961 at p. 962 ; K.S.M. Guruswami Nadar *v.* N.G. Ranganathan, A.I.R. 1954 Mad. 402.
4. Everest and Strodes' *Law of Estoppel*, 2nd Ed., p. 276.
5. I.L.R. (1909) 36 Mad. 58 : 19 I.C. 555.
6. Volume 18, para 961.

such threat attorns to the claimant, he can set this up as an eviction by way of defence to an action for rent... But there is no eviction if the tenant gives up possession voluntarily."

The question was considered in *Delaney* v. *Fox*.[1] The case was heard by Cockburn, C.J., and three Judges. The following observations from the judgment of Willes, J., may be usefully quoted :

> "It is competent to the tenant to show that his landlord's title has expired, but that has not happened in this case. It is then said that there is another exception to the rule which precludes the tenant from disputing his landlord's title, namely, where the tenant has been evicted by title paramount. No such eviction was proved here."

The same principle was laid down in *In re Emery* v. *Barnett*.[2]

The last mentioned case[3] was quoted with approval by the House of Lords in *Mathey* v. *Gurling*.[4] The same view was taken by a Bench of the Madras High Court in *Alaga Pillai* v. *Ramaswamy Thevan*.[5]

Against the covenant to pay the rent eviction by title paramount is a good defence. That defence obviously must be established by the party who sets it up.[6]

As explained by Lord Denman, C.J., in *Neale* v. *Mackenzie*,[7] title paramount is a title superior to those both of the lessor and the lessee against which neither is enabled to make a defence.

15. At the beginning of the tenancy.—The words can only apply to cases, in which the tenants are put into possession of the tenancy by the person to whom they have attorned, and not to a case where the tenants have been previously in possession.[8]

Although a tenant may not, during the continuance of the tenancy, deny that his landlord had a title at the beginning of such tenancy, he may show that such title has expired or has been defeated by a title paramount.[9]

"Letting into possession"; meaning of.

The tenant may not deny that his landlord had a title *at the beginning of the tenancy*. English text-writers, in discussing the principle, generally speak of *the letting into possession* as that which creates the estoppel, and the application of the principle has in more than one case[10] depended upon the answer to the question, what constitutes a letting into possession. "In one case," says Mr. Taylor, "where a party was in possession of premises without leave obtained from any one, and a person came to him and said, 'you have no right to the premises', upon which he acquiesced and took a lease from this person, the Court held that the relation of landlord and tenant was sufficiently created to debar the one from

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1. (1857) 2 C.B.N.S. 768 : 26 L.J.C.P. 248.
2. (1858) 4 C.B.N.S. 423 : 27 L.J.C.P. 216 : 4 Jur. N.S. 634 : 6 W.R. 634.
3. *In re* Emery *v.* Barnett, (1858) 4 C.B. N.S. 423 : 27 L.J.C.P. 216 : 4 Jur. N.S. 634: 6 W.R. 634.
4. (1922) 2 A.C. 180 : 91 L.J.K.B. 593 : 127 L.T. 247 : 38 T.L.R. 475 : 66 S.J. 386 ; *see* Valia Muhammad *v.* Savakutti Keyi, A.I.R. 1934 Mad. 197 at pp. 197-98.
5. A.I.R. 1926 Mad. 187 : 49 M.L.J. 742 : 1925 M.W.N. 878 : 91 I.C. 1024 : 23 M.L.W. 296.
6. Jogendra Lal Sarkar *v.* Mahesh Chandra Sadhu, A.I.R. 1929 Cal. 22 at p. 25 : I.L.R. 55 Cal. 1013 : 47 C.L.J. 387 : 32 C.W.N. 559 : 112 I.C. 172.
7. (1836) 1 M. & W. 747 : 2 Gale 174 : 6 L.J. Ex. 263.
8. Lal Mohammad *v.* Kallanus, I.L.R. 11 Cal. 519 at p. 523.
9. Ammu *v.* Ramkishna Sastri, I.L.R. 2 Mad. 266 ; Burn & Co. *v.* Bishomayi Dasi, 14 W.R. 85 ; Mohan Mahtu *v.* Shamasul Huda, 21 W.R. 5 ; Gopanand Jha *v.* Govind Prosad, 12 W.R. 109.
10. *See* the remarks of Tindal, C.J., in Claridge *v.* Mackenzie, 4 Manning & Granger's Reports 152.

disputing the title of the other. But, in a subsequent case, where a tenant, being already in possession of premises under a demise from a termor, had, at the expiration of the termor's right, when his own title also expired, entered into a parole agreement with another party, to hold the premises under him, but it appeared that he had done so in ignorance of the real facts of the case, and under the supposition that this party was entitled to the premises,—it was held that the agreement was not equivalent to first letting into possesion.[1]

The case of *Lal Mohammad* v. *Kallanus*,[2] has been followed in *Rahimannessa* v. *Mahadeb Das*.[3] The case however has been explained in *Ketu Das* v. *Surendra Nath Sinha*,[4] where the broad proposition that the tenant is not estopped appears to have been dissented from.[5] In *Vethal Das* v. *Secretary of State*,[6] it was said that the admission by the defendants that they had paid rent to the plaintiff was sufficient to raise *prima facie* presumption of title in the plaintiff's favour and to throw on them the onus of proving that the rent had been paid under a mistake. One who pays rent to another, believing him to be the landlord's representative, is not estopped from afterwards showing the want of title in that other ;[7] and there is nothing to prevent a tenant from questioning the title of the alleged assignee of his admitted landlord.[8] In *Subbaraya* v. *Krishnappa*,[9] the plaintiff demised certain waste land, adjacent to his own land, to a cultivator who brought it under cultivation, but the land was not assessed to revenue. The cultivator sub-let the land to a third person, who assigned his rights in it to the defendant, who obtained a *pattah* for the land. *Held* that he was not estopped from setting up a title adverse to the plaintiff. In cases where the doctrine of estoppel does not come into play, it is open to the tenant-defendant to urge that the plaintiff, as *benamidar* for the beneficial owner, is not entitled to claim rent from him.[10] It is open to the lessee to show want of lessor's title at a time anterior to the commencement of the tenancy,[11] and he may show expiry of the lessor's title.[12]

"At the beginning of the tenancy"; when applicable in India.

Case-law.

Presumption of title from payment of rent.

When estoppel is no bar tenant can deny landlord's title.

16. At the beginning of the tenancy—What is meant by "putting into possession".—This rule of estoppel only applies to cases in which tenants are put into possession of the property by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. This rule has been laid down in the case of *Lal Mohammad* v. *Kallanus*,[13] which was approved in *Ketu Das* v. *Surendra Nath Sinha*.[14] The same principle was laid down

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1. Section 90 : Sec. 103, 8th Ed.
2. I.L.R. 11 Cal. 519.
3. 12 C.L.J. 428 ; Yerraguntla *v.* Makku Malla, 25 I.C. 721 (Mad.) ; Rikhi Kesh *v.* Mela Ram, 73 I.C. 450 (Punj.) and Sugan Chand *v.* Chhabileram, 76 I.C. 884 (Nag.).
4. 7 C.W.N. 596.
5. *See* also Mathura Prasad *v.* Gokul Chand, I.L.R. 41 All. 654 ; Makhan Singh *v.* Baisakhi Ram, 50 I.C. 591 (Punj.).
6. I.L.R. 26 Bom. 410.
7. Beni Madhab Ghosh *v.* Thakurdas Mandal, B.L.R. (F.B.) 588 : 6 W.R. Act X, 71 ; Gauri Das *v.* Jagannath Rai, 7 W.R. 25.
8. Tilleshari Koer *v.* Asmedh Koer, 24 W.R. 101.
9. I.L.R. 12 Mad. 422.
10. Rahimannessa *v.* Mahadeb Das, 12 C.L.J. 428 ; 41 C.L.J. 341.
11. Prosunno Kumar Sen *v.* Mahabharat Saha, 7 C.W.N. 575.
12. Nakchedi Bhagat *v.* Nakchedi Misr, I.L.R. 18 All. 329.
13. I.L.R. 11 Cal. 519.
14. (1903) 7 C.W.N. 596.

in *Prosunno Kumar Sen* v. *Mahabharat Saha*.[1] In *Ketu Das* v. *Surendra Nath Sinha*.[2] it was observed that if the tenant did not obtain possession from a person who was only recognized as landlord, either by express agreement or by attornment, or formal acknowledgment by payment of rent, he may always show that his conduct was due to mistake or ignorance of facts relating to title, mis-representation or fraud. Where the tenants were in possession long before they signed the lease, and they signed the lease under pressure, under a mistake and in ignorance of facts relating to the appellants' title the execution of the lease does not raise any estoppel against them.[3]

The estoppel, as embodied in Sec. 116, Evidence Act is confined to the time when the tenancy commenced, and a tenant can always plead that the landlord who had originally title to the property had lost such title by any act of his or by operation of any law.[4]

In *K.S.M. Guruswami Nadar* v. *N.G. Ranganathan*,[5] Satyanarayana Rao and Rajagopalan, JJ., after an exhaustive review of the case-law bearing on the subject summarised their conclusions at page 514 (of M.L.J.) : (at p. 404 of A.I.R.), in the following words :

Exception to the rule of estoppel.

"From, this, the exception follows that it is open to the tenant even without surrendering possession to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title-holder or that...under a threat of eviction he had attorned to the paramount title-holder."[6]

Acknowledgement by the tenant of landlord by paying rent.

Once a tenant admits the title of his landlord and acknowledges that he is the person to whom he shall pay the rent. Sec. 116 will apply. Of course, it is open to very tenant to prove that he attorned under coercion or as a result of fraud, misrepresentation or mistake, but subject to this modification every tenant is estopped from denying the title of his landlord when with open eyes he has attorned to him and has admitted that he was entitled to receive the rent.[7]

The defendant having attorned to the plaintiffs and paid rent in respect of the accommodation to them, is estopped under Sec. 116 of the Evidence Act from denying their title as landlord.[8]

Section 116 of the Evidence Act *inter alia* precludes a tenant from denying a title of his landlord at the commencement of tenancy. There is no estoppel therefore against tenant to deny title of his landlord at some time prior to the commencement of tenancy or to deny title of property in interest of landlord. The words "at the beginning of the tenancy" in Sec. 116 of the Evidence Act ought not to be construed in a limited way. A new tenancy may begin though tenant has been in possession prior to the tenancy. It may begin by granting of a lease by a landlord or it may begin attorning to a new landlord.[9]

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1. (1903) 7 C.W.N. 575.
2. (1903) 7 C.W.N. 596.
3. U Po Shin *v.* Edward, A.I.R. 1934 Rang. 139 at p. 144 : 150 I.C. 898.
4. India Electric Work Ltd. *v.* Mrs. B.S. Mantosh, A.I.R. 1956 Cal. 148 at pp. 154-55 : I.L.R. (1957) 2 Cal. 613.
5. (1953) 2 M.L.J. 511 : A.I.R. 1954 Mad. 402.
6. Bobbili Gowresu *v.* Kottu Subhadramma, A.I.R. 1957 A.P. 961 at p. 962.
7. Ram Ditta Mal Moti Ram *v.* Charat Singh Lehna Singh, A.I.R. 1938 Pesh. 49 at p. 50 : I.L.R. 11 Pesh. 29 : 1938 Pesh. L.J. 57 : 177 I.C. 555.
8. Motilal *v.* Yusuf Ali, 1972 M.P.L.J. 187 at p. 193 : *see* also Kumar Krishna Prasad Lal Singha Deo *v.* Baraboni Coal Concern Ltd., A.I.R. 1937 P.C. 251.
9. **Gulamminya *v.* Sakhavatkhan, 2001 (2) G.L.R. 1068 at p. 1081.**

An analysis of the abovesaid provision would show that a tenant is absolutely forbidden from denying that his landlord at the beginning of the tenancy, had title to the immovable property. It provides that neither a tenant nor anyone claiming through a tenant shall be heard to deny that the particular landlord had at that date a title to the property. There is no exception even for cases where the lease itself discloses the defect of title.[1]

Persons let into possession cannot deny landlord's title.

It was held by their Lordships of the Privy Council that (page 567) in *Bilas Kunwar* v. *Desraj Ranjit Singh*,[2] that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.

But it does not necessarily follow that if the tenant is not let into possession by the landlord he is not equally estopped. According to the ruling of the majority of the Judges in the Full Bench case in *Venkata Chetty* v. *Aiyanna Goundan*,[3] a tenant who has executed a lease, but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion. The decision of the Madras High Court is consistent with the view taken by the Bombay High Court in *Vasudev Daji* v. *Babaji Ranu*,[4] and *Trimbak Rameshchandra* v. *Sheikh Gulam Zilani*.[5] In certain conceivable cases it may be possible for the tenant to show that there was no relationship of landlord and tenant established, and that the contract between the parties was void or voidable on the ground that the contract was entered into or procured by fraud, misrepresentation and coercion or by mistake. But this preliminary issue will have to be decided before the question of estoppel arises for consideration. If once the relation of landlord and tenant is established between the parites, the tenant would be estopped from disputing the landlord's title. There are no words in Sec. 116, Evidence Act, to show that the tenant must be put into possession by the landlord in order to estop that tenant from disputing the landlord's title. The words "at the beginning of the tenancy" should be construed to mean the time when the tenant was first let into possession. That view is not accepted by the majority of the Judges of the Full Bench in *Venkata Chetty* v. *Aiyanna Goundan*[6] and is not quite consistent with the view taken by the Bombay High Court in *Vasudev Daji* v. *Babaji Ranu*[7] and *Trimbak Ramchandra* v. *Sheikh Gulam Zilani*.[8] It may be that in some cases the tenant may be in possession before the new tenancy begins and he may attorn to another landlord by executing a lease which constitutes a new tenancy. The question, therefore, to be decided to each case under Sec. 116 would be whether a new tenancy had arisen and not whether the tenant had been let into possession by the landlord.[9]

In some cases tenant can prove no landlord-tenant relation exists.

On beginning of new tenancy or coming in of a new landlord.

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1. **D. Sreenivasa Mudaliar Charity *v.* Dhanasekaran, 2001 (3) C.T.C. 520 at p. 524 (Mad.).**
2. I.L.R. 37 All. 557 : A.I.R. 1915 P.C. 96 : 42 I.A. 202 (P.C.).
3. I.L.R. (1917) 40 Mad. 561 : 31 M.L.J. 712 : 5 M.L.W. 304 : 36 I.C. 817 : (1917) M.W.N. 55 (F.B.).
4. (1971) 8 B.H.C. 175.
5. I.L.R. (1905) 34 Bom. 329 : 5 I.C. 965 : 12 Bom. L.R. 208.
6. I.L.R. (1917) 40 Mad. 561 : 31 M.L.J. 712 : 5 M.L.W. 304 : 36 I.C. 817 : (1917) M.W.N. 55 (F.B.).
7. (1871) 8 B.H.C. 175.
8. I.L.R. (1905) 34 Bom. 329 : 5 I.C. 965 : 12 Bom. L.R. 208.
9. Shankar Rana Patil *v.* Jaganath Mathura Lal Bhat, A.I.R. 1928 Bom. 265 at pp. 266-67 : 30 Bom. L.R. 741 : 111 I.C. 911.

The question as to whether the words "at the beginning of the tenancy" occurring in Sec. 116, Evidence Act, refer to commencement of the particular lease of contract between the tenant and the landlord or whether they refer to the beginning of the occupation of land by the tenant or by the person through whom he claims is not free from doubt, but the better view is to hold that Sec. 116, Evidence Act, relates also to tenancies other than those in which the tenant was first let into possession.[1]

Attornment not excluded.

There is no warrant for construing the words "at the beginning of the tenancy" as implying only the point of time when the tenant was first let into the property. These words do not exclude from their purview cases of attornment. In relation to the successors-in-interest of the original landlord equally the provisions of Sec. 116 are available if the tenant attorns to the successors-in-interest. *Qua* such successors the words "at the beginning of the tenancy" must be deemed to refer to the relationship of landlord and tenant which was established between the tenant and the successors-in-interest upon the latter's acquiring the interest of the original landlord. This view finds some support from the decisions reported in the case of *Sital Prasad* v. *Badri Prasad*,[2] and *Parameswar Lal Agarwalla* v. *Dalu Ram Jalan*.[3] The defendant having attorned to *G.* and having treated him as his sole landlord is estopped from contending that the plaintiff, who has only stepped into shoes of *G.* is not the sole landlord.[4]

Tenant's denial relating to subsequent happenings.

The words to be particularly noted in this section are "at the beginning of the tenancy" and there is no justification for holding that even where the tenant's denial is related to facts which have happened subsequent to the commencement of the tenancy still the bar of estoppel comes into operation.[5] A Division Bench of the Allahabad High Court in *Ganpat Rai* v. *Multan*[6] proceeded to observe as follows :

Allahabad High Court view.

> "It seems to us quite clear that once a person is tenant of another person he cannot be allowed to deny that the person whose tenant he was, was the owner when the tenancy was created. He can no doubt admit that his landlord was the owner at the commencement of the tenancy and allege and prove by evidence that the landlord's estate has subsequently come to an end....."

The same view of the true interpretation of Sec. 116, Evidence Act, was taken by a Division Bench of the Allahabad High Court in the case of *Nakchhedi Bhagat* v. *Nakchhedi Misr*.[7] That was a case between a mortgagor and a mortgagee but the principle laid down there is clearly applicable to a case.

In *Krishna Prosad Lal Singh Deo* v. *Baraboni Coal Concern Ltd.*,[8] their Lordships observed...."nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end".

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1. Ramzani *v.* Bansidhar, A.I.R. 1935 Oudh 385 at pp. 386-87 : 154 I.C. 1089 : 1936 O.W.N. 449.
2. A.I.R. 1923 All. 53.
3. A.I.R. 1957 Assam 188 at p. 192.
4. Tej Bhan Madan *v.* 2nd Additional District Judge, Allahabad, A.I.R. 1980 All. 320 at pp. 322, 323.
5. Rev. Luckman, Chaplain *v.* Pearylal, A.I.R. 1939 All. 670 at pp. 671, 672 1939 A.W.R. 546 : 1939 A.L.J. 913.
6. A.I.R. 1916 All. 121 : 33 I.C. 7 : I.L.R. 38 All. 226 : 14 A.L.J. 263.
7. I.L.R. 18 All. 329 : 1896 A.W.N. 90.
8. A.I.R. 1937 P.C. 251 : 169 I.C. 556 : 64 I.A. 31 : I.L.R. (1938) 1 Cal. 1 : 31 S.L.R. 625 : 41 C.W.N. 1253 (P.C.).

While under Sec. 116, Evidence Act, a tenant during the continuance of the tenancy is estopped from denying that at the beginning of the tenancy his landlord had any title to the demised premises, it is open to a tenant in a suit for recovery of rent to show that the title of his landlord has expired or been legally determined.[1] In *Lodi Mulla* v. *Kali Das*,[2] various defences open to a tenant in a suit for recovery of rent are set out and one of these is that the landlord's or plaintiff's title has expired or been defeated by a title paramount. Such a defence is also permissible without the tenant having to surrender possession as is ordinarily necessary before a lessee can deny his lessor's title, however defective.[3]

Tenant can show landlord has life interest in the property only.

The tenants are precluded from denying that the landlord had the right to let the property on rent to their father; that, however, does not prevent them from showing that the landlord had only a life interest in the property and that when he died the property devolved on others.[4]

No estoppel against tenant if he was in possession.

In the case of *Lal Mohammad* v.*Kallanus*,[5] it has been held that a tenant is estopped to deny his landlord's title only if he was let into possession by the landlord and that there is no estoppel against the tenant if he was already in possession.

A contrary view has, however, been taken in the case of *Krishna Prosad Lal Singh Deo* v. *Baraboni Coal Concern Ltd.*,[6] that if the relation of the landlord and the tenant is established, the tenant is estopped from denying the landlord's title even though he was not put into possession by the landlord.

Valid tenancy; whether existed be decided first.

The tenant may, however, show that no valid tenancy has been created between the landlord and himself because the lease was executed under a mistake or in consequence of a fraud, misrepresentation or coercion practiced on him by the landlord. But in the absence of any circumstances as would avoid a contract, the execution of a lease or a verbal agreement to hold as a tenant, would constitute a valid tenancy and bring in the estoppel. This view is supported by the cases of *Krishna Rao Raghunath* v. *Ghammon Ghama*,[7] and *Ramjani* v. *Bansidhar*.[8] The principle of estoppel applicable will be the same whether a man was let into possession or whether he has continued into such possession by specific agreement between himself and the landlord.[9]

Only one kind of estoppel is dealt under Sec. 116, Evidence Act.

Section 116, Evidene Act, does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with only one kind of estoppel. The section postulates that there is a continuing tenancy, that it had its beginning at a given date from a given landlord, and

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1. *Vide* pp. 259 to 1053 of Woodfall's *Law of Landlord and Tenant*, Ed., 23.
2. I.L.R. 8 Cal. 238 : 10 C.L.R. 581.
3. Ram Rakhamal *v.* Munna Lal Maidan, A.I.R. 1931 Lah. 243 at p. 244 : 32 P.L.R. 338 : 133 I.C. 653.
4. Madan Lal *v.* Mst. Gur Dassi, A.I.R. 1928 All. 650 at p. 650 : 26 A.L.J. 1255 : 110 I.C. 376.
5. I.L.R. 11 Cal. 519 ; Faqir Mohammad *v.* Bhagu, A.I.R. 1925 All. 244 : 79 I.C. 371 ; Ramzan *v.* Arura Mal, 108 I.C. 182 (Lah.) and Rikhikesh *v.* Melaram, A.I.R. 1923 Lah. 483 : 73 I.C. 450.
6. A.I.R. 1937 P.C. 251 : 64 I.A. 311 (P.C.) ; Mst. Sajoo *v.* Basdeo, Prasad, A.I.R. 1937 Oudh 505 : 171 I.C. 84 and Krishna Rao Raghunath *v.* Ghamon Ghama, A.I.R. 1935 Bom. 144 : 155 I.C. 249.
7. A.I.R. 1935 Bom. 144 : 36 Bom. L.R. 1074 : 155 I.C. 249.
8. A.I.R. 1935 Oudh 385 : 154 I.C. 1029 : 1934 O.W.N. 449.
9. Dangam Venket Rajam *v.* Peddi Gundla Rajiah, A.I.R. 1953 Hyd. 241 at pp. 241-42 : I.L.R. (1953) Hyd. 200.

it provides that neither a tenant nor anyone claiming through a tenant, shall be heard to deny that the particular landlord had at that date a title to the property.

Section postulates a continuing tenancy.

It is too much to contend that a tenant in possession, if he has in fact attorned to a landlord, would still be entitled to challenge his derivative title, because at the beginning of the tenancy he was not let into occupation by the landlord in question. The beginning of tenancy in such a case would refer to the beginning of the new tenancy between the tenant and the landlord by virtue of the attornment and the tenant's occupation of the land thenceforward would be referable to that attornment.[1]

17. During the continuance of his tenancy.—Section 116 of the Evidence Act provides that no tenant of any immovable property shall, during the continuance of the tenancy, be permitted to deny his landlord's title.[2] To the same effect is the decision of the Privy Council in the case reported in *Chandrika* v. *B.B. & C.I. Rly. Co.*,[3] *viz.* "tenant cannot dispute his lessor's title so long as he remains in possession under an agreement which he has made with them."[4]

The words "during the continuance of the tenancy" have been interpreted to mean during the continuance of the possession that was received under the tenancy in question, and the Courts have repeatedly laid down that estoppel operates even after the termination of the tenancy so that a tenant who had been let into possession, however, defective it may be, so long as he has not openly surrendered possession, cannot dispute the title of the landlord at the commencement of the tenancy. The rule of estoppel is thus restricted not only in extent but also in time restricted, *i.e.* to the title of the landlord and during the continuance of the tenancy, and by necessary implication, it follows that a tenant is not estopped, when he is under threat of eviction by the title paramount, from contending that the landlord had no title before the tenancy commenced or that the title of the landlord has since come to an end.[5]

The rule of estoppel under Sec. 116 of the Evidence Act is restricted to the denial at the commencement of the tenancy it is open to the tenant without surrendering tenanted premises, to show that since the inception of the tenancy title of the landlord came to an end. The Supreme Court in its decision in *D. Satyanarayana* v. *P. Jagdish*,[6] held in para 3 thus :—

The rule of estoppel is restricted not only in extent but also in time.

> "The rule of estoppel is thus restricted not only in extent but also in time *i.e.* restricted to the title of the landlord and during the continuance of the tenancy; and by necessary implication, it follows that a tenant is not estopped, when he is under threat of eviction by the title paramount, from contending that the landlord had no title before the tenancy commenced or that the title of the landlord has since come to an end."[7]

This is a settled view that having regard to the provisions of Sec. 116 of the Evidence Act no tenant of immovable property or person claiming through such tenant shall during the continuance of the tenancy, be permitted to deny the title of the owner of such property. In this connection it would be relevant to make a reference to the decision of this Court in *Veerraju* v. *Venkanna*,[8] wherein this Court,

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1. Parameshwarlal Agarwalla *v.* Dula Ram Jalan, A.I.R. 1957 Assam 188 at pp. 191-92.
2. Bilas Kunwar *v.* Desraj Ranjit Singh, 14 I.A. 202.
3. A.I.R. 1935 P.C. 59.
4. Adhar Malik *v.* Kanhoo *alias* Kanhel Malik, 37 Cut. L.T. 1197 at p. 1201.
5. D. Satyanarayana *v.* P. Jagadish, (1987) 3 S.C.J. 537 at p. 540 : 1989 M.L.J. 1 at pp. 2,3 (S.C.).
6. A.I.R. 1987 S.C. 2192.
7. **Stanley Parker *v.* Bansraj, 2001 (2) Mah. L.J. 675 at p. 680 (D.B.).**
8. (1966) 1 S.C.R. 831 (839) : A.I.R. 1966 S.C. 629 at p. 633.

with reference to the decision of Privy Council (A.I.R. 1915 PC 96 at p. 98) took the view as under :—

> "A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.[1]

According to the law of England the person who has been let into possession as tenant is estopped from denying his lessor's title without first surrendering possession. The law here is the same.[2]

As is well known, the rule of estoppel in Sec. 116 is subject to the important qualification that a tenant is not estopped from contending either before or after the expiration of the lease that his landlord's title has terminated by transfer or otherwise, or been lost or defeated by title paramount.[3]

Erle, J., in *Mountnoy* v. *Collier*,[4] stated the reason for his rule thus :

A reason for such a rule.

> "...a tenant is liable to the person who has the real title, may be forced to pay him. either in an action for use and occupation, or in trespass for the mesne profits. It would be unjust if, being so liable he could not shew that as a defence..."

During the continuance of the tenancy, a tenant will not be permitted to deny the title of the deity (landlord) at the beginning of the tenancy.[5]

Title of the deity.

In *Bilas Kumar* v. *Desraj Ranjit Singh*,[6] the Privy Council observed :

> "A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord".

It is also well settled that during the continuance of the tenancy the tenant cannot acquire by prescription a permanent right of occupancy in derogation of the landlord's title by mere assertion of such a right to the knowledge of the landlord.[7]

These decisions received the approval of the Supreme Court in *Patna Municipal Corporation* v. *Ram Das*.[8] In the last cited case, the Supreme Court refrained from pronouncing upon the soundness of the following observations in *Bastacolla Colliery Co. Ltd.* v. *Bandhu Beldar*[9] :

Supreme Court view.

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1. Joginder Singh *v.* Jogindero, A.I.R. 1996 S.C. 1654 at p. 1656.
2. *See* Bhaiganti Bewah *v.* Himmat Bidyakar, 20 C.W.N. 1335 : 24 C.L.J. 103 ; Muthunayan *v.* Sinnasamanaiyan, I.L.R. 28 Mad. 526.
3. Seth Fida Hussain *v.* Fazal Hussain, A.I.R. 1963 M.P. 232 at p. 234 : 1963 M.P.L.J. 248 : 1963 Jab. L.J. 282.
4. (1853) 118 E.R. 573 at p. 577.
5. Atyam Veeraju *v.* Pachetti Venkanna, A.I.R. 1966 S.C. 629 at pp. 633-34.
6. I.L.R. 37 All. 557 at p. 567 : A.I.R. 1915 P.C. 96 at p. 98.
7. *See* Mohammad Mumtaz Ali Khan *v.* Mohan Singh, 50 I.A. 202 : A.I.R. 1923 P.C. 118 ; Madhavan Waman Saundalgekar *v.* Raghunath Venkatesh Deshpande, 50 I.A. 255 : A.I.R. 1923 P.C. 205 : 25 Bom. L.R. 1005 : I.L.R. 47 Bom. 798 : 50 I.A. 255 : 1923 M.W.N. 689 : 74 I.C. 362 : 47 M.L.J. 248 ; A.S. N. Nainapillai Marakayar *v.* T.A.R.A. Rm. Ramnathan Chettiar, 51 I.A. 83 : A.I.R. 1924 P.C. 65.
8. Civil Appeal No. 598 of 1963, dated 11th August, 1965 (S.C.).
9. A.I.R. 1960 Pat. 344 at p. 348 (F.B.) : I.L.R. (1960) 39 Pat. 140 : 1960 Bih. L.J. 245 : 1960 Pat. L.R. 100.

> "There are, however, some cases in which a lessee can acquire the right of a permanent right by prescription in spite of payment and acceptance of rent. Those are cases where the lessee pays rent on the basis of a notorious claim of permanent tenancy to the knowledge of the owner."

A lessee so long as he retains the possesion he obtained from the lessor cannot even after his term has expired set up in lessor's suit for ejectment, the defence that the lessor had no title at the time the lease was granted.[1] The estoppel arises not by reason of some fact agreed or assured to be true, bus as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor.[2]

How estoppel arises.

As said in *Bhaiganti Bewah* v. *Himmat Bidyakar*,[3] the words "during the continuance" of the tenancy occurring in Sec. 116 would mean during the continuance of the possession that was received by or under the tenancy in question.

"During the continuance" : meaning of.

In this judgment, there is reference to the leading case of *Doe Dem Joseph Manton* v. *Austin*[4] in which Tindal, C.J., is reported to have said :

> "The principle is that the tenant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession."

The real significance of the term 'during the continuance' is that so long as the tenant is continuing in enjoyment of the benefits of the tenancy he shall not be allowed to deny or challenge the author to the said tenancy.[5]

Real significance of term "during the continuance."

The words "continuance of the tenancy" in Sec. 116, Evidence Act, applies to the tenancy in question in the same suit in which the estoppel arises and not to any previous tenancy.[6]

Following *Bilas Kunwar* v. *Desraj Rajit Singh*,[7] it has been held in *Ganpat Rai* v. *Multan*,[8] that this estoppel continues during all the time that the relation of landlord and tenant subsists and right up to the time that relationship ceases to exist and this disability is not removed by the cessation of the tenancy.

A mortgagee in possession is estopped from denying the title of his mortgagor during the continuance of his mortgage.[9] It is not open to the mortgagee to resist redemption on the ground that the mortgagor had no right in the property or such right belongs to a third party. It is well-settled that a mortgagee is estopped from denying the title of the mortgagor to the mortgaged property. When a mortgagee has accepted the security for the advance made by him, it is not open to refuse to allow redemption when the money advanced is tendered or paid to him.[10] It is

Mortgagee in possession and "denial of title."

Mortgagee cannot refuse to allow redemption.

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1. Bhaiganti Bewah *v.* Himmat Bidyakar, 20 C.W.N. 1335 : 24 C.L.J. 103 ; *see* the judgment of Mookerjee, J., dealing with the history of the law on the subject.
2. Baman Das *v.* Nilmadhab, I.L.R. 44 Cal. 771 : 20 C.W.N. 1340.
3. 24 C.L.J. 103 : 20 C.W.N. 1335.
4. (1832) 9 Bing. 41.
5. Udaypratap Singh Deo *v.* Krushna Padhano, A.I.R. 1952 Orissa 95 at pp. 97-98.
6. Nagindas Sankalchand *v.* Bapalal Purshotam, A.I.R. 1930 Bom. 395 at p. 396 : 32 Bom. L.R. 692 : 125 I.C. 695 : I.L.R. 54 Bom. 487.
7. I.L.R. 37 All. 557 (P.C.) ; *see* also Mohammad Azim Khan *v.* Raja Saiyid Mohammad Sadad Ali Khan, A.I.R. 1931 Oudh 177 at p. 227.
8. I.L.R. 38 All. 226.
9. Ibad Ashraf *v.* Inayet Ullah, 80 I.C. 62 (Oudh).
10. S.K. Raffiquddin *v.* Sk. Samsuddin, 37 Cut. L.T. 1257 at pp. 1262, 1263.

open to the tenant to prove a subsequent cessor of the landlord's title, it is not necessary actually for the tenant to go out of possession and if upon a claim being made by a person with title paramount he consents by an attornment to such person to change his title under which he holds or enters into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking.[1] A tenant cannot be allowed to hold over and ramain in possession and then uses that possession as a lever to support a case in which he denies the landlord's title.[2] *A* purporting to be the *dharmakarta* of a temple, gave a lease of the temple properties to *B*; during the tenancy *C* and not *A* was declared in a separate suit to be the rightful *dharmakarta*. *Held* that in a suit by *A* for rent, *B* was estopped from denying *A*'s title.[3]

Estoppel and its effect after the expiry of tenancy.

Section 116, Evidence Act, confines the operation of the doctrine of estoppel against a tenant during the continuance of the tenancy. When the period of tenancy has expired Sec. 116, Evidene Act, has no application.[4] The plaintiffs mortgaged a certain property to defendants 1 and 2, and the latter subsequently leased the property to defendants 4 and 5. During resurvey defendants 4 and 5 were registered as *pattadars*. The lessors while in possession attorned to the zamindar. The plaintiffs brought a suit for recovery of the property after redemption. *Held* that the lessees were estopped from denying the right of plaintiff even after they attorned to the zamindar for there was no change in the nature of their possession.[5] Even prior to the enactment of the Evidence Act the view prevalied that a tenant who had been let into possession was estopped from denying the landlord's title without surrendering possession.

Applicability of principle of estoppel to cases of attornment to successor-in-interest of original landlord.

Even if it be assumed that Sec. 116 of the Evidence Act does in its strictness apply to cases of attornment the principle of estoppel would still apply in regard to tenant who has by payment of rent or otherwise attorned to the successors-in-interest of the original landlord. There is good authority for the proposition that the principle of estoppel enshirned in Sec. 116 of the Act is not the only kind of estoppel which may arise between a landlord and his tenant and that Sec. 116 is not exhaustive. In *Krishna Prosad Lal* v. *Baraboni Coal Concern Ltd*,[6] it has been held that Sec. 116 does not profess to deal with all kinds of estoppel which may arise between a landlord and tenant. The same view has been taken in some other cases also.[7]

In *Bhaiganti Bewah* v. *Himmat Bidyakar*,[8] the suit was brought for ejectment of a tenant after the expiry of the tenancy. Sir Lancelot Sanderson, C.J., and Asutosh Mookerji, J., held that the tenant was estopped from disputing the title of the landlord.

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1. Ram Chandra Chatterjee *v.* Promotho Nath Chatterjee, 35 C.L.J. 146 ; Ramaswami *v.* Alaga, 79 I.C. 881 (Mad.).
2. Ekoba *v.* Dayaram, 55 I.C. 353 (Bom.).
3. Devalraju *v.* Mohammad Zaffer, I.L.R. 36 Mad. 53.
4. Mst. Munia *v.* Manohar Lal, A.I.R. 1941 Oudh 429 at p. 432 : 1941 O.W.N. 648 : 194 I.C. 161.
5. Majji Gurunaidu *v.* Gottemukkalafenkataraju, A.I.R. 1938 Mad. 85 at pp. 86, 87 : 46 M.L.W. 742 : 1937 M.W.N. 1221 : 176 I.C. 564.
6. A.I.R. 1937 P.C. 251.
7. *See* Parameshwar Lal Agarwalla *v.* Dalu Ram Jalan, A.I.R. 1957 Assam 188 at p. 192 ; John Nadjarian *v.* E.F. Trist, A.I.R. 1945 Bom. 399 and at p. 567 : Tej Bhan Madan *v.* 2nd Addl. District Judge, Allahabad, A.I.R. 1980 All. 320 at p. 323 A.I.R. 1959 Pat. 562.
8. A.I.R. 1917 Cal. 498 : 35 I.C. 7.

Rule is based on reason and justice.

The rule of estoppel is no longer open to question after the pronouncement of their Lordships of the Privy Council in *Mst. Bilas Kunwar* v. *Desraj Ranjit Singh*,[1] *Makhan Singh* v. *Baisakhi Ram*,[2] *Shams-ud-din Khan* v. *Agha Sayid Fateh Shah*,[3] *J.A. Vertames* v. *J.G. Robinson*,[4] *Dayalal and Sons* v. *Ko Lon*,[5] *Mujibar Rahman* v. *Sheikh Issub Surati*,[6] *Usman Koya* v. *Chidriamokkausa Akoth*,[7] *Krishnaswami Naidu* v. *Jayalakshmi Ammal*,[8] *Charubala Basu* v. *Gomes*,[9] *Ganpat Rai* v. *Multan*[10] and *Krishna Prasad* v. *Adyanath Ghatak*.[11]

Until surrender of tenancy is made estoppel continues.

The rule of estoppel is grounded on the tenant being still on the premises which he had obtained from the landlord. The estoppel continues so long as the tenant does not surrender possession to the landlord.[12]

The estoppel of a tenant against questioning the title of the lessor relates to the date when the lease was granted.[13] Section 116 does not debar one who has once been a tenant from contending that the title of his landlord has been lost or that his tenancy has determined.[14]

Estoppel against statutory tenant.

The bar of estoppel would come into play during the continuance of tenancy and not when the tenancy is determined. In the instant case, the tenancy was determined by the plaintiff by giving a notice and the defendant was continuing in the premises as a statutory tenant. It is, therefore, difficult to say whether the estoppel as envisaged in Sec. 116 of the Evidence Act would be applicable to the facts of the instant case.[15]

18. Inter-pleader suit maintainable.— The rule is that an inter-pleader suit is only maintainable if the landlord subsequent to the letting has done some act whereby his right to recover the rent is entangled. In order that an interpleader suit may lie, the claim of the party other than the landlord must be consistent with the title of the landlord at the commencement of the tenancy in question.[16]

19. Ways in which relation arises.—By written contract,[17] by an oral contract, there may have been no express contract, written or oral, but the relation of landlord and tenant may be inferrable from circumstances; for example, from submitting to a distress.[18] Where the case falls under Cl. (*a*), there may be the

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1. A.I.R. 1915 P.C. 96 : I.L.R. 37 All. 557 (P.C.).
2. A.I.R. 1919 Lah. 334 : 50 I.C. 591.
3. A.I.R. 1924 Oudh 309 : 75 I.C. 936.
4. A.I.R. 1928 Rang. 162 : 120 I.C. 657.
5. A.I.R. 1929 Rang. 15 : I.L.R. 6 Rang. 657.
6. A.I.R. 1928 Cal. 546 : I.L.R. 56 Cal. 15.
7. 15 M.L.J. 368.
8. A.I.R. 1931 Mad. 300 : I.L.R. 54 Mad. 671.
9. A.I.R. 1934 Cal. 499 : 152 I.C. 212.
10. A.I.R. 1916 All. 121 : I.L.R. 38 All. 226.
11. A.I.R. 1944 Pat. 77 : I.L.R. 22 Pat. 513.
12. Mst. Hirabai *v.* Jiwanlal Palode, A.I.R. 1955 Nag. 234.
13. Velayudhan Pillai *v.* Ouseph, A.I.R. 1953 T.C. 574 at p. 575 : 8 D.L.R. (T.C.) 420.
14. Ammu *v.* Ramakishna Sastri, I.L.R. 2 Mad. 226 at p. 229.
15. Nanavati Jayantilal Chunilal *v.* Shah Ashabhai Mahijibhai (1974) 15 Guj. L.R. 675 at p. 683.
16. Yeswant Bhikai Vilankar *v.* Sadashiv Govind Arekar, A.I.R. 1940 Bom. 414 at p. 415 : I.L.R. (1940) Bom. 842 : 42 Bom. L.R. 881 : 191 I.C. 655.
17. *See* Brievier *v.* Palmer, 3 Estop 213 and Ramsbetoom *v.* Morby, 2 M. & S. 445.
18. *See* Panton *v.* Jones, 3 Camp. 372 : Allason *v.* Stark, 9 A. & E. 255 ; Dood Harvey *v.* Francis 2 M. & Rob. 57 : Lodai Mollah *v.* Kally Dass Roy, I.L.R. 8 Cal. 238 at p. 241 : 10 C.L.R. 581 : 48 Shome L.R. 275.

following defences. The execution of the contract may be denied. The acutal execution may be admitted but it may be contended that the contract is invlaid, because it was obtained by fraud, force, undue influence. The defendant may show that the plaintiff's title has expired or has been defeated by a title paramount; but the defendant cannot deny that the plaintiff had a title at the time when the defendant was let into possession.[1] A tenant for life was in possession of certain premises and the defendant lived with her in those premises until the death of the tenant for life, and continued to do so after her death, without coming to any arrangement with the reversionary heir, the plaintiff. The plaintiff having subsequently brought an action for use and occupation, it was argued that the action should have been in ejectment and not for use and occupation. *Held* that the action for use and occupation would lie, as the defenant occupied the cottage with the plaintiff's permission. Therefore, he was not a trespasser and he could set up no adverse title to the permises,[2] the plaintiffs were, in virtue of a *sanad*, the registrered holders of a village. The descendants of the first owners of the village (the defendants) resigned their title to it to the plaintiff's ancestors, on condition of retaining a third of the lands rent-free as their share. *Held* that no relationship of landlord and tenant arose between the parties.[3] The suit was to recover possession of certain lands, to which the defendant pleaded that they were included in a *mulgeny* lease granted to him. *Held* that, as the defendant was, in fact, a trespasser setting up a pretended tenancy the case must, be regarded not as one between landlord and tenant.[4]

Defence.

20. Continuance of relation of landlord and tenant.—The relation of landlord and tenant may be continued by the admissions of the parties.[5]

Where the petitioners are claiming as lessees they are estopped from raising any question as to the title to the lessors.[6]

Tenancy arising from acknowledgement by tenant.

Section 116 of the Evidence Act introduces the principle of estoppel against tenant. It states that no tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property. Having acknowledged the plaintiff-appellant as the sole landlord in Ext-1, the defendant-respondent will now be estopped from challenging the position asserted and acknowledged by him in Ext. 1. The principle of estoppel will, therefore, stand as a bar to any such contention being raised.[7]

21. Whether relation of landlord and tenant exists between grantor and grantee.—No relation of landlord and tenant exists between a grantor and grantee.[8] A tenant cannot question his landlord's title, but a grantee in fee may do so. It is not a case of a permissive occupation. The possession is in the sole right of the grantee.[9] There is, therefore, no estoppel where the occupant is not under

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1. *See* Sec. 16, Evidence Act ; Lodai Mollah *v.* Kally Dass Roy, I.L.R. 8 Cal. 238 at pp. 241-42, 10 C.L.R. 581 : 4 Shome L.R. 275.
2. Hellier *v.* Silcox, 19 L.J.Q.B. (N.S.) 295 ; *see* Krishnaji Ramachandra *v.* Antaji Pandurang, I.L.R. 18 Bom. 256 at p. 259.
3. Jesignbhai *v.* Hataji, I.L.R. 4 Bom. 79.
4. Mardin Saiba *v.* Nagapa, I.L.R. 7 Bom 96 at p. 99.
5. 5 Bom. L.R. 274 at p. 291.
6. Mohammad Israil *v.* Union of India, A.I.R. 1976 Cal. 189 at p. 195.
7. Baidya Nath Prasad *v.* Ramji Prasad Gupta, A.I.R. 1981 Pat. 275 at p. 277 : (1981) 29 B.L.J.R. 653..
8. 10 C.W.N. 747 at p. 753 ; Averill *v.* Jones, 4 Bart. 180 (Amer.).
9. Osterhout *v.* Shoemaker, 3 Hill. 513 (Amer.).

an obligation, express or implied, that he will, at some time, or in some event, surrender the possesson. The grantee in fee does not receive the possession under any agreement that he will ever give it up.[1] With certain exceptions, a grantee is not estopped to deny the title of his grantor, and it is not broadly true to say that, when two persons trace title to the same grantor, each is estopped against the other, though it may be, as in such a case as that of *Dalton* v. *Fitzgerald*,[2] that, if a grantee assert no other right or title than that from a common grantor, he will be precluded, as against other grantees under the same instrument, from denying that his grantor had title when he conveyed.[3]

22. Effect of payment and receipt of rent.—It will be convenient to consider here the effect of the receipt and payment of rent as an admission of the relation of landlord and tenant. In the case of *Doe d Harvey* v. *Francis*,[4] Patterson, J., said : "that where a tenancy was attempted to be established by mere payment of rent...evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received". It has been held, however, that the tenant will be concluded by payment of rent, if he cannot show that it was paid under a mistake or that some other person was entitled to it, or cannot show some special reason to the contrary. Submitting to a distress and paying rent under it is a strong admission of title in the distrainer, but it is not conclusive and may be rebutted by showing that he never had any title. A distress by the landlord admits the tenancy to be a subsisting relation up to the time of distraining. Speaking generally, these principles have followed in India. *See* the following cases, *viz. Vasudev Daji* v. *Bapuji Pamu*,[5] *Trimbak Ram Chandra* v. *Sheikh Gulam Zilani*,[6] *Abhai Gobind Chaudhri* v. *Bejai Govind Chaudhri*,[7] *Beni Madhab Ghosh* v. *Thakur Das Mandal*,[8] *Mohesh Chandra Basu* v. *Ugra Kant Banarji*,[9] *Venkata Gopal* v. *Rangappa*.[10] When a person purchased an undertenure alleged to be transferable, and contended that the zamindar by receiving rent from him had conclusively admitted him as purchaser to be his under-tenant, it was held that mere acceptance of rent could not have such an effect though it might be otherwise if such acceptance were with notice or full knowledge of the fact.[11] Where a landlord with full knowledge of the facts accepted rent from his tenant's mortgagee he was thereby estopped from disputing the mortgage.[12] It has been held that Government is not estopped from claiming land as an escheat in default of heir by having received revenue from a person who entered after the death of the proprietor.[13]

Distress by landlord admits the tenancy.

Case-law.

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1. 10 C.W.N. 747.
2. 2 Ch. D. 86.
3. 10 C.W.N. 747.
4. 2 Maclean and Robinson's Scotch Appeals 57.
5. 8 Bom. H.C.J. 175.
6. I.L.R. 34 Bom. 329.
7. 9 W.R. 162 (admission of payment of rent held equivalent to admission of tenancy in the absence of evidence to rebut).
8. B.L.R.F.B. Sup. Vol. 588 : 6 W.R. (F.B.) 71 (payment of rent not conclusive, but only *prima facie* evidence, which the tenant is not estopped from rebutting if he can).
9. 24 W.R. 127 (receipt of rent by reversionary heir held to ratify tenure granted by widow while she held the estate).
10. I.L.R. 7 Mad. 365 (F.B.). (contract to pay a certain rent implied from payment for a number of years) ; *see* also Durga *v.* Jhinguri, I.L.R. 7 All. 511 at p. 515.
11. Mritan Jai Sirkar *v.* Gopal Chandra Sirkar, 2 B.L.R. (A.C.) 131 ; Gour Lal Sirkar, 2 B.L.R. (A.C.) 131 ; Gour Lal Sirkar *v.* Rameswar Bhumik, 6 B.L.R. App. 92.
12. Ganga Bissen *v.* Ram Gut Rai, 2 N.W.R. Rep. 49.
13. Government *v.* Giridhari Lal Rai, 4 W.R. 13.

Whether in the teeth of provisions of Secs. 115 and 116 of Evidence Act the defendants are estopped from denying the title of plaintiff. The trial Court believing the rent receipts produced held that the defendants were paying rent in respect of disputed property, it is clear from the said conclusion that the defendants held the plaintiff to be the landlord of the premises and under the provisions of Sec. 116 of the Evidence Act, the defendants are estopped from questioning the title of plaintiff and in view of that provisions, the objection raised by the petitioner for the first time is noteworthy of consideration in the writ petition.[1]

Effect of non-payment of rent for 12 years.

The relation of landlord and tenant, when proved to have existed, will not be determined by mere non-payment of rent even for 12 years.[2] A tenancy, once entered upon, continues and, under ordinary circumstances, mere length of enjoyment, without payment of rent, does not affect the relation of the parties.[3]

There is no specific provision either in the Transfer of Property Act or in the Evidence Act laying down that tenancy is created by mere acceptance of rent. Section 116 of the Evidence Act deals with estoppel against the tenant in certain cases and not against the landlord. Sec. 115 of the Evidence Act has no application to a case where the acceptance of rent is under a mistake. In such a case, the act of the landlord in accepting rent does not lead to the inference that this was done in pursuance of a contract of tenancy.[4]

Nor institution of rent-suit subsequently withdrawn.

When the relation of landlord and tenant has been established between two parties, the fact that the landlord instituted a suit for rent, which he afterwards withdrew, is not sufficient to show that the relationship has ceased.[5] Lessees are estopped from raising any question as to the title to the lessors.[6]

Proof of this relation.

Payment of rent proves the relation of landlord and tenant.[7] Where the defendant in a former suit admitted the relation of landlord and tenant between himself and the plaintiff, it was held that, in a subsequent suit for a *kabuliyat* by the plaintiff, it was sufficient for the latter to put in the defendant's deposition in the former case, as proof of the relation of landlord and tenant,[8] Discontinuance of payment of rent is not dispossession.[9] It has been held that the resumption of *lakhiraj* land does not dissolve the contract between the landlord (former *lakhirajdar*) and his tenant.[10]

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1. Rajendra Kumar *v.* District Judge, Jaunpur, A.I.R. 1996 All. 178 at p. 180.
2. Rungo Lall Mundul *v.* Abdool Guffoor, I.L.R. 4 Cal. 314 : 3 C.L.R. 119 : Thakurani Dasi *v.* Bisheshar Mukharji, B.L.F.B. Sup. Vol. 321 : Tiruchurana Perumal Nadan *v.* Sanguvien, I.L.R. 3 Mad. 118.
3. 15 C.P.L.R. 9 at p. 10.
4. Komalchand Gulabchand Jain *v.* State of Madhya Pradesh, 1963 M.P.L.J. 389 at p. 391.
5. Rango Lall Mundul *v.* Abdool Gaffoor, 3 C.L.R. 119 : I.L.R. 4 Cal. 314 : 3 Ind. Jur. 461.
6. Mohammad Israil *v.* Union of India, A.I.R. 1976 Cal. 189 at p. 195.
7. Vithaldas Kanjishet *v.* Secretary of State of India, I.L.R. 26 Bom. 413 : 4 Bom. I.R. 28 ; Lodai Molhah *v.* Kally Dass Roy, I.L.R. 8 Cal. 238 at p. 241 : 10 C.L.R. 581 : 4 Shome L.R. 275 ; Rajkishore Surma Chuckerbutty *v.* Grija Kant Lahiree Chowdhry, 25 W.R. 66 : 8 B.H.C.R. 175 and Durga *v.* Jhinguri, I.L.R. 7 All. 511 at p. 515 : 5 A.W.N. (1885) 135.
8. Kowsullaya Dossee *v.* Ram Juggutnath Dey Sircar, 9 W.R. 162.
9. Tarini Mohan Mazumdar *v.* Ganga Prasad Chakarvarti, I.L.R. 14 Cal. 649.
10. Marzhara Banu *v.* Azizanissa, B.L.R. Sup. Vol. F.B. 175.

23. Tenant's right to plead adverse possession.—The possession of a tenant is, in the eye of the law, the possession of his landlord.[1] The tenant, in order to claim title in himself, must first establish that he surrendered the tenancy to the landlord. Without establishing the fact of surrender, it is not open to the defendant to deny the title of the landlord and claim an adverse title from the mere fact of his continuing in possession. In *Atyam Veeraraju* v. *Pechetti Venkanna*,[2] Bachawat : J, following the decision of the Privy Council in *Bilas Kunwar* v. *Desraj Ranjit Singh*[3] observed as follows at p. 633 :

Tenant's possession is landlord's.

> "Having regard to Sec. 116 of the Indian Evidence Act, 1872 during the continuance of the tenancy, the tenant will not be permitted to deny the title of the deity at the beginning of the tenancy. 'A tenant who has been let into possession cannot deny his landlord's title, however defective it may be so long as he has not openly restored possession by surrender to his landlord'....."[4]

The possession of a tenant not being adverse to the title of his landlord, limitation cannot be applied in a suit by the latter against the former.[5] In a suit to recover possession, the defendant, by acknowledging himself to be the plaintiff's tenant, precludes himself from pleading adverse possession or limitation, whether he sues the defendant as a tenant or a trespasser.[6] So long as the relation of landlord and tenant exists, the mere omission by the tenant to pay his rent does not constitute an adverse possession.[7] *Ryots* are not in a position to plead adverse possession as against their landlord's right to recover rent.[8] In a suit for possession, where the defendant admits tenancy, the Court cannot regard his possession as adverse.[9] Where the relation of landlord and tenant had been established by a competent tribunal, it does not lie in the mouth of the tenant to ignore his landlord's title, or set up the point of limitation against him in bar of any suit he may bring.[10]

When tenant can plead adverse possession and limitation.

Whether the tenant is to assert his ownership by adverse possession over portions other than the portions which form a part of his tenanted accommodation, the provisions of Sec. 116 of the Evidence Act, are of no avail to the defendants.[11]

Where the relationship of landlord and tenant has once been shown to exist, no question of limitation can be said to arise.[12] Where lands are held as a remuneration for service, the fact that no services are performed does not of itself make the holding adverse.[13] A possession of land, which begins by permission does not become adverse, even

Question of limitation.

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1. Grish Chunder Roy *v.* Bhugwan Chunder Roy, 13 W.R. 191.
2. A.I.R. 1966 S.C. 629.
3. I.L.R. 37 All. 557 : A.I.R. 1915 P.C. 96.
4. Balasubramania Nadalvar *v.* Saraboji Gounder, A.I.R. 1973 Mad. 305 at p. 307.
5. Shristeedhur Mazoomdar Chowdhree Zemindar *v.* Kalikant *alias* Shib Chunder Bhuttacharjee, 1 W.R. 171.
6. Messrs. R. Watson & Co. *v.* Ranee Shurut Soonduree Debia, 7 W.R. 395.
7. Troyluckho Tarinee Dossia *v.* Mohima Chunder Muttuck, I.L.R. 18 Bom.. 256 at p. 258 : 7 W.R. 400 : 7 Bom. 40.
8. Lakhoo Khan *v.* J.P. Wise, 18 W.R. 443.
9. Baboo Daolee Chand *v.* Sham Beharee Singh, 24 W.R. 113.
10. Haradhun Roy *v.* Hulodhur Chunder Chowdhry, 25 W.R. 56 at p. 57.
11. Manmohan Service Station *v.* Mohd H.J. Japanwala, 54 (1994) D.L.T. 552 at p. 558.
12. Raj Kishore Surma Chuckerbutty *v.* Grija Kant Lahiree Chowdhry, 25 W.R. 66 at p. 67.
13. Komargowda *v.* Bhimaji Keshav, I.L.R. 23 Bom. 602 at p. 607.

though the occupier pays no rent to the owner of the land.[1] The mere non-payment of rent for a term of 12 years and more does not relieve an occupancy *ryot* from the status of a tenant, and would not create in him an independent title to the land.[2] A bare knowledge of the owner, that a tenant proposes to rely on the assertion of a certain title, will not in itself render the tenant's possession adverse.[3] But if the tenant not only openly asserts, to the knowledge of the owner an adverse interest, but proceeds to enjoy benefits claimable only on the basis of that interest, his possession becomes adverse, and limitation begins to run against the owner from that date.[4] The circumstance that rent has been reserved by, or been paid under, a void lease, does not preclude the tenant from setting up the plea of adverse possession, as to a limited interest.[5] The plea of limiation can be raised and determined in a suit brought by a landlord against a person, who is really a trespasser, but who has set up a false case of tenancy.[6]

Assertion of adverse possession by a tenant.

The mere assertion of adverse possession by an admitted tenant would not create any right superior to that of his tenancy even though followed by possession for over 12 years.[7] In *Srinivasa Ayyar* v. *Muthusami Pillai*,[8] it was held that a person who has lawfully come into possession of land as tenant cannot by setting up during the continuance of such relation any title adverse to the landlord, acquire by the operation of the Law of Limitation title as owner or any other title.[9] If a tenant is in possession of land and the landlord has not the immediate right of re-entry any assertion by the tenant would not make time run against the landlord. The real circumstance which makes the Law of Limitation run against the landlord is that he is entitled to possession. This principle has been enunciated in the case of *Maharaja Birendra Kishore Manikya* v. *Fuljan Bibi*.[10]

In the instant case, after the expiration of the last of the leases, the appellant continued in possession as tenant on the terms which are found expressed in the leases. *Held* that the point that the appellant was in adverse possession as from the date of such expiration was an impossible contention.[11]

View of the Lahore High Court.

There are authorities of the Lahore High Court to the effect that after the period of lease has expired, the relationship of landlord and tenant ceases and the tenant becomes a trespasser by the operation of sub-clause (*a*) of Sec. 111, Transfer of Property Act.[12]

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1. U.B.R. (1892-1896) 363 at p. 364.
2. Nazir Khan *v.* Proladh Dutta, I.L.R. 4 Cal. 661.
3. 5 Bom. L.R. 274 at p. 291.
4. *Ibid.*
5. *Ibid.*, at p. 292 ; Attorney General *v.* Davy, 19 Beav. 521 ; A.G. *v.* Payne, 27 Beav. 168.
6. 12 Bom. L.R. 274.
7. Gopal Chandra Das *v.* Satya Bhanu Ghoshal, A.I.R. 1926 Cal. 634 at p. 636 : 92 I.C. 963.
8. I.L.R. 24 Mad. 246.
9. Maharaja Birendra Kishore Manikya *v.* Fuljan Bibi, (1917) 25 C.L.J. 467 ; Sidik Haji Yacub *v.* Mohammad Faruq, A.I.R. 1926 Sind 71.
10. (1917) 25 C.L.J. 467 ; (Khatemey) Chaikuddin Chaudhury *v.* Ram Narayan Ghose, A.I.R. 1926 Cal. 364 (2) at p. 366 : 90 I.C. 17.
11. Chandrika Prasada *v.* Bombay Baroda and Central India Ry. Co., A.I.R. 1935 P.C. 59 at pp. 61, 62 : 1935 O.W.N. 379 : 68 M.L.J. 552.
12. *See* Ubedul Rahman *v.* Darbari Lal, A.I.R. 1933 Lah. 509 at p. 510 : 146 I.C. 845 : 34 Punj. L.R. 262 : Kirath Singh *v.* Kalu Singh, A.I.R. 1934 Lah. 129 : 149 I.C 948 : 35 Punj. L.R. 24 ; Asa Ram *v.* Kishan Chand, A.I.R. 1930 Lah. 386 : 120 I.C. 166, all Division Bench rulings.

The facts found in the case were that the plaintiffs had settled this land with the defendant for one year after the expiry of which the defendant had continued in possession without payment of rent and without any evidence of assent on behalf of the plaintiffs that he should remain in possession. The main contention of the defendant, however, was that he had been in possesson of the lands for more than 40 years. Therefore, the plaintiffs were not entitled to claim recovery of possession of the disputed lands. *Held* that no question of estoppel as against the defendant arises in this case.[1]

The defendants had been in adverse possession of the land for nearly 15 years prior to the purchase of the land by the plaintiffs. The plaintiff's case was that after he had purchased the land the defendants obtained their permission to occupy this land. *Held* that at the time of the date of the sale, the vendors of the plaintiffs had no right, title or interest in the land. The permission, if any, by the plaintiffs to the defendants would not estop them under Sec. 116, Evidence Act, from denying the plaintiff's title. It is still open to the defendants to plead that they acquired title by adverse possession.[2]

Proof of right to plead adverse possession.

Where there is proof of the relation of landlord and tenant, the tenant in possession must show that this relation was put an end to, at such a period anterior to the suit, as would entitle him to rely on his possession for 12 years as adverse to the landlord.[3]

Where the plaintiff has admitted that he is lessee of the defendant he cannot set up a case of acquisition of title by adverse possession.[4]

24. Surrendering right of tenancy in favour of third party—No new tenancy is created.—By a unilateral action of the .tenant of surrendering his right of tenancy in favour of a third party by delivering possession of the tenanted premises to the said third party, no new tenancy is created which may legally bind the landlord. By mere acceptance of rent for the tenanted premises tendered by the tenant in the name of the registered society, neither a new tenancy or a valid sub-tenancy in favour of the said registered society has been created.[5]

Whether the third party claiming title to the property in a proceeding of eviction is a proper party or not would depend upon the nature of the title of the plaintiff. Where there is a contractual relationship of landlord and tenant between the plaintiff and the defendant and where the defendant has been inducted into possession of the suit property as a premises tenant by the plaintiff, there is no question of impleading a third party as a party in the proceeding to set up his title to the suit property in view of the provisions of Sec. 116 of the Evidence Act, 1872. Any investigation about the title of the third party would be completely barred in such situation by reason of the rule of estoppel contained in Sec. 116 as the tenant cannot deny the title of the landlord at the commencement of the tenancy. Accordingly, in such cases the third person would not be a proper party to be added in the proceeding under Order 1, Rule 10 (2) of the Code of Civil Procedure.[6]

When third party claiming title.

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1. Sheogobind Bhakat *v.* Sujan Mahto, A.I.R. 1960 Pat. 156 at pp. 157, 158.
2. Maung Ba Than *v.* Maung Sein Wing, A.I.R. 1929 Rang. 170 at pp. 171, 172 : 120 I.C. 66.
3. Tiruchurna Perumal Nadan *v.* Sanguvien, I.L.R. 3 Mad. 118.
4. Adhar Malik *v.* Kanhoo, A.I.R. 1972 Orissa 154 at p. 155.
5. Ram Saran *v.* Pyare Lal, A.I.R. 1996 S.C. 2361 at p. 2367.
6. **Chandi Charan Paul *v.* Rabindra Nath Adhikary, 2001 (1) C.H.N. 668 at pp. 671-72 (Cal.)**

A tenant who had been let into possession cannot deny his landlord's title, however defective it may be so long as he has not openly restored possession by surrender to his landlord. Where the tenant is in possession he cannot be allowed to challenge the lessor's title.[1]

It is settled law that where a tenant who had been let into possession of the premises by the landlord, the tenant under Sec. 116 of the Evidence Act is estopped from denying the right and title of the lessor however defective it may be so long as he has not openly restored possession by surrender to his landlord. The tenant's estoppel operates even after termination of the tenancy as long as he continues in possession.[2]

25. Tenant may question landlord's title—Conditions for this.—Section 116 precludes a tenant denying that his landlord had a title at the beginning of the tenancy.[3] The rule of law, which prohibits a mortgagee or tenant from disputing his mortgagor's or landlord's title, does not bar the mortgagee or tenant from showing that the title of his mortgagor or landlord, under which he entered, has determined.[4] As a general rule, when a person takes land from another and pays rent to him, he cannot deny the title of his landlord. But he is not precluded or estopped from proving, when sued for rent, that that title has expired.[5] The rule that a tenant is estopped denying the title of his landlord applies only to the title of his landlord who lets the tenant in. If the tenant did not obtain possession from a person, who was only recognized as landlord, either by express agreement, or by attornment, or formal acknowledgment by payment of rent, he may always show that his conduct was due to mistake or ignorance of facts relating to title, misrepresenation or fraud.[6] If the tenant could have proved that his attornment proceeded from the representation of him who claimed as remainder-man, he might have proved that another was still alive and entitled.[7]

Tenant may question title of landlord's assignee.

A tenant is not prevented from questioning the title of the alleged assignee of his admitted landlord.[8]

A case of mere attornment after previous possession as a proprietor would not raise any estoppel.[9]

Estoppel contemplated by the section.

The estoppel contemplated by Sec. 116 of the Indian Evidence Act is restricted to the denial of title at the commencement of the tenancy and by implication, it follows that a tenant is not estopped from contending that the landlord had no title before the tenancy commenced or that the title of the lessor has since come to an end.[10] Tenant may resist eviction sought to be enforced by his landlord in a suit instituted for the purpose by raising a plea that his landlord's title has come to an

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1. Mahabir Prosad Lohia *v.* Karam Chand Thapar and Bros. Ltd., A.I.R. 1985 Cal. 209 at p. 214.
2. **Ram Krishna Jaiswal *v.* District Judge, Allahabad, A.I.R. 1999 All. 198 at p. 200.**
3. 5 Bom. L.R. 274 at p. 290.
4. Nakchedi Bhagat *v.* Nakchedi Misr, (1896) 16 A.W.N. 90 : I.L.R. 18 All. 329.
5. Messrs. Burn & Co. *v.* Busho Moyee Dossee, 14 W.R. 85; *see* also B.L.R. Sup.. Vol. 588 (F.B.) and Marsh 227.
6. 7 C.W.N. 506.
7. Williams Bertholomew, 1 B. & P. 326 ; Rogers *v.* Pitcher, 6 Taunt 202 ; *see* 7 C.W.N. 596 at p. 597.
8. Ranee Tillessuree Kooer *v.* Ranee Asmedh Kooer, 24 W.R. 101.
9. Kumar Kamakhya Narayan Singh *v.* Surrendra Karan Deo, A.I.R. 1928 Pat. 284 at pp. 292-93.
10. S.A.A. Annamalai Chettiar *v.* Molaiyan, A.I.R. 1970 Mad. 396 at p. 397.

end or been extinguished subsequent to the commencement of his tenancy notwithstanding Sec. 116, Evidence Act. The extinction of the landlord's title may come about either by voluntary or involuntary transfer of the title of the landlord or by operation of any law for the time being in force. It is obvious that there will be no difference in the legal effect of the extinguishment of the landlord's title even though such title vests in the tenant by the very mode which puts an end to it in the landlord. Where the defendants—appellants plead acquisition of paramount title to the suit house subsequent to their alleged tenancy which includes the plea of extinguishment of plaintiff's title since the commencement of their tenancy such a plea comes within the exception to rule of estoppel in Sec. 116 of the Evidence Act. The question of paramount title must be determined in plaintiff's suit to evict tenant and the defendants should not be driven to a separate suit.[1]

In *Fida Hussian* v. *Fazal Hussain*,[2] the Madhya Pradesh High Court has ruled that it is open to the tenant to plead that after the expiration of the lease the landlord's title had terminated by transfer or otherwise or has been lost or defeated by title paramount. In *Guruswami Nadar* v. *Ranganathan*,[3] a Division Bench of High Court has stated that it is open to the tenant, even without surrendering possession to show that, since that date of tenancy, the landlord's title had come to an end or that he (the tenant) was evicted by paramount title holder or that, even though there was no actual eviction or dispossession from the property under a threat of eviction he had attorned the tenancy.

In *P.V. Chinnia Gounder* v. *P. Punnuswami*,[4] it was contended that having regard to the fact that the property originally belonged to the Government, being a poromboke, which came to be assigned in favour of Manapparai Municipality and further having regard to the fact that the said Municipality had granted permission to the plaintiff to remain in the property, it was well open to him to set up title in the paramount title-holder, *viz.*, the Municipality. *Held* that as between the Municipality and the defendants, this title is yet to be decided. Consequently it was not open to plaintiff to deny their title.

In *Chidambara Vinayagar Devasthanam* v. *Duraiswamy*,[5] Natesan, J., has observed that it is open to a tenant even without surrendering possession to show that, since the commencement of the tenancy, the title of the landlord has come to an end.[6]

Tenant can deny land-lord's title within permissible limits.

It is to be noted that Sec. 116 of the Indian Evidence Act only provides for a restricted kind of estoppel. There may be other kinds of estoppel which have been applied by the Indian courts on principles of equity, justice and good conscience. What a tenant cannot be permitted to do is to deny the title of the original lessor. Similarly, he cannot be permitted to deny the derivative title of a reversioner if he has attorned to him. However, if he has not attorned to him or if he has not paid any rent to him, he can certainly deny. Similarly, he can also contend as against the original lessor that he has ceased to be his landlord because of some subsequent transfer. Where he denies the title within these permissible limits the estoppel will not be applied as against the tenant.[7]

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1. Krupasinghu Routra *v.* Purna Chandra Misra, A.I.R. 1973 Orissa 44 at p. 46.
2. A.I.R. 1963 M.P. 232.
3. A.I.R. 1954 Mad. 402.
4. A.I.R. 1977 Mad. 138 at pp. 139, 140.
5. (1967) 2 M.L.J. 181.
6. S.A.A. Annamalai Chettiar *v.* Molaiyan, A.I.R. 1970 Mad. 396 at pp. 297-98 : 83 M.L.W. 716.
7. Smt. Sugga Bai *v.* Smt. Hiralal, A.I.R. 1969 M.P. 32 at pp. 33-34.

Mere attornment creates no new tenancy.

Now it is clear that a mere attornment does not create a new tenancy. It may be that in some cases the attornment is not a mere attornment and as a result of the attornment a new tenancy is created. It is true that even a mere attornment does create an estoppel against the tenant, but that estoppel is not the same as is given statutory effect by Sec. 116, Evidence Act. It does not prevent the defendant from showing that he attorned in ignorance of fact that the plaintiff had no title.[1]

26. Tenant's right to dispute title of his landlord (assignment, succession, attornment, mistake, etc.).— In cases where there is a contractual relationship of landlord and tenant and defendant has been inducted into possession of the suit property as tenant by the plaintiff any enquiry about the title of a third party would be completely shut out by reason of the rule of estoppel. However, in cases were the plaintiff claim title to the suit property on the basis of inheritance, assignment, etc. and the tenant has not attorned to him, the above mentioned rule of estoppel does not operate against him and it is open to him in the suit to set up the title of a third person.[2] It is now established that estoppel does not extend to the derivative title of the persons claiming through the landlord,[3] that is to say, it is open to the tenant to deny the derviative title.

When derivative title is once established.

But if once the derivative title is established, the tenant cannot, even between himself and a person who claims the reversion, deny the title of the tenancy.[4]

In *Aras Khan* v. *Ali Mian*,[5] it was observed that, once the opportunity to establish title was given to the plaintiffs and plaintiffs did establish their title in the premises in question on the basis of their sale-deeds there was no reason to deny the equitable relief to the plaintiffs.

Section 116, Evidence Act, does not estop a tenant from denying the right as his landlord, of person who claims to have succeeded to the landlord who put the tenant in possession.[6]

Where the defendants have, apparently for some years, paid to the plaintiff the amount, or part of the amount, levied from them as quit-rent by the Government, such payments cannot be held to estop the defendants when better informed of their rights, from contesting the title of the plaintiffs to any further payments.[7] Where the plaintiff claims by a derivative title and the defendant has attorned to him, the defendant is not thereby estopped from showing that the title is really not in the plaintiff, but in some other person.[8] A defendant would not be estopped, under Sec. 116, from denying the plaintiff's title, because of the execution of a *kabuliyat* by him, while in possession of the holding, in favour of the plaintiff, who claims under a derivative title.[9] It is not necessary for the tenant

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1. John Nadjarain *v.* E.F. Trist, A.I.R. 1945 Bom. 399 at pp. 400-1 : I.L.R. (1945) Bom. 343 : 47 Bom. L.R. 209.
2. Urban Improvement Trust *v.* Raj Kumari, A.I.R. 1969 Raj. 131 at pp. 134, 135.
3. *Vide* Krishna Prosad Lal *v.* Baraboni Coal Concern Ltd., A.I.R. 1937 P.C. 251 : I.L.R. (1938) 1 Cal. 1 (P.C.).
4. K.S.M. Guruswami Nadar *v.* V.G. Ranganathan, A.I.R. 1954 Mad. 402 at p. 404 : I.L.R. (1954) 1 Mad. 341 : (1953) 2 M.L.J. 511.
5. A.I.R. 1985 Pat. 126 at p. 128.
6. Daulat Ram *v.* Haveli Shah, A.I.R. 1939 Lah. 49 at p. 50 : 41 P.L.R. 346 : 182 I.C. 433.
7. Jesingbhai *v.* Hataji, I.L.R. 4 Bom. 79 at p. 83.
8. *See* Rogers *v.* Pitcher, 6 Taunt. 202 ; Claridge *v.* Mackenzie, 4 M.T.Q. 143 and Gregory *v.* Doidge, 3 Bing 474 ; *see* Lodai Mollah *v.* Kally Das Roy, I.L.R. 8 Cal. 238 at p. 243 : 10 C.L.R. 581 : 4 Shome L.R. 275.
9. Lal Mohammad *v.* Kallanus, I.L.R. 11 Cal. 519 at p. 523.

to allege and prove coercion, fraud, mistake or misrepresentation.[1] The plaintiffs, as registered proprietors, brought a suit for recovery of rent. It was found that the defendant, in good faith and under the reasonable belief that the land held by him was included in the estate of a third person, attorned to him some four years prior to the suit, *held* that, upon the above facts, Sec. 60, Bengal Tenancy Act, did not estop the defendant from pleading that rent was due to a third person.[2] Certain property was mortgaged in 1884. In 1889, the appellant took from the mortgagors and another person a lease of certain lands, which included a portion of the mortgaged property. In a suit by the mortgagee on his mortgage to which the appellant was made a party defendant, *held* that the appellant was not, owing to the lease taken by him in 1889, estopped from showing that the mortgagors were not entitled to the whole of the mortgaged property at the time the mortgage was executed in 1884.[3] *Held* that the tenant, having come into possession under a former owner and having entered into an agreement with the defendant to pay him rent, in ignorance of the defect in the defendant's title, might show that the defendant was not his landlord.[4] The addmision of a man's representative character by payment of rent to him is not conclusive, but *prima facie* evidence, which the tenant is not estopped from reubuting if he can.[5]

Ryot.

Where the plaintiff is not the person from whom the land was originally taken, but claims under a derivative title from him, the *ryot* would not be precluded from denying such derivative title, or proving that the person from whom he took had conveyed land to some other person.[6] When a tenant is sued for rent, he can set up eviction by title paramount to that of his lessor, as an answer and, if evicted from part of the land, an apportionment of the rent may take place.[7] Where application is made to a Collector for a tenure liable to pay revenue and it is found that Government is not in a position to create such a tenure the applicant is not bound by his offer nor is he estopped thereby from pleading as against the landlord, that he is not liable to pay any rent.[8]

The plaintiff granted a *mulgenichit* of waste land, adjacent to his *warg*, to a person, who converted it into paddy fields; the land was not assessed in the name of any of these persons. Two years afterwards, the tenant let a sub-tenant into possession, who subsequently assigned his rights to the defendant, a neighbouring *warg*-holder, who got a *patta* for that land from the revenue authorities. The plaintiff sued to eject the defendant. *Held* that the defendant was not estopped, by Sec. 116, from denying the title of the plaintiff.[9]

27. Tenant paying rent on behalf of somebody else—Principle of estoppel would not be operative.—In order to operate as estoppel within the meaning of Sec. 115 of the Evidence Act, there must be a declaration or act made intentionally with a view to engender the belief in the person claiming to be the landlord that the tenancy is genuine. The tenant is accepting him to be the landlord that the tenancy is genuine. The tenant is accepting him to be his landlord and not paying

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1. Lal Mohammad *v.* Kallanus, I.L.R. 11 Cal. 519, cited in 7 C.W.N. 598.
2. 4 C.W.N. 606.
3. 7 C.W.N. 575.
4. Gregory *v.* Doidge, 3 Bing 474 ; *see* 7 C.W.N. 596 at p. 597.
5. Muddun Gopal Thakoor *v.* Ram Buksh Pandey, 6 W.R. (Act (X) 71 (F.B.).
6. Gouree Dass Byragee *v.* Jugurnath Roy Chowdhry, 7 W.R. 25 at p. 26.
7. Gopanund Jha *v.* Lalla Gobind Pershad, 12 W.R. 109.
8. Brijonath Chowdhry *v.* Lall Meah Munneepooree 14 W.R. 391.
9. Subbaraya *v.* Krishnappa, I.L.R. 12 Mad. 422 at p. 423.

the rent on behalf of somebody else. If the tenant is paying rent on behalf of somebody else, then the principle to estoppel would not be operative at all because it does not engender the belief of relationship of landlord and tenant. Therefore, the Court is required to examine the evidence on record from this point of view and decide the case if the appellant has succeeded in proving his case.[1]

28. *Benami* tenancy.—If a landlord sues *A* for rent, and afterwards discovers that *A* only holds *benami*, while *B* is the real tenant, he is not thereby estopped from suing *B* subsequently.[2] In this last case, which was heard by a Full Bench, Peacock, C.J., said .....It is a general rule of English law that when an agent enters into a contract in his own name as principal without disclosing the fact that he is acting merely as agent, the principal when discovered is liable to be sued upon the contract.[3] This rule is founded on principles of justice, and is applicable as well in this country as in England." It is also a rule of English law that when the agent contracts in his own name as principal, parol evidence though admissible to charge the real principal, is not admissible to discharge or exonerate the agent.[4] Where the contract on the face of its purports to have been made between *A* and *B*, and it is sought to show by oral evidence that not *A* and *B*, but *A* and *C* were the contracting parties, it may be said that this is really introducing oral evidence to contradict the writing. Norman, J., took this view in *Bipin Behari Chaudhry* v. *Ram Chandra Rai*,[5] and was of opinion that it could not be done. In *Trueman* v. *Lorder*,[6] the Lord Chief Justice said : "Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. If he is sued for the price and his identity is made out, the contract is not varied by appearing to have been made by him in a name not his own."

Cases under Indian Contract Act.

Wallis, J., in *Kuppu Konan* v. *Thirugnana Sambandam Pillai*,[7] has held that the plea of estoppel available against a tenant is only in favour of the real owner and not in favour of the *benamidar*.[8] But according to Calcutta High Court if a tenant has been inducted on the land by a person the tenant cannot question the title of the person who has so inducted him upon the land. The tenant is estopped from setting up the case that the person who had inducted him upon the land is the *benamidar* of some one. This position was stated in clear terms in *Lodai Mollah* v. *Kally Das Roy*,[9] and *Lal Mohammad* v. *Kallanus*.[10] The cases where a tenant can be allowed to raise a question as to the title of the landlord are also noticed in the said judgments. The principle is laid down in clear terms in *Bhaiganta Bewah* v. *Himmat Bidyakar*.[11] At page 11 Sir Asutosh Mukherjee puts the matter in this form : Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to

Estoppel not available to a *benamidar*.

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1. **Rajendra Kumar *v.* Smt. Shakuntala, 2000 (1) M.P.L.J. 44 at p. 49.**
2. Prasanna Kumar Pal Chaudhri *v.* Kailas Chandra Pal Chaudhri, 7 W.R. 97 ; Bipin Bihari Chaudhri *v.* Ram Chandra Rai, 5 B.L.R. 235 ; Jadunath Pal *v.* Prasannonath Dutt, 9 W.R. 71 ; Hiralal Bakshi *v.* Rajkissor Mazumdar, W.R. Sp. No. 58.
3. *See* Paterson *v.* Gandasequi, Addison *v.* Gandasequi, Thomson *v.* Davenport, 2 Smith's *Leading Cases*, 347, 356 and 364 and Secs. 232, 233 and 234 of the Indian Contract Act, IX of 1872.
4. *See* 2 Smiths's *Leading Cases*, 393, *et seq.*
5. 5 B.L.R. 235 at p. 243.
6. 11 Adolphus and Ellis's Rep. 595.
7. I.L.R. 31 Mad. 461.
8. *See* also Muthusamy Aiyar *v.* Soli Kanan, A.I.R. 1915 Mad. 48 (1) at p. 48.
9. I.L.R. 8 Cal. 238 : 10 C.L.R. 581.
10. I.L.R. 11 Cal. 519.
11. A.I.R. 1917 Cal. 498 : 35 I.C. 7 : 24 103 : 20 C.W.N. 1335.

dispute the title of his landlord. That this was unquestionably the law in this country before the Evidence Act was passed is clear from a long line of decisions. The doctrine was expressly fromulated in *Mohesh Chandra Biswas* v. *Gooroo Persad Bose*,[1] *Vasudeb Daji* v. *Babaji Kami*[2] and was impliedly recognized in *Bani Madhub Ghose* v. *Thakoor Doss Mundul*,[3] *Gouree Doss Byragee* v. *Jugurnath Roy*,[4] *Messrs. Burn & Co.* v. *Rusho Mayee Dossee*,[5] *Jainarain Bose* v. *Kadambini Dasi*.[6] There is further the weighty opinion of Sir Subramanya Ayyar, C.J., expressed in *Muthunanjan* v. *Suina Samavaiyan*,[7] that now, as before, a tenant who had been let into possession was estopped from denying the landlord's title without first surrendering possession.[8]

A distinction must be made between a case where a person claiming to be the owner of a certain property, leases it to a tenant but takes the lease-deed in the name of his *benamidar* and the case where a *benamidar* happening to be in possession of the property on behalf of the real owner grants a lease of it without disclosing his *benami* character. In the former case, it may be correct to say that tenant's estoppel operates in favour of the real lessor and not the *benamidar* who was not a party to the transaction. The decision in *Kuppu Kanan* v. *Thirugnana Sambandam Pillai*[9] was apparently a case of that kind. But in the second case referred to above *benamidar* clearly comes within the protection of Sec. 116, as he was the person who in fact leased the property and placed the tenant in possession.[10]

29. Tenant may show apparent landlord to be *benamidar*.—*A* executed a *kabuliyat* for a term of years to *B* as zamindar. *B* gave a *patni* of the zamindari to *C.C.* instituted a suit for arrears of rent against *A*, the lessee. *Held* that, in India, the English doctrine of estoppel did not apply, and that *A* was competent to deny his lessor's title as stated in the lease, and, by parol evidence, to prove a different title to that recital in the lease.[11] Where a lease is executed by a tenant in favour of the *benamidar*, the real owner, must be regarded, as the landlord, for the purposes of this section.[12]

30. Onus of proof on tenant to prove who real owner is.—Where a tenant, who has executed a *kabuliyat* in the name of *A*, pleads that *A* is *benami* for somebody else, the onus is on him to prove who that somebody else is and that the ostensible owner is not the real owner.[13]

31. Rent may be collected from real tenant, if *benami* tenant fails.—A Collector may give a decree for arrears of rent against the real lessees in possession another party being the ostensible owner of the lease and not denying liability.[14] When the *benamidars* were unable to pay rent, landlord was allowed to sue the persons really interested in the lease.[15]

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1. (1868) Marshall 377 : 2 Hay. 473.
2. (1871) 8 Bom. H.C.R. 175.
3. (1866) Beng. L.R. Sup., Vol. 588 : 6 W.R. Act 10, R. 71.
4. (1867) 7 W.R. 25.
5. (1870) 14 W.R. 85.
6. (1871) 7 Beng. L.R. 723n.
7. I.L.R. 28 Mad. 526 : 15 M.L.J. 419.
8. *See* also Trimbak Ramchandra *v.* Sheikh Gulam Zilani, I.L.R. 34 Bom. 329 : 5 I.C. 965.
9. I.L.R. 31 Mad. 461.
10. Vinjamuri Venkatanarasimhacharyulu *v.* Jami Gangaraju, A.I.R. 1941 Mad. 607 at p. 608 : (1941) 1 M.L.J. 554 : 53 M.L.W. 492 : 1941 M.W.N. 404 : 198 I.C. 616.
11. Kedar Nath Chuckerbutty *v.* Mrs. Benjamin Donzelle, 7 B.L.R. 720 : 20 W.R. 352.
12. Kuppu Konan *v.* Thirugnana Sambandam Pillai, I.L.R. 31 Mad. 461.
13. Mst. Inderbuttee Kooer *v.* Shaikh Muhboob Ali Ticcadar, 24 W.R. 44.
14. 9 W.R. 71 at p. 72.
15. Pitambur Sen *v.* Devenath Roy Chowdhry, 18 W.R. 132.

32. Conveyance may be shown to be *benami*.—The plaintiff having sued to obtain possession of certain land, which the defendant held as tenant, the defendant alleged that the plaintiff had conveyed to him the premises leased. This conveyance was found to be a mere *benami* transaction. *Held* that the plaintiff was not estopped from asserting the tenancy and, under the circumstances, was entitled to recover.[1]

The law does not preclude a person from contending that the purchase was made for him *benami*, by a purchaser at a revenue sale.[2]

33. Accepting a new lease.—Under English law, a tenant, by accepting a lease for a new term even less than the existing one, is held impliedly to surrender the previous tenancy. This doctrine has no application to land in India out of the Presidency towns. The new lease is generally regarded as confirmatory of the tenure.[3]

Holding over of tenancy coupled with payment of rent creates a renewed tenancy.

In the under-noted case the holding over of the land was coupled with the payment of rent which was accepted by the landlord even after the expiry of the term of the lease. In view of the concluding words of Sec. 116 of the Transfer of Property Act, a lessee holding over is in a better position than a tenant-at-will.[4]

34. Disclaimer of landlord's title—Effect.—The landlord's right of forfeiture arising from disclaimer of his title is not part of the contract of tenancy, but is a right, which the law implies in all cases from the relationship of landlord and tenant.[5] In the Bombay Presidency, a disclaimer of the lessor's title by the annual tenant of a holding, if made prior to suit, enables the lessor to recover possession, without proof of notice to quit.[6] The disclaimer of the landlord's title, made in the written statement, would not operate by itself as forfeiture, so as to render notice to quit unnecessary.[7] A manifest assertion by the tenant of a right, inconsistent with that claimed by the landlord to treat him as a tenant would be disclaimer of the landlord's title under the ruling in *Vivian* v. *Moat*.[8]

The rule with reference to the English law of forfeiture has been explained by Parke, B., in *Deo d Gray* v. *Stanion*.[9] At page 702, the learned Baron observes thus :

> "A disavow by the tenant of the holding under the particular landlord, by words only, is sufficient."

English law of forfeiture.

In explanation of this dictum the learned Baron adds :

> "But in order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant, or, to a distinct claim to hold possession of the estate, upon a ground wholly

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1. 10 C.L.R. 199.
2. 4 M.L.T. 316.
3. *See* Ramchandra Dutt *v.* Jageshchandra Dutt, 12 B.L.R. 229 ; Udit Narain Singh *v.* Abharam Rai, 4 W.R. Act X, 1 ; Pado Mani Dasi *v.* Jholla Pali, 7 W.R. 283.
4. Harihar Pal *v.* Sudhir Kumar Pal, A.I.R. 1988 Cal. 68 at p. 74.
5. Vekaji Krishna Nadkarni *v.* Lakshman Devji Kandar, I.L.R. 20 Bom. 354 at p. 361 (F.B.).
6. *Ibid.*
7. Ambabai *v.* Bhan Bin Rajaram, I.L.R. 20 Bom. 759 at p. 761 ; Dodhu *v.* Madhavrao Narayan Gadre, I.L.R. 18 Bom. 110 and Vithu *v.* Dhondi, I.L.R. 15 Bom. 407.
8. 15 Ch.D. 780 ; *see* 5 Bom. L.R. 290.
9. (1836) 1 M. & W. 695.

inconsistent with the existence of that relation which by necessary implication is a repudiation of it. An omission to acknowledge the landlord as such, by requesting further information will not be enough."

Basis of the rule; case-law.

This rule seems to have been based upon a consideration of not allowing a party to make inconsistent cases of different times by saying that the relationship of landlord and tenant does not exist between the palintiff and the defendant and then saying on a future occasion that he was a tenant on the land and that he was willing to treat the plaintiff as the landlord and should not, therefore, be ejected from the land. Some English authorities have held in these circumstances that the defendant is estopped. There have been several cases on this point in the Calcutta High Court and all of them followed the principle that when the tenancy was denied under the plaintiff he should not be entitled to claim on a future occasion that the tenancy under the plaintiff was subsisting. In such cases, as has been held in *Ekambar* v. *Hara Bewa*,[1] the principle of *res judicata* comes into play. The principle governing the law of forfeiture by disclaimer has been considered in many cases. *See* the cases of *Mallika Dasi* v. *Makhanlal Chowdhury*,[2] *Pratap Narain Mukherjee* v. *Biraj Dasi*,[3] and *Annada Charan Dutt* v. *Mohim Chandra Guha*.[4] The principle to be deduced from all these cases is that where the tenant denies the plaintiff title to recover rent from him *bona fide* on the ground of seeking information of such title or having such title established in a court of law in order to protect himself, he is not to be charged with disclaiming the plaintiff's title. But where the disclaimer is done not with this object but with an express repudiation of the tenancy under the plaintiff, it would operate as forfeiture.[5]

35. Deposit of rent—Notice.—The mere deposit of rent, in the Collector's office, by the purchaser of an under-tenure in his own name and that of the registered tenant, is not sufficient notice to the zamindar of such purchaser nor is the mere acceptance, by the zamindar, of rent so paid, an acknowledgment on his part of the purchaser as his under-tenant; but it is otherwise, when there is acceptance with notice, notwithstanding that the transfer had not been registered.[6]

36. Dispossession.—Where a person was in receipt and enjoyment of the rents from the *ryots*, the mere discontinuance of the payment of that rent would not constitute a dispossession, without his consent, within the meaning of Sec. 9 (new Sec. 6 of Act 47 of 1963) of the Specific Relief Act.[7] Where there is no eviction but a mere trespass, there is no suspension of rent, and mere discontinuance of rent by the *raiyats* does not amount to dispossession.[8]

37. Landlord's estoppel in case of tenant's dispossession.—Where the tenant (defendant) was dispossessed of the land leased to him, by a third party it was held that the landlord was precluded from suing the tenant for rent during the period of such dispossession.[9]

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1. (1911) 15 C.W.N. 335 : 8 I.C. 664 : 13 C.L.J. 1.
2. (1905) 2 C.L.J. 389 : 9 C.W.N. 928.
3. (1914) 19 C.L.J. 77 : 20 I.C. 823.
4. (1917) 26 C.L.J. 261 : 42 I.C. 673.
5. Hatimullah *v.* Mahamad Abju Chowdhury, A.I.R. 1928 Cal. 312 at pp. 314-15 : 32 C.W.N. 391 : 113 I.C. 13.
6. 2 B.L.R. (A.C.) 131.
7. Tarini Mohun Mozumdar *v.* Gunga Prosad Chuckerbutty, I.L.R. 14 Cal. 649 at p. 652.
8. Dhunput Singh *v.* Mahomed Kazim Ispahain, I.L.R. 24 Cal. 296-304.
9. Kadumbinee Dossia *v.* Kasheenath Biswas, 13 W.R. 338, ref. to in Dhunput Singh *v.* Mahomed Kazim Ispahain, I.L.R. 24 Cal. 296 (301).

38. Licensee.—An example of the principle applied to a licensee is supplied, by the case of *Doe d of Johnson* v. *Baytup*.[1] It was held that if he wanted to establish his title, he must first give up possession to the party by whom he was let in. In *Gaur Hari Mal* v. *Amirunnissa Khatun*,[2] the defendants pleaded that they, as members of the public community, were entitled to exercise a right of fishery therein. But is was held that the defendants being licensees, and having paid rent to the plaintiff, were precluded from setting up this defence.[3]

When certain persons who entered into possession of property executing a registered *kabuliyat* pleaded that in the absence of a lease there was no contract of tenancy and rent could not be recovered by suit; *held* that the suit might be treated as one for use and occupation and the defendants could not be heard to say that they are not liable for use and occupation.[4] A grantee of land attached to an office is estopped from setting up any title inconsistent with the terms of the grant, and an alienee from such grantee is similarly estopped.[5]

Where there is a finding that the defendant was in permissive occupation of the land under the plaintiff, the defendant is estopped from denying the title of the plaintiff.

The rule of estoppel between landlord and tenant is also extended under Sec. 116, Evidence Act, in terms to licensee and, for the matter of that, to a person in permissive occupation of immovable property.[6]

39. Estoppel of grantor's licensee.—The respondent came upon the land in dispute by the licence of the appellant. The respondent was held to be estopped from denyng the appellant's title, under Sec. 116, and the presumption was that he continued to hold under him.[7]

40. Estoppel in case of trade-mark.—A right to use a trade-mark may be created by licence or assignment, and the owner may be, in respect of a trade-mark estopped by his conduct from denying the title of another person.[8]

41. Estoppel of person working for patentee.—A licensee who has undertaken to manufacture machines, as being the subject of an invention, which has been patented, cannot, as between himself and the patentee, dispute the validity or novelty of the invention, or any other circumstances which go to make a valid patent.[9]

42. Licensee's estoppel.—Section 116, Evidence Act, does not state that every licence is revocable at the whim of the licensor.[10]

Rule.

This section embodies the rule that a lessee as well as a licensee are estopped to deny the title of the landlord or the licensor, as the case may be. The forfeiture of a right is in the nature of a penalty. In the absence of an express condition or a statutory provision

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1. 3 Adolphus and Ellis's Reports, p. 188.
2. 11 C.L.R. 9.
3. For further provisions as to licenses, *see* Secs. 52 to 56, Act V of 1882, whcih, however does not extend to Bengal.
4. Sheokaran *v.* Maharaja Prabhunarain, I.L.R. 31 All. 276 (F.B.).
5. Thayel Begam *v.* Venkatarama, 33 I.C. 858 (Mad.) referring to Kadakamvallemaru *v.* Othennan Nair, 10 I.C. 339 (Mad.) ; Seshamma Shettati *v.* Chickaya Hegade, I.L.R. 25 Mad. 507 and Alamelu Ammal *v.* Balu Ammal, 26 I.C. 455 (Mad.).
6. Dr. Dwijendra Mohan Lahiri *v.* Rajendra Nath, A.I.R. 1971 Assam. 143 at pp. 145-146.
7. U.B.R. (1892-1896). 561.
8. Lavergne *v.* Hooper, I.L.R. 8 Mad. 149 at p. 154.
9. *In the matter of* D.H.R. Moses, I.L.R. 15 Cal. 244.
10. U. Ahdeiksa *v.* Ma San Me, A.I.R. 1930 Rang. 29 at pp. 30-31 : I.L.R. 7 Rang. 617 : 121 I.C. 787.

prescribing for forfeiture on the denial of the owner's title, it is not permissible to invoke the law of forfeiture applying the analogy of a lessor and lessee.[1] The undernoted cases[2] have taken the view that a denial of title of the owner by the licensee will not entail forfeiture.

Third party seeking to raise controversy about licensor's title—Licensee cannot question licensor's title.

The learned counsel for the appellant, had contended that the plaintiff was only one of the co-owners of the property and his own brother Nokhe Lal who was another co-owner, had entered the witness-box on behalf of the defendant-appellant and thus it should be held that the said co-owner wanted the defendant appellant to remain in occupation of the accommodation. In this situation, the learned counsel contends that the suit could not be decreed at the instance of only one of the co-owners of the property. In Court's opinion, this contention is untenable. The finding of both courts below is that the defendant-appellant had been inducted as a licensee by the plaintiff alone. Subsequently, it seems that Nokhe Lal raised some dispute about the title of the house in dispute. The plaintiff denied that Nokhe Lal had any right or interest in the said property. However, the defendant-appellant as a licensee, who had been induced by the plaintiff alone, could not take advantage of this dispute between the plaintiff and Nokhe Lal. It did not lie in his mouth to deny the title of the plaintiff to eject him when it has been found that it was the plaintiff alone who had inducted the defendant-appellant. Merely, because a third party seeks to raise some controversy about the plaintiff's title could not entitle a licensee who has been inducted by a licensor to question the title of the licensor. The licensee would be estopped from doing so.[3]

Estoppel against successor-in-interest of licensee.

In the instant case, the first defendant in her statement on oath stated that she lived in the house in suit in the status of her father although she also said that she lived as owner.[4]

43. Estoppel against a person getting possession in a fiduciary capacity.—Any one getting possession of property in a fiduciary capacity is estopped as long as he continues to be in possession in that capacity from questioning the title of the person from whom he got the possession. The statute law on this subject is contained in Secs. 115, 116 and 117 of the Evidence Act. The list of different statutes that leads to estoppel, mentioned in Secs. 116, 117 is not exhaustive, and they are given more or less illustratively ; others, not expressly set out, but in a position analogous or similar are also estopped.[5]

44. Derivative title of landlord.—To constitute denial of title of the landlord, a tenant should renounce his character as tenant and set up title or right inconsistent with the relationship of landlord and tenant, either in himself or in third person. In the case of derivative title of the landlord, in the absence of a notice of transfer of title in favour of the landlord or attornment of tenancy, a tenant's assertion that the landlord is a co-owner does not amount to denial of his title, unless the tenant has also renounced his relationship as a tenant. The principle of

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1. Ravuru Punnamma *v.* Lakkaraju Venkata Subba Rao, A.I.R. 1953 Mad. 456 at p. 458 : (1952) 2 M.L.J. 473 : 65 M.L.W. 871.
2. Dharmkunwar *v.* Fakira, 1901 A.W.N., 157 ; Mst. Durga *v.* Baburam, A.I.R. 1923 All. 403 : 75 I.C. 596 : Akbar Ali Khan *v.* Shan Mohammad I.L.R. 39 All. 621 ; Amjad Khan *v.* Shaffiuddin Khan, A.I.R. 1925 All. 203 : 78 I.C. 216 and Tripathi Anand Nath Tewari *v.* Jokhu Kumari, 113 I.C. 757.
3. Ram Prasad Pandey *v.* Jagmohanlal Shukla, A.I.R. 1977 All. 458 at p. 458.
4. Nadri Begum, Mst. *v.* Mst. Nasrat Bibi, A.I.R. 1980 All. 210 at p. 212.
5. Balram Chunnilal *v.* Durgalal Shivnarain, A.I.R. 1968 M.P. 81 at p. 84 : (1867) M.P.L.J. 383 : (1967) Jab. L.J. 471.

equity that a person cannot approbate and reprobate finds legislative recognition in Sec. 116 of the Evidence Act and Sec. 111 (*g*) of the Transfer of Property Act.[1]

A tenant already in possession can challenge the plaintiff's claim of derivative title showing that the real owner is somebody else, but this is subject to the rule enunciated by Sec. 116 of the Evidence Act. The section does not permit the tenant, during the continuance of the tenancy, to deny that his landlord had at the beginning of the tenancy a title to the property. The rule is not confined in its application to cases where the original landlord brings an action for eviction. A transferee from such a landlord also can claim the benefit, but that will be limited to the question of the title of the original landlord at the time when the tenant was let in. So far claim of having derived a good title from the original landlord is concerned, the same does not come under the protection of the doctrine of estoppel, and is vulnerable to a challenge.[2]

Derivative title cannot be questioned by a tenant.

Suhrawardy, J., in *Indra Narain Manna* v. *Sarbasova Dasi*,[3] held that a tenant is not estopped from questioning the derivative title of the plaintiff derived from a person who had inducted the tenant upon the land. The matter has been settled by the decisions of their Lordships of the Judicial Committee in the case of *Mst. Bilas Kunwar* v. *Desraj Ranjit Singh*,[4] where the view of their Lordships is expressed thus :

> "....A tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored possession by surrender to his landlord."

Calcutta High Court view.

This is also the view which has been enunciated in *Jogendra Lal* v. *Mohesh Chandra*,[5] by Mukerjee, J. He says that a tenant is estopped from questioning the title of his landlord who had inducted him upon the land, during the continuance of the tenancy, but it is open to the tenant to question the title of the landlord who had inducted him, if the tenancy is terminated and possession surrendered.[6]

117. Estoppel of acceptor of bill of exchange, bailee or licensee.—No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it ; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence.

Explanation 1.—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation 2.—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

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1. **C. Chandra Mohan *v.* Sengotiaiyan, (2000) 1 S.C.C. 451 at p. 458.**
2. Subhash Chandra *v.* Mohammad Sharif, A.I.R. 1990 S.C. 636 at p. 639 : 1990 All. C.J. 215 at p. 210 (S.C.) ; *see* also Mangat Ram *v.* Sardar Meharban Singh, (1987) 4 S.C.C. 319.
3. A.I.R. 1925 Cal. 743 : 87 I.C. 930 : 41 C.L.J. 341.
4. A.I.R. 1915 P.C. 96 : 30 I.C. 299 : 42 I.A. 202 : I.L.R. 37 All. 557 : 19 C.W.N. 1207 (P.C.).
5. A.I.R. 1929 Cal. 22 : 112 I.C. 172 : I.L.R. 55 Cal. 1013 : 47 C.L.J. 387 : 32 C.W.N. 559.
6. Dinabandhu Gan *v.* Makim Sardar, A.I.R. 1936 Cal. 93 at pp. 95-96 : 40 C.W.N. 460 : 161 I.C. 468 : I.L.R. 63 Cal. 763.

SYNOPSIS

1.	Principle	... 4540	6.	Estoppel of payee of forged *hundi*	... 4542
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1. Principle.—"The acceptance of a bill of exchange", says Mr. Taylor, "is also deemed a conclusive admission, as against the acceptor, of the signature of the drawer, and of his capacity to draw; and, if the bill be payable to the order of the drawer, of his capacity to endorse ; and if it be drawn by procuration of the authority of the agent to draw in the name of the principal;.... The law, however, in general, recognizes no such admission on the part of the acceptor, either of the signature of the payee, though he be the same party as the drawer or of that of any other endorser; and this too, although, at the time of the acceptance, the endoresements were on the bill. Neither does the acceptor admit that an agent, who has drawn a bill by procuration, payable to the order of the principal has authority to endorse the same.[1] Under the provisions of Sec. 120 of the Negotiable Instruments Act, 1881 (16 of 1881), a maker of a promissory note, a drawer of a bill of exchange or cheque and acceptor of a bill of exchange for the honour of the drawer are, in a suit by a holder in due course, estopped from denying the validity of the instrument as originally made or drawn. Under Sec. 121 of the same Act a maker of a promissory note and an acceptor of a bill of exchange payable to, or to the order of, a specified person are, in a suit thereon by holder in due course, estopped from denying the payee's capacity at the date of the note to indorse the same. Under Sec. 122 an endorser of a negotiable instrument is, in a suit thereon by a subsequent holder, estopped from denying the signature or capacity to contract of any prior party to the instrument.

Bill of exchange; law regarding admission on the part of the acceptor.

When a person is estopped from denying the validity of an instrument.

Promissory note.

Negotiable instruments.

As to bailments, see Chapter IX, Secs. 148-181 of the Indian Contract Act (IX of 1872).

Bailments.

The Act is silent on the subject of agents, who are not ordinarily, permitted to set up the adverse title of a third person to defeat the rights of their principals, or to dispute the title of their principals.[2]

Agents.

2. Scope of Secs. 115 to 117.—The rule of estoppel which binds landlords and tenants, mortgagors and mortgagees, bailors and bailees, applies to employees and contracting parties generally who cannot accept the benefits of the contract and yet when called upon to perform their duties under it repudiate it as made without right or as otherwise wanting in force, provided the contract is not actually in violation of law or wholly void; the assignee or licensee of any right accepted and acted under is accordingly estopped to deny the authority from which the right proceeds.[3] Sections 115 to 117 are not exhaustive and the principle of estoppel contained in these sections may be applied by analogy to parties not mentioned therein.[4]

Contracts.

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1. Section 778 ; Sec. 851, 8th Ed. ; *see* also Story on *Bills of Exchange*, Secs. 113, 114, 115, 262, 412.
2. Story on *Agency*, Sec. 217.
3. Lakhana Jena *v.* Arjun Naik, 18 C.W.N. 1104.
4. Rupchand *v.* Sarveswar, I.L.R. 33 Cal. 915 : 10 C.W.N. 747, *per* Woodroffe, J.

3. Acceptor of a bill of exchange.—The *bona fide* holder of a forged *hundi*, to whom, after it has been dishonoured, it has been transferred by endorsement, by the payees who at the time of the endorsement knew that the *hundi* was forged,

Forgery.

sued the payees on the *hundi* to recover the amount he had paid them for it ; *held* that the payees were estopped from setting up the forgery of the *hundi* as a bar to the suit.[1] Sections 24, 25 and 26 of the Negotiable Instruments Act, 1881, contain nothing to support the contention that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to say that the signatory was in reality acting for an undisclosed principal.[2] The endorsee of a *hundi*, which was drawn payable to bearer and which was not saved by the proviso to Sec. 26 of the Paper Currency Act, sued to enforce it as against the endorser; *held* that the *hundi* was invalid according to the section and that the endorser was not estopped from denying the validity of the *hundi*.[3]

The suit was filed for damages due to the dishonour of a bill of exchange

Suit for damages on dishonoured bill, etc.

accepted by the defendant firm. *Held* that after the defendant accepted the bill of exchange and by so doing got possession of the goods, it was not open to him to plead that the defendant was merely an agent acting for an undisclosed principal.[4]

It is contrary to all established rules that—

"In an action on a pro-note or bill of exchange against a person whose

Plea that the agent was acting for an undisclosed principal; when estoppel from such denial.

name properly appears as a party to the instrument it is not open to either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.[5]

4. Holder of negotiable instruments.—If the holder of negotiable instruments gives them to another, with authority to that other to raise money upon them for his own purposes, he is estopped from setting up his right to the negotiable instruments, adversely to those, who have lent money on the security of the instruments and the faith of the authority of the owner.[6]

5. Endorsements in blank—Estoppel.—(*a*) Where several promissory notes had been endorsed by the defendant on blank forms, without any amount being mentioned, Lord Mansfield says :

"....It does not lie in the defendant's mouth to say that the endorsements were not regular."[7]

(*b*) If a gentleman entrusts to his own man of business a blank paper, duly stamped as a bond and signed and sealed by himself, and, if the instrument is afterwards drawn up and money obtained upon it from persons, who have no reason to doubt the *bona fide* of the transaction, the bond must, in the absence of

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1. Bishen Chand *v.* Rajendro Kishore Singh, I.L.R. 5 All. 302.
2. Sadasukh Jankidas *v.* Sir Kishan Prashad, I.L.R. 46 Cal. 663 (P.C.).
3. Alagappa Chetty *v.* Algappa Chetty, I.L.R. 44 Mad. 187, following Chidambaram *v.* Avaswami, I.L.R. 40 Mad. 585 and dissenting from the obsevations of Seshagiri Ayyar J., in Arunachalam *v.* Narayanam, I.L.R. 42 Mad. 470.
4. Phoenix Trading Co. Ltd. *v.* F.R.B. Diwanchand Sibal and Sons, A.I.R. 1929 Sind 172 (1) at p. 172 : 117 I.C. 160.
5. *Per* Lord Buckmaster in Firm of Sadasuk Janki Das *v.* Kishan Pershad, A.I.R. 1918 P.C. 146 : I.L.R. 46 Cal. 663 : 46 I.A. 33 (P.C.).
6. 8 Bom. L.R. 921.
7. Russel *v.* Langstaffe, 2 Doug, 514 ; *see* Wahidunnessa *v.* Surgandass, I.L.R. 5 Cal. 39 at p. 42.

evidence to the contrary, be taken to have been drawn up in accordance with the obligor's wishes and instructions.[1]

6. Estoppel of payee of forged *hundi*.—The payee of a forged *hundi* who, knowing that it is forged, fraudulently endorse it over to another person, cannot, in a suit by such person for the recovery of the consideration paid by him for the *hundi*, set up the forgery of it, as a bar to the suit.[2]

7. Delivery order for goods.— The defendants who were warehousemen, had sold to a Mr. Clark, a portion of a large quantity of flour, which was lying at their warehouse. Mr. Clark then sold to the plaintiffs, a portion of that flour and gave them a delivery order for it, which delivery order was taken to the defendants, who said that "it was in order", and subsequently delivered to the plaintiffs a portion of the flour. Clark then became insolvent, and the defendants refused to deliver to the plaintiffs the remainder of the flour. But it was held that it was not competent to the defendants to recede from their word or to repudiate the transfer.[3]

8. Negligence in dealing with negotiable instruments.—(*a*) Negligence, to amount to an estoppel, must be in the transaction itself, must be the proximate cause of leading the party into mistake and, also, must be the neglect of some duty, which is owing to such party or the general public.[4]

When negligence amounts to estoppel.

(*b*) Negligence in the custody of a draft, or in its transmission by post, will not disentitle the owner of it to recover the draft, or its proceeds, from one who has wrongfully obtained possession of it.[5]

Negligence of the post office, etc.

(*c*) A *hundi* payable to *shajoge* (to the respectable holder) was endorsed by the drawer "*hundi* sent for realization by G (drawer) to *B* of Calcutta (plaintiffs)" and sent by him to the plaintiffs. The plaintiffs handed the *hundi* to one *S*, the palintiffs' *jemadar*, *S* took the *hundi* to the defendants, but subsequently one *R*, who had no authority from the plaintiffs to receive payment, represented himself to the defendants, as *jemadar* of the plaintiffs, wrongfully obtained the *hundi* from the defendants, forged the plaintiffs'signature to it, and obtained payment. *Held* that there was no negligence on the part of the plaintiffs, in entrusting the *hundi* to *S* ; even if such an act was negligent, the negligence was not so immediately conducive to the payment of the *hundi* as to estop the plaintiffs from saying that *R* had no authority from them to receive payment and that the payment had not been made to them.[6]

9. Estoppel of bailee.—Where a car is delivered for repair by the respondent to the defendant the defendant is estopped from questioning the title of the respondent.[7]

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1. Wahidunnessa *v.* Surgandass, I.L.R. 5 Cal. 39 at p. 42.
2. Bishen Chand *v.* Rajendro Kishore Singh, I.L.R. 5 All. 302 : 3 A.W.N. 50.
3. Woodley *v.* Coventry, 2 H. & C. 164 : *see* also Knights *v.* Wiffer, L.R. 5 Q.B. 66; *see* Gobind Lall Seal *v.* Debendronath Mullick, I.L.R. 5 Cal. 679.
4. Arnold *v.* Cheque Bank, 1 C.P.D. 518 ; *see* 6 C.W.N. 429 at p. 449.
5. *Ibid.* ; *see* 5 C.W.N. 325.
6. 5 C.W.N. 313 ; Roberts *v.* Tucker, 16 Ad. & El. 560 ; Bank of Island *v.* Trustees of Evans Charities in Ireland, 5 H.L.C. 389 ; Mayor of the Staple of England *v.* Bank of England, 21 Q.B.D. 160 and Bank of England *v.* Vagliano Bros., L.R. (1891) App. Cas. 107.
7. Calcutta Credit Corpn. Ltd. *v.* His Royal Highness Prince Peter of Greece, A.I.R. 1964 Cal. 374 at p. 377 ; 68 C.W.N. 554.

In the instant case the defendant admitted the plaintiff to be the onwer of the truck, characterizing himself as a bailee of the vehicle in the agreement. *Held* that he cannot say that the plaintiff is not the owner of the truck.[1]

10. Licensee.—A licensee cannot be permitted to deny that his licensor at the time when the licence commenced had authority to grant such licence : Sec. 117 would at any rate cast upon the defendants the burden of proving their plea that the plaintiffs had not the authority they professed to exercise.[2] The fact that the licensee had repudiated the contract cannot give him the right to question the licensor's title.[3]

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1. S. Gurdial Singh Bedi *v.* Sunda Hire-Purchase Corporation, A.I.R. 1970 Pat. 7 at p. 13.
2. G.S. Hannah *v.* Jagannath & Co., 19 C.W.N. 1.
3. Jagannath & Co. *v.* Cresswell, I.L.R. 40 Cal. 814, referring to Johnstone *v.* Mile, (1886) 16 Q.B.D. 460.

CHAPTER IX
OF WITNESSES

118. Who may testify.—All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

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1. Principle.—The tendency of modern legislative progress, discriminating between the *competency* and the *credibility* of witnesses, has operated to remove former grounds of exclusion, and to admit to the witness-box all persons from whom even a grain of truth can be gleaned, leaving it to the court to attach to their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained.[1]

Tendency of discrimination between competency and credibility of witness.

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1. Warren's *Law Studies*, Vol. II, p. 1110.

2. Difference between English and Indian law.—Under this section a child is competent to testify, if it can understand, the questions put to it, and give rational answers thereto. In England, a child, to be competent witness, must believe in punishment in a future state for lying.[1]"

Child-witness.

3. Scope.—Section 118, Evidence Act, has been worded negatively. If the Court would consider that a particular witness does not understand the question put to him and fails to give rational answers to those questions the Court would not proceed to take the evidence of that witness. Where there is absence of record, but yet the Court proceeds to record the evidence, it must be taken that the Court considered the witness as competent to testify. There is no provision in law to ask preliminary questions to test the capacity of child-witness to testify, though it has always been taken to be a wholesome course to be adopted. If in fact the child is examined as a witness, the best test of his capacity to testify is the evidence itself and the manner in which it is given. There is nothing illegal in the procedure if the Court satisfies itself by recording the evidence straightway without resorting to preliminary questions.[2]

Section has been worded negatively.

Testing the capacity of a child-witness.

In the case reported in *Shivji Genu Mohite* v. *State of Maharashtra*,[3] there was a solitary witness, a girl of twelve years of age. The only question for consideration was whether her evidence was acceptable or not.

Solitary witness—Evidence of.

Held that her evidence had to be scrutinized with care and caution :

In *Naran Pradhan* v. *State of Orissa*,[4] carefully scrutiny of the evidence of a twelve year old boy did not at all reveal any suspicion of tuition. He had boldly denied the suggestion that he was speaking false-hood in Court. There was no material on the basis of which it could be said that he had been influenced by any person who might have influenced on him. It was held that his evidence appeared natural and straight forward and there was no reason why the same should not be accepted.

The only requirement of law is that before basing a conviction on the sole testimony of a child witness, the rule of caution that it is unsafe to rely on such testimony unless corroborated by other evidence should be present in the mind of the court. The rule of law is not to the effect that the testimony of a child witness cannot be believed in any circumstance unless it is corroborated by other evidence. The judgment convicting a person on the sole testimony of a child witness should only indicate that the rule of caution referred to above was present in the mind of the Court before it accepted the testimony of the child witness.[5]

The real test for either accepting or rejecting the testimony of a child is to see how consistent the story spoken to by it is, how the evidence stands the test of cross examination and how far it fits in with the rest of the evidence and the circumstances of the case.[6]

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1. Whitley Stokes, Vol. II, p. 831.
2. Karu Singh *v.* Emperor, A.I.R. 1942 Pat. 159 : I.L.R. 20 Pat. 893 : 23 Pat. L.T. 310 : 199 I.C. 200 : 43 Cr. L.J. 479 and Lakhan Singh *v.* Emperor, A.I.R. 1942 Pat. 183 : I.L.R. 20 Pat. 898 : 23 Pat. L.T. 332 : 199 I.C. 638 : 43 Cr. L.J. 570 ; State of Orissa *v.* Machindra Majhi, A.I.R. (1964) Orissa 100 at p. 102 : (1964) 1 Cr. L.J. 422.
3. A.I.R. 1973 S.C. 55 at p. 60.
4. (1982) 54 Cut. L.T. 527 at p. 540.
5. State *v.* Jan Mohammad, 1981 All. L.J. 367 at p. 369.
6. Avanasiyappa Goundan *v.* State of Kerala, 1960 Ker. L.T. 435 at pp. 439, 440 ; *see* also Chudiamal Jain *v.* State of Orissa, (1984) 57 C.L.T. 81.

Generally speaking, it is dangerous to place implicit reliance on the evidence of a child witness. But there are also exceptions to this general rule. It is not in every case of child witness the Court should proceed on the assumption that it was dangerous to place reliance on the evidence of child witness, but should consider the evidence of the child witness regard being had to the facts and circumstances of the given case, because whether the evidence given by the child witness is a truthful version of the occurrence or a tutored version is always a question of fact and has to be decided on the facts and circumstances of the particular case. Therefore, it would not be proper in all cases to proceed on the basis that it is dangerous to place reliance on the evidence of a child witness. Much depends on the age and understanding of the child, and opportunity to witness the occurrence and the time that elapsed between the occurrence and the version of such occurrence related by the child witness who is called upon to give evidence of such occurrence.[1]

Leper attesting witnesses can be examined on commission.[2]

4. Competency of a witness.—In order to judge the credibility of the witnesses, the Court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses, but it is open to it to look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trustworthiness of the witnesses.[3]

The only test of competency is the capacity to understand the questions and to give rational answers. However, the competency of a person to testify as a witness is different from that of credibility of the testimony of the witness. It is true that the testimony of such person will definitely be subject to the scrutiny in the manner provided in the provisions contained in Sec. 60 of the Evidence Act. Moreover, it would be in the realm of credibility of such testimony and not relating to the competency of a person to depose on behalf of some other person.[4]

Conspiracy to smuggle gold into India.

Certain persons were found to have entered into a criminal conspiracy to smuggle gold into India. One Ethyl Wong by her own statements made to the customs officials showed herself to be the unknown carrier. The customs authorities treated Ethyl Wong as a witness and produced her in Court.

Held that Ethyl Wong was a competent witness although her evidence could only be received with caution necessary in all accomplice evidence.[5]

Competency of a person to testify as a witness.

The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation. The Court is at liberty to test the capacity of a witness to depose by putting proper questions. It has to ascertain in the best way it can whether from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard on a particular occasion. If a person of tender years can satisfy those requirements his competency as a witness is established.[6]

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1. Balavantappa *v.* State of Karnataka, (1982) 1 Knt. L.C. 108 at p. 117.
2. Ramkrishna Panda *v.* Arjuno Padhano, A.I.R. 1963 Orissa 29 at p. 30.
3. Ramchandra Rambux *v.* Champabai, A.I.R. 1965 S.C. 354 at p. 357 : 66 Bom. L.R. 486 : (1964) 1 S.C.W.R. 629 : 1965 M.P.L.J. 17 : (1965) 2 S.C.J. 557 : (1964) 6 S.C.R. 814.
4. **Humberto *v.* Floriano, 2000 (1) Mah. L.J. 690 at pp. 694-95 : 2000 (2) Bom. C.R. 754.**
5. Laxmipat Choraria *v.* State of Maharasthra, A.I.R. 1968 S.C. 938 at p. 942.
6. Purna Chandra Khandra *v.* State, A.I.R. 1959 Cal. 306 at p. 308 : 1959 C.L.J. 142 : (1959) 60 Cr. L.J. 584.

All persons are competent to testify unless "the Court considers that they are prevented from understanding the questions put to them or from giving rational answers on account of any infirmity. Tender age and old age are, of course, factors which law regards as capable of affecting testimonial capacity of a person But the mere fact that a witness is of tender age or of old age is hardly sufficient to conclude that he has no testimonial competence. The Explanation added to Sec. 118 of the Evidence Act shows that even lunacy by itself is not sufficient to disqualify a person from giving evidence unless the person's capacity to understand questions and giving rational answers has been impaired on account of such lunacy.[1]

The important consideration when a Judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.[2]

Court is not bound to test the competency of a child-witness.

Sir Ashutosh Mookerjee and Beachcroft, JJ., in the case of *Nafar Seikh* v. *Emperor*,[3] went so far as to say that in view of Sec. 118 of the Evidence Act it was not obligatory on a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such a witness before the actual examination commences. Following the case of *Fakir* v. *Emperor*,[4] it was further held that the question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the jury.

Supreme Court view.

In *Sukha* v. *State of Rajasthan*,[5] it is said that where one part of a witness's evidence is disbelieved, Judges of fact have the right to act on the rest of his testimony. But it will be so only if the Judge regards the rest of the testimony as reliable. Where on the scrutiny of evidence, one finds that on the whole the evidence is more false than true, it would be dangerous to act upon it.[6]

Maxim, *falsus in uno falsus omnibus* not followed in India.

It is true that the courts in India have been reluctant to act on the maxim, *falsus in uno falsus omnibus*, yet the disregard of the maxim cannot be pushed too far. The whole statement should be scrutinised and if found unsatisfactory, it must be rejected.[7]

The argument that the witnesses should be condemned on communal grounds is against the spirit of the Constitution of India. The law does not recognize the impeachment of a witness on such grounds.[8]

It is surprising that a judicial officer should hold the view that public servants, discharging their lawful duties must be regarded as interested persons.[9]

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1. Kesavan *v.* State of Kerala, 1993 S.C. Cr. R. 440 at p. 442.
2. R. *v.* Hayes, (1977) 2 All E.R. 288 at p. 291.
3. 18 C.W.N. 147 : A.I.R. 1914 Cal. 276.
4. (1906) 11 C.W.N. 51.
5. A.I.R. 1956 S.C. 513.
6. State of Madhya Pradesh *v.* Banshilal Behari, A.I.R. 1958 M.P. 13 at p. 15 : 1957 M.P.C. 600 : 1957 M.P.L.J. 852 : 1958 Jab. L.J. 153 : (1958) 59 Cr. L.J. 44.
7. State of Madhya Pradesh *v.* Banshilal Behari A.I.R. 1958 M.P. 13 at p. 15 1957 M.P.C. 600; 1957 M.P.L.J. 852 : 1958 Jab. L.J. 153 (1958) 59 Cr. L.J. 44.
8. Kashiram Kanaiyaram *v.* Lakhmichand Gangaram, A.I.R. 1958 M.P. 407 at p. 408 : 1958 M.P.L.J. 494.
9. Public Prosecutor *v.* Pokarmal Gupta, A.I.R. 1960 A.P. 563 at p. 565.

5. All persons including a child of tender years are competent witnesses under Sec. 118, Evidence Act.—The above section of the Indian Evidence Act declares *all persons to be competent* to testify, unless they are in the opinion of the Court unable to understand the questions put to them or to give rational answers to those questions.

Admissibility and competency of the witnesses.

A witness may be competent in view of Sec. 118, Evidence Act, yet his evidence may be inadmissible if it does not speak to facts but to opinions, inferences and beliefs (Sec. 45) or if it refers to what the witness had not seen and heard (Sec. 60), i.e. hearsay, or when the witness happens to be a police officer and he seeks to prove a confession made to him (Sec. 25).[1]

When Court should question a witness.

When there is reason to suspect that a person may be incapable of giving rational answers to questions put to him, the usual course is for the attention of the Court to be drawn to the matter and for the Court to question the person with a view to ascertaining whether he is competent to give evidence or not.

Reg v. *Whitehead*[2] was a case in which a deaf and dumb girl was called by the prosecution to support a charge of rape. She was to give her evidence by means of signs and the Court was at first satisfied that the expert, who was to interpret the signs, was competent to do so. Before, however, her examination had proceeded very far, it transpired that the expert was not really in communication with her at all, and the Court had no alternative but to stop the examination and expunge such evidence as had already been recorded. The case was thus a wholly exceptional—one.[3]

Witness once declared competent cannot be declared otherwise.

When a court in this country has once decided that a witness is competent, it ought not to intervene at a later stage *suo motu*, and reverse its previous decision and expunge the evidence already recorded, especially when that evidence has been recorded at some length.[4]

If a child-witness is a competent witness.

No doubt, a child-witness is a competent witness.[5] But, the prosecution is entitled to examine only such of the witnesses, whom it considers to be material for the case.[6]

When a young child is called as witness the first step for the Judge or Magistrate to take is to satisfy himself, by questioning the child that the child is a competent witness within the meaning of Sec. 118, Evidence Act.[7] When a Sessions Judge thought a child sufficiently intelligent to understand and answer the questions but too young to understand the nature of an oath and therefore

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1. Maganlal Radha Kishan *v.* Emperor, A.I.R. 1946 Nag. 173 at p. 180.
2. (1866) 1 C.C.R. 33 : 35 L.J.M.C. 186 : 14 L.T. 489 : 14 W.R. 677 : 10 Cox C.C. 234.
3. Jacobs *v.* Layborn, (1943) 11 M. & W. 685 : 1 D. & L. 352 : 12 L.J. Ex. 427 : 7 Jur. 562.
4. Rampadarath Singh *v.* Emperor, A.I.R. 1941 Pat. 513 at p. 515 : I.L.R. 20 Pat. 339 : 196 I.C. 478 : 42 Cr. L.J. 878.
5. Dhani Ram *v.* Emperor, A.I.R. 1915 All. 437 ; Panchu Choudhury *v.* Emperor, A.I.R. 1923 Pat. 91 ; Ghulam Hussain *v.* Emperor, A.I.R. 1930 Lah. 337 ; Rameshwar *v.* State of Rajashtan, A.I.R. 1952 S.C. 54 and Jalwanti Lodhin *v.* State, A.I.R. 1953 Pat. 246.
6. *Vide* Doraiswami Udayan *v.* Emperor, A.I.R. 1924 Mad. 239 ; Jowaya *v.* Emperor, A.I.R. 1930 Lah. 163 ; Stephen Seneviratne *v.* King, A.I.R. 1936 P.C. 289 ; Habeeb *v.* State of Hyderabad, A.I.R. 1954 S.C. 51 and Bakhshish Singh *v.* State of Punjab, A.I.R. 1957 S.C. 904 ; Aheiban Ningol Thongam Ongbi Thaba *v.* State of Manipur, A.I.R. 1967 Manipur 11 at p. 22.
7. Ah Phut *v.* King A.I.R. 1939 Rang. 402 at p. 403 : 1940 Rang. L.R. 104 I.L.R. 12 Rang. 185 : 185 I.C. 205.

advisably examined it on simple affirmation, it was held that the evidence was nonetheless admissible.[1]

Competency of child-witness.

Ordinarly the proper course to adopt, for a court of law to judge the competency of a child witness, is to put preliminary questions to see whether the witness is capable of understanding the questions and giving rational answers, such questions should be simple questions, meant only to judge the level of understanding attained by the child witness. Such preliminary examination is always desirable and a record of questions and answers put to the witness should be preserved, but it cannot, be laid down as a matter of law that without such preliminary examiantion the statement of the witness is inadmissible. Where the statement of the witness has been recorded, the statement of the witness recorded by the Trial Court will ordinarily furnish sufficient material to the Appellate Court to judge the competency of the witness.[2] This view has been taken in a large number of cases, all of which need not be cited. Reference may, however, be made to the Division Bench case of *Nafar Sheikh* v. *Emperor*,[3] Mookerjee, J., observed as follows on this point :

If the statement of witness has been recorded.

> "It has further been argued that, under Sec. 118 of Indian Evidence Act, he was bound to ascertain, before these children of tender years were examined as witnesses, whether they had capacity to undersatnd and to give rational answers. Reliance has been placed upon the decision in *Seikh Fakir* v. *Emperor*,[4] It may be conceded that there are expressions in the judgment in the case mentioned which tend to support this broad statement, but in my opinion, the proposition thus widely formulated is not justified by the terms of Sec. 118 of the Indian Evidence Act. The Legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must, by a preliminary examination, test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness, before the actual examination commences. In fact, the case of *Queen* v. *Whitehead*[5] shows that the incompentency of a witness may very well appear in the course of his examination-in-chief, and that the evidence of a witness so found to be incompetent may at that stage be withdrawn from the jury. The rule on the subject is concisely stated by Balmer, J., in *Wheeler* v. *United States*.[6] The mere circumstance that the Sessions Judge did not interrogate the witnesses, before their examination began, with a view to test their capacity, does not, in the view I take of the true effect of Sec. 118 of the Indian Evidence Act, invalidate the trial."

Whether a boy of tender years may be a competent witness.

This view has been followed by the Calcutta High Court in *Krishna Kahar* v. *Emperor*,[7] and the Patna High Court in *Lakhan Singh* v. *King-Emperor*,[8] has also taken the view that there is no legal obligation to ask preliminary questions though it is a wise

Views followed by the Calcutta High Court and Allahabad High Court.

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1. Queen *v.* Itwarya, 14 B.L.R. 54 : 22 W.R. Cr. R. 14 ; Queen *v.* Sewa Bhogta, 14 B.L.R. 294, a decision of a Full Bench overruling Queen *v.* Ananto Chakravartti, 14 B.L.R. 295 note : 22 W.R. Cr. 1. This was dissented from in Queen-Empress *v.* Maru, I.L.R. 10 All. 207, but, affirmed in Queen-Empress *v.* Shava, I.L.R. 15 Bom. 359.
2. State of Rajashtan *v.* Vijairam, (1968) 19 Raj. L.W. 1 at p. 3.
3. I.L.R. (1914) 41 Cal. 406.
4. (1906) 11 C.W.N. 51.
5. (1866) L.R. 1 C.C.R. 33.
6. (1895) 159 U.S. 523.
7. I.L.R. (1939) 2 Cal. 569.
8. I.L.R. (1941) 20 Pat. 898 : A.I.R. 1942 Pat. 159.

course and that the object of such preliminary questioning is not to legalise the evidence but merely to save the time of the Court. The Allahabad High Court in *Ram Hazoor Pandey* v. *State*,[1] has also taken the view that—

> "Although it is not necessary to have a preliminary examination namely, *voire dire*, of a child-witness in order to make his testimony admissible, nevertheless, we are of the opinion that such a course is desirable and should be resorted to, for it offers an opportunity to the Court to assess the mental capacity of a child-witness."

Non-administration of oath to a child-witness—Effect of.

A child's evidence is not inadmissible merely because no oath was administered to it.[2] The mere fact that a court *advisedly* refrains from administering oaths does not render the statement of the witness inadmissible. The better course, however, is for the Court to administer the oath whenever it considers the witness capable of giving evidence. In the case of a child of tender years produced as a witness the Court should examine it after being satisfied that the child is intellecutually sufficiently developed to enable it to understand what it has seen and to afterwards inform the Court thereof.[3] Sessions Judge examined three boys between seven and nine years of age without administering an oath or affirmation to any to them. Relying on the evidence of these three boys and an eye- witness, the learned Judge convicted the accused. *Held*, per Shah, J., affirming the conviction that the evidence of the boy witnesses is admissible. It is necessary that before proceeding to examine such a witness of tender years, the Court should satisfy itself that the witness was capable of understanding the questions put to him and of giving rational answers to these question ; and that thereafter the Court should proceed to administer an oath or affirmation. If the witness is found to be incapable of understanding the obligation of such an oath or affirmation, he may be examined without an oath or affirmation, provided he is found to be a competent witness.[4]

Section 13, Oaths Act—Admissibility of evidence of child witnesses.

The question of the capacity of a witness to testify, is a question for the Judge himself to decide.[5] "The question whether a witness understands the nature and obligaion of an oath or affirmation is foreign to the question of competency to testify. Intellectual capacity is the only test. I respectfully dissent from the dictum in *Fakir* v. *Emperor*,[6] that the Judge must form his opinion as to the competency of a witness before his actual examination commences."[7]

Child below six years of age as witness.

When however, a girl of six years and two others of fours years each were examined as witnesses without being affirmed. The Sessions Judge having assumed without investigation that the children were of tender age and that they could not appreciate the value and significance of an affirmation, *held* that the Judge should not have adopted the course he did.[8] In a later case it has been held on the authority of the

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1. A.I.R. 1959 All. 409.
2. *Re* Chinna Venkadu, I.L.R. 38 Mad. 550 : 15 Cr. L.J. 151 (Mad.), following Queen-Empress *v.* Viraperumal, I.L.R. 16 Mad. 105 and dissenting from Queen-Empress *v.* Maru, I.L.R. 10 All. 207
3. Dhani Ram *v.* Emperor, I.L.R. 38 All. 49, doubting Queen-Empress *v.* Maru, I.L.R. 10 All. 207
4. Hari Ramji Panar *v.* Emperor, 20 Bom. L.R. 365 : 19 Cr. L.J. 593 45 I.C. 497, following Queen *v.* Sewa Bhogta, 14 B.L.R. 294 (F.B.) ; Queen-Empress *v.* Shava, I.L.R. 10 Bom. 359 ; *see* also Fatu Santal *v.* King- Emperor, 6 Pat. L.J. 147 : 22 Cr. L.J. 417 : 61 I.C. 705.
5. Nafar Sheikh *v.* Emperor, I.L.R. 41 Cal. 406.
6. 11. C.W.N. 51.
7. *Ibid.*, *per* Beachcroft, J.
8. *Ibid.*

Full Bench in *Queen v. Sewa Bhogta*,[1] that the omission to administer an oath or affirmation even if intentional would be cured by the Oaths Act.[2]

6. Credibility of child-witness.—(*a*) *English law relating to corroboration of child evidence*.—In *R V. Campbell*[3] at the end of the judgment Lord Goddard, C J., summed up in (1956) 2 All ER at 276, (1956) 2 QB (438) the conclusions of the Court. They may be stated as follows : (*a*) The unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children the Judge must stop the case. (*b*) If makes no difference whether the child's evidence relates to an assault on himself or herself or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article (*c*) The sworn evidence of a child need not as a matter of law be corroborated, but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls although they may do so if convinced that the wintess is telling the truth. (*d*) Such warning should also be given where a young boy or girl is called to corroborate the evidence either of another child whether sworn or unsworn or of an adult. (*e*) As the statute which permits a child of tender years to give unsworn evidence expressly provides for such evidence being given in any proceedings against any person for any offence the unsworn evidence of a child can be given to corroborate the evidence of another person given on oath but in such case a particularly careful warning should be given.[4]

Essence of corroboration evidence.

Corroboration is nothing other than evidence which confirms or supports or strengthens other evidence [Lord Morris of Borth-y- Gest, (1972) 3 All ER at 1065 : 1972-3 WLR at p. 919, 920 Lord Pearson, 1972-3 All ER at 1070, (1972) 3 WLR 925 and Lord Diplock. (1972) 3 All ER at 1071 : 1073 : (1972) 3 WLR at 927, 928]. It is, in short, evidence which renders other evidence more probable. If so, there is no essential difference between, on the one hand, corroboration and, on the other, supporting evidence or evidence which helps to determine the truth of the matter. Each is evidence which makes other evidence more probable. Once it is accepted that the direct evidence on one count is relevant to another by way of circumstantial evidence, it follows that it is available as corroboration if corroboration is required.[5]

Mutual corroboration by child-witnesses.

The House of Lord has now decided in *Director of Public Prosecutions* v. *Hester*,[6] that the sworn testimony of a child can be corroborated by the unsworn testimony of another child and *vice versa*. In so doing the House disapproved the "circular argument" doctrine first enunciated by Lord Hewart, C.J., in *R* v. *Manser*,[7] which was at one time generally accepted, and which is probably the only real support for the general proposition contended for on behalf of the respondent. There Lord Hewart, C.J., said :

> "The argument for the prosectuion is therefore an argument in a circle. Let it be granted that the evidence of Barbara (the elder child-witness for

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1. 14 B.L.R. 294 (F.B.).
2. King-Emperor *v.* Sashi Bhusan Maity, 24 C.W.N. 767.
3. (1956) 2 All E.R. 272 : (1956) 2 Q.B. 432.
4. Director of Public Prosecutions *v.* Hester, (1972) 3 All E.R. 1056 at pp. 1062, 1964 (H.L.).
5. Director of Public Prosecutions *v.* Kilbourne, (1972) 1 All E.R. 440 at p. 463 (H.L.).
6. (1972) 3 All E.R. 1056 : (1972) 3 W.L.R. 910.
7. (1934) 25 Cr. App. Rep. 18 at p. 20.

> the prosecution who may have been sworn or unsworn) has to be corroborated, it is corroborated by the evidence of Doris (the younger child-witness who was unsworn). She, however, also needs to be corroborated. The answer is that she is corroborated by the evidence of Barbara, and that is called 'mutual corroboration'. In truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated."

To be remembered that the trial Court which had the opportunity of watching the demeanour and conduct of these two child witnesses found them to be truthful. Held it is entirely irrelevant that the locality was full of houses. The High Court has erred in coming to the conclusion that it was not shown that the two children stayed in the locality. During cross-examination of both these child witnesses, it has been put to them that they would have been lighting crackers near their house and that they could not have seen the respondent from near their house. This showed that even the defence accepted that they stayed in the locality. It is also in evidence that their house was merely 4/5 houses away from the house of P.W. 10 i.e. Shantabai. There is nothing strange in there being no other children bursting fire crackers at that time. On the contrary, it is highly unlikely that all the children in the locality would be lighting firecrackers at the same time and place. The High Court has also disbelieved them on the ground that it is impossible that they would not have divulged such information to their parents. But there is nothing on record to show that they did not divulge this incident to their parents. No questions have been put to them in this regard. Therefore, the High Court was wrong in conducting that their conduct in not divulging the incident to their parents was difficult to believe.[1]

In *Director of Public Prosecutions* v. *Hester*,[2] the House of Lords has stigmatized this argument as fallacious. With respect the House wholly agrees. While considering whether there can be matual corroboration between witnesses each of whom require corroboration the question must or at least ought to be whether it would be too dangerous to allow this. It might often be dangerous if there were only two children. But here the House is dealing with cases where there is a system. Where several children, between whom there can have been no collaboration in concocting a story, all tell similar stories it appears that the conclusion that each is telling the truth is likely to be inescapable and the corroboration is very strong. Once there are enough children to shew a system one can see no ground for refusing to recognise that they can corroborate each other.[3]

This case is not one where the prosecution have sought to bring before the Court, in support of a charge that child *A* has been the victim of a sexual assault, evidence from children *B*, *C* and *D* that they have been the victims of similar sexual assaults at the hands of the same accused person. The problem is different. It arises because the alleged victim was a young boy and one of the witnesses, his brother, whose evidence was relied on as corroborating the evidence of the victim, was also a young boy and the third boy was also a boy though substantially older in years.[4]

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1. **State of Maharashtra** *v.* **Bharat Fakira Dhiwar, A.I.R. 2002 S.C. 16 at p. 21 : 2002 Cr.L.J. 218 at p. 223 (S.C.).**
2. (1972) 3 All E.R. 1056 : (1972) 3 W.L.R. 910.
3. Director of Public Prosecutions *v.* Kilbourne (1973) 1 All E.R. 440 at p. 463.
4. R. *v.* Morgan (1978) 3 All E.R. 13.

A person cannot be corroborator of himself.

R v. *Lillyman*[1] show that evidence of complaint immediately after a sexual assault is admissible and relevant to show consistency of conduct and negative consent, but does not amount to corroboration. But the only reason why this is admissible and relevant-evidence could not amount to corroboration was because it was not from an independent source, or, as it is sometime put, a person cannot corroborate himself, or be his own corroborator.[2]

Evidence of a child-witness—Corroboration if essential.

(*b*) *Indian law relating to corroboration of child evidence* —There is no rule of law that the evidence of a child-witness cannot under any circumstances be acted upon without corroboration. But the rule which according to decided cases has hardened into one of law is that the necessity of corroboration, as a matter of prudence, must be present to the mind of the Judge before a conviction without corroboration can be sustained.[3]

It is not the rule of the law that every material particulars in the evidence of the victim should stand corroborated by the evidence that was adduced. Under such circumstances, evidence of the child-witness could not be relied upon in the absence of corroboration on all material particulars.[4]

Section 118 of the Evidence Act envisages a general rule that every person irrespective of his age, is a competent to testify unless he is found incompetent due to the reasons stated therein. Section 118 makes the understanding as sole test of the competency of a witness and not on the age of a witness. Thus competency of a child giving evidence depends on the degree of his understanding and not on his age. Extreme care and caution to scrutinise statement of a child witness is necessary only when he is the only eye-witness. That apart, tender years of the child, coupled with circumstances appearing on record e.g. as its demeanour, unlikelihood of tutoring etc. may render corroboration unnecessary but it is also a question of fact depending on every case, besides corroboration is not a rule of prudence but of practice only. It is also a general belief that a child is artless, innocent and uncrafty and that being so chances of false implication at whose instance are rare unless externally influenced and tutored to give a particular statement. Therefore, while assessing version of a child witness possibility of his being tutored has to be consistently kept in view by the Court. And in case after carefully analysing child's testimony, it appears pure, and unpolluted from external influence, it is entitled to the highest credit.[5]

The Supreme Court in *Rameshwar Kalyan Singh* v. *State of Rajasthan*,[6] in dealing with the case of a young girl eight years old who was alleged to have been raped observed :

"The tender years of the child which is the victim of a sexual offence, coupled with other circumstances appearing in the case, such for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be, and be understood and appreciated by him or them"....

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1. (1896) 2 QB 167 : (1895-99) All E.R. Rep. 586.
2. Lord Atkinson in R. *v.* Christic, (1914) A.C. at 557 ; (1914-15) All E.R. Rep at p. 68 : Director of Public Prosecutions *v.* Kilbourne (1973) 1 All E.R. 440 at p. 463 at pp. 15-16.
3. Sanatan Bindhani *v.* State, (1972) 38 Cut. L.T., 428 at pp. 434-35 ; *see* also Balvantappa *v.* State of Karnataka, (1982) 1 K.L.C. 108.
4. Narayan Iranna Potkanthi *v.* State of Maharashtra, 1994 Cr. L.J. 1752 at p. 1759 (Bom.).
5. **Tarachand *v.* State of Rajasthan, 2001 Cr.L.J. 3604 at p. 3608 (Raj.)**
6. A.I.R. 1952 S.C. 54.

Principles regarding corroboration.

Dealing next with extent of corroboration required, when it is not considered safe to dispense with it, their Lordships thought that the following principles have to be borne in mind while seeking for such corroboration :

(1) It is necessary that there should be independent confirmation of every material circumstance. All that is required is that there must be some additional evidence rendering it probable that the story of the child-witness is true and it is reasonably safe to act upon it.

(2) The independent evidence must not only make it safe to believe that the crime was committed but it must in some way reasonably connect or tend to connect the accused with it.

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one child-witness would not be sufficient to corroborate that of another.

(4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of this connection with the crime.[1]

Weight of child-witness.

The rule of corroboration of the statement of a child-witness is not a rule of practice but it is rather a rule of prudence. That rule has been crystallized with the experience of Judges who very often find such witnesses under influence and their testimony tainted by extraneous circumstances. If the statement of a child-witness inspires confidence and there is unlikelihood of tutoring and his demeanour is found straight forward by the Trial Judge, no corroboration would be required of his statement. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.[2]

In *Dalip Singh* v. *State of Punjab*,[3] the criticism against the evidence of the D & A. was as they were tutored witnessess and had given the prosecution version parrot like, it was held that both of them were teenaged children of the deceased and their version was so truthful that it was rightly believed by the courts below.

In *Rameshwar Kalayan Singh* v. *State of Rajasthan*,[4] it was observed that—

Verdict of the Supreme Court.

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration is a matter of prudence, except where the circumstances make it safe to dispense with it must be present to the mind of the Judge."

Similar view has been accepted in *Krishnan Chithan* v. *State of Kerala*.[5]

Regarding the evidence of child-witness it has been held in the case of *Panchhi* v. *State of U.P.*,[6] that testimony of such witness must be evaluated more carefully and with greater circumspection and should find some corroboration. Similar view was taken in the case of *Arbind Singh* v. *State of Bihar*,[7] where it was held that corroboration is necessary as child-witness is prone to tutoring and hence

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1. Sanatan Bindhani *v.* State, (1972) 38 Cut. L.T. 428 at pp. 435-36.
2. Dharam Pal *v.* State, A.I.R. 1971 H.P. 17 at p. 19.
3. A.I.R. 1979 S.C. 1173 at p. 1176.
4. A.I.R. 1952 S.C. 54.
5. (1962) Cr.L.J. 650 ; Dharam Pal *v.* State, A.I.R. 1971 H.P. 17 at p. 19.
6. (1998) 7 S.C.C. 117 : 1998 (6) Supreme 420 : 1998 (3) Crimes 181.
7. (1995) Supp. 2 S.C.C. 416.

Court should look for corroboration. In case of single teenager witness in decisions reported at A.I.R. 1973 S.C. 55, it was held that her evidence has to be scrutinised with care and caution. The rule of corroboration of the statement of a child-witness is not a rule of practice, but it is rather a rule of prudence. If the statement of PW 1 the solitary child-witness of this case inspires confidence that there was unlikelihood of tutoring, even in absence of corroborative evidence, she can be relied upon.[1]

It is true that one has to accept the evidence of child-witnesses with caution but when their evidence is susbtantially corroborated by prosecution witnesses one can feel that child-witnesses have also spoken the truth.[2]

Where the very statement of the child-witness could form the basis of conviction no corroboration is needed by producing any witness.[3]

It has justly been laid down in *Darpan Potdarin* v. *Emperor*,[4] that the evidence of children is notoriously dangerous unless immediately available and unless received before any possibility of coaching is eliminated. It has been repeatedly laid down by courts of law that the evidence of a child-witness should be treated with caution and the need for corroboration of the evidence of a child-witness must be present in the mind of the Court, though the Court may convict an accused on the testimony of a child-witness if it feels satisfied about the guilt of the accused. In *R* v. *Campbell*,[5] it has been held that the unsworn evidence of a child must be corroborated by sworn evidence and if the only evidence implicating the accused is that of the unsworn child, the Judge must stop the case. But the law in England is somewhat different from that in India.

Can Court convict the accused on the testimony of a child-witness ?

It has been specifically provided under Sec. 38 (1) of the Children and Young Persons Act, 1933 that the accused shall not be liable to be convicted of the offence on the unsworn testimony of a child-witness unless that evidence is corroborated by some other material evidence implicating him. Such a restriction in the matter of acceptance of the evidence of an unsworn child-witness is not to be found under the provisions of the Indian Oaths Act. The weight to be attached to the evidence of child-witnesses will of course depend on the circumstances of each case, and it may be that a Court may come to the conclusion, on appreciation of evidence, that the unsworn testimony of a child-witness does not furnish sufficient corroboration to the unsworn testimony of another child-witness. But in India it cannot be laid down as a matter of law that the unsworn testimony of a child-witness must always be corroborated by sworn testimony. Even in *R.* v. *Campbell*,[6] Goddard, C.J., has pointed out that the sworn testimony of a child-witness can be corroborated by the unsworn testimony of a child-witness.

Unsworn testimony of a child-witness.

Although the unsworn testimony of child is admissible, it must be received with great caution. Children of tender age, generally speaking, are pliable and their evidence can easily be shaped and moulded. They can be made to repeat glibly a story put into their mind. They do not possess the discretion to distinguish between what they have witnessed and what they have heard. It is, therefore, desirable that absolute reliance should not be placed on the evidence of a solitary

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1. **Ram Bilas Singh *v.* State of Bihar, 1999 (3) Crimes 4 at pp. 8-9 : 1999 Cr. L.J. 2360 (Pat.).**
2. Dhansai Sahu *v.* State, A.I.R. 1969 Orissa 105 at p. 108.
3. Dharam Pal *v.* State, A.I.R. 1971 H.P. 17 at p. 20.
4. A.I.R. 1938 Pat. 153 at p. 158 : 39 Cr. L.J. 384.
5. (1956) 2 All E.R. 272.
6. *Ibid.*

child-witness. One should look for corroboration of the same from other circumstances in the case. The tender years of the child, coupled with other circumstances appearing in the case, for example, its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary. But that is a question of fact in every case. If, after carefully scrutinising the evidence, the Court comes to the conclusion that there is a great impress of truth in it, there is no bar in law in the way of accepting the evidence of a child-witness. The Court should look for corroboration as a matter of caution and not as a rule of law. In the instant case P.W. 2 is no other than the son of accused. Unless he saw the incident, he would not have come forward and testify to what he actually witnessed. His evidence appears to be natural. Therefore, the contention that the evidence of P.W. 2 cannot be taken into consideraton was rejected.[1]

Appreciation of evidence of both the child-witnesses.

Of course, it is to be always remembered that the evidence of both the child-witnesses, is to be looked at with care acted upon with caution.[2] Kenny has observed in his *Outlines of Criminal Law* at page 420 (1952 Ed.) that children are a most untrustworthy class of witnesses, and it is found from common experience that they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, although intelligent children are very often acutely observant of facts and events external to themselves and remember them with great accuracy. His observations have been adopted by a Division Bench of the Lahore High Court in *Abbas Ali* v. *Emperor*.[3]

Kenny's view on credibility of child-witness.

Dr. Hans Gross, who has been described by many as the father of criminal reseach, has set out in his book—*Criminal Investigation*, 1934 Ed., at pages 61-62, the nature and character of evidence given by children. He has said that in one sense the best witnesses are children of seven to ten years of age as at that time love and hatred, ambition and hypocrisy, considerations of religion, rank, etc. are yet unknown to them. He has, however, pointed out the great drawbacks which have made men distrustful of the capacity of children. They are apt to say much more from imagination than they actually know.[4]

Whether young child is a dangerous witness.

It has been laid down by the courts, time and again that the evidence of child-witness is dangerous in the extreme and that they live not unoften in a climate of "make-believe", they easily mistake what they had been asked to believe for what they may not have seen themselves and are persuaded to testify to or speak of such things as if they have seen them for themselves.[5]

Where the capacity of the child-witness was dully ascertained by the learned Trial Judge it was held that the quesiton of credibility of course still remained to be satisfied. Being a child-witness, she was subject to all those frailties which are amenable to any ordinary witness and besides all these frailties being tender in age and small in intellect, she was likely to be tutored and therefore a precaution

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1. Badi Guravaiah *v.* State of A.P., 1993 Cr. L.J. 3496 at pp. 3501, 3502.
2. State of Rajashtan *v.* Vijairam, (1968) 19 Raj. L.W. 1 at pp. 5-6.
3. A.I.R. 1933 Lah. 667 at p. 688 : 34 Cr.L.J. 606.
4. Jalwanti Lodhin *v.* State, A.I.R. 1953 Pat. 246 at pp. 248-49 : I.L.R. 32 Pat. 217 : 1 P.L.J. 280 ; State *v.* Dukhi Dei, A.I.R. 1963 Orissa 144 at p. 146 : I.L.R. (1962) Cut. 726. Normally evidence of child-witness should not be accepted, unless immediately available and unless narrated before any possibility of coaching is eliminated ; there should be closer scrutiny of the evidence of child-witnesses before the same is accepted by a Court of law.
5. State *v.* Roop Singh, (1966) 17 Raj. L.W. 282 at p. 385.

was to be observed to bring her testimony to a state of credibility so that she could be stated to have proved or disproved a question of fact. For this, corroboration was required to her statement.[1]

Thus it was observed in *Manni* v. *Emperor*,[2] as follows :

Oudh Chief Court's view.

"There is no more dangerous witness than a young child. Any mistakes or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well-taught lesson. Children have good memories and no conscience."

Necessity of corroboration of a child-witness.

On the question of necessity for corroboration of a child-witness, their Lordships of the Privy Council in *Mohammad Sugal Esa Mamasan Rer Allah* v. *King*,[3] held that in the Indian Evidence Act, the evidence of a child-witness is made admissible whether corroborated or not. In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused but in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not; once there is admissible evidence a Court can act upon it ; corroboration, unless required by statute, goes only to the weight and value of the evidence; it is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.[4]

It is true that children of tender age, generally speaking, are not to be regarded as trustworthy witnesses since they do not possess the discretion to distinguish between what they have seen and what they have heard. As a matter of prudence, therefore, courts are generally chary of putting absolute reliance on the evidence of a solitary child-witness and look for corroboration of the same from other circumstances in the case.[5]

In *B. Bhikha* v. *State of Gujarat*[6] it was held that even if there are no infirmities in the evidence of a young boy, it is desirable to seek corroboration of his evidence in view of his tender age. It is dangerous to convict on the uncorroborated evidence of a child of tender age. In the instant case no reliance can be placed on testimony of the child-witness due to improvements in his statement before the Sessions Judge, as against his statement before the police; and in view of his tender age of seven years.[7]

Supreme Court's view.

Corroboration of testimony of child-witness.

"Corroboration is required in those cases in which under the Childern and Young Persons Act, 1933, a very young child was allowed to give evidence without being sworn. The precaution is wise. It has been said that children are a most untrustworthy class of witnesses; for they are both 'suggestible' and even 'auto-suggestible'. On the other hand, intelligent children are very often acutely observant of facts and events

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1. Shrinivasa Murthy *v.* State of Karnataka, (1977) 2 Kant. L.J. 341 at p. 344.
2. A.I.R. 1930 Oudh 406.
3. A.I.R. 1946 P.C. 3 : 1946 A.L.J. 100 : 48 Bom. L.R. 138 : 50 C.W.N. 98 : (1945) 2 M.L.J. 493 : (1946) M.W.N. 101 : 1946 Pesh L.J. (P.C.) 3 222 I.C. 304.
4. State *v.* Dukhi Dei, A.I.R. 1963 Orissa 144 at p. 147 : I.L.R. (1962) Cut. 726.
5. Ulla Mahapatra *v.* King, A.I.R. 1950 Orissa 261 at p. 262 : I.L.R. (1950) Cut. 293 : 16 C.L.T. 102.
6. A.I.R. 1971 S.C. 1064 : 1971 Cr. L.J. 927.
7. Ram Singh *v.* State, 1976 Cr. L.J. 667 at pp. 670, 671 ; *see* also, State of Bihar *v.* Rachhya Singh, 1985 B.L.T. (Rep.) 77.

external to themselves and remember them with great accuracy." Though according to Sec. 118 of the Evidence Act, a child of six or seven years is a competent witness to give evidence in Court.[1] There should be closer scrutiny of the evidence of child-witnesses before the same is accepted by a Court of law.[2]

Ordinarily at that age of puberty, i.e. at about 13 years of age, girls have full power of understanding and give rational answers.[3]

7. The holding of preliminary enquiry is merely a rule of prudence and not a legal obligation upon the Judge.—The legal position is that when a child is a witness, the first step for the Judge is to satisfy himself that the child is a competent witness within the meaning of Sec. 118 of the Evidence Act and competency of the child should be ascertained by putting a few questions in order to find out whether the witness is intelligent enough to understand what he had seen and afterwards to inform the Court thereof and understands the duty of speaking truth or not. The holding of preliminary enquiry is merely a rule of prudence and not a legal obligation upon the Judge, A.I.R. 1942 Pat. 159 : (1942) 43 Cr. L.J. 479. Under Sec. 5 of the Oaths Act, oath shall be administered to such wintess only who understand the sanctity of oath. A witness may be a competent witness, though he may not understand the sanctity of oath and in such case Sec. 13 of the Oaths Act becomes applicable, in which the Court refrains from administering the oath to such witness.

Notwithstanding Sec. 5 of the Oaths Act, evidence of a child witness is not inadmissible merely on the ground that no oath was administered.[4]

There is no rule of law that a Judge or Magistrate before recording statement of a child-witness, should invariably put preliminary questions for the purpose of ascertaining the child's capacity to understand and give rational answers; and the mere fact a Judge did not interrogate the child-witness before the examination will not render his evidence inadmissible. The object of putting questions is to enable the Judge to form his opinion whether the child has sufficient understanding to be qualified to be witness. But, in order to find this out, it is not obligatory that a preliminary investigation should be made. Another object of putting questions before examination is that time of the Court may not be wasted, if it is found afterwards that the child is not intelligent enough to give evidence.[5]

Object of putting preliminary questions.

In *Bipin Behari Sahu* v. *State of Orissa*,[6] and accused was a boy of 13 years of age when he gave evidence before the Trial Court. From the reading of the evidence of P.W. 4, it is crystal clear that he was capable of understanding the nature of questions put to him and the facts he deposed. As a matter of fact he gave clear statements in examination-in-chief and cross-examination. Therefore, there was no irregularity for non-compliance of Sec. 118 of the Evidence Act.

Although it is not necessary to have a preliminary examination, namely, *voire dire*, of a child-witness in order to make the testimony admissible, nevertheless, such a course is desirable and should be resorted to, for it offers an opportunity to the Court to assess the mental capacity of a child witness. Failure to record the

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1. Jalwanti Lodhin *v.* State, A.I.R. 1953 Pat. 246 : I.L.R. 32 Pat. 217 : 1 B.L.J. 280.
2. Dasarathi Mahanto *v.* State, 37 Cut. L.J. 169 at p. 174.
3. State *v.* Dukhi Dei, A.I.R. 1963 Orissa 144 at p. 151 : I.L.R. (1962) Cut. 726 : (1963) 2 Cr. L.J. 294.
4. **Ram Bilas Singh *v.* State of Bihar, 1999 Cr. L.J. 2360 at p. 2362 : 1999 (3) Crimes 4 (Pat.).**
5. Nandeswar Kalita *v.* State of Assam, 1983 Cr. L.J. 1515 at pp. 1516, 1517 (Gau.) ; *see* also Sudhakaran *alias* Aniyan Kunju *v.* State, 1983 (2) Crimes 150 at p. 154 (Ker.).
6. 1986 Cr. L.J. 406 at p. 407 (Orissa).

evidence of any child witness will seriously affect the credibility of the witness so much so that in some cases it may be necessary to reject the evidence altogether.[1]

In the case of *Mangal Singh* v. *State of Rajasthan*,[2] it was argued that though she was treated as a child-witness and her competency to testify was treated by *voir dire*, no record of the preliminary questions put to her was maintained It was argued that this failure is a serious circumstance and the accused stands prejudiced thereby. Failure to record the preliminary questions put to the child to judge his competency is *per se* no ground for rejecting his testimony if the child understood the question and gave the rational answers to the questions put to him, it is admissible for the reason that the recorded statement of a child-witness ordinarily furnishes sufficient material to judge the competency of that witness. It may be pointed out that the statement of this witness is a long one running into 38 fullscape typed pages. The answers she gave are lengthy and gruelling cross-examination leave no room to doubt that she is an intelligent child and was competent to testify.

Preliminary examination of a child-witness.

There is no legal requirement to hold a preliminary examination to determine the competence of a child-wintess and the failure to conduct such examination will not necessarily effect his evidence. However, in a series of decisions it has been laid down time and again over years as a rule of prudence that not only it is desirable that a preliminary examination of a child-witness should be made by the Court but that a formal record of such examiantion should also be maintained. In the case of a criminal prosecution, where the fate of the accused depends on the testimony of such a witness, the imperative necessity of *voir dire* has been underlined with greater emphasis for obvious reasons. It may be that the incompetence of such a witness to depose to the *res gestae* or his ignorance about the duty to speak truth may often come out during the examination of the witness. However, it is always desirable to resort to a preliminary examination which will tend to disclose his capacity and intelligence, for, such an examination may expose even a witness who has been fully tutored and who on that account might be able to stand the test of cross-examination. Besides, if actual examination is preceded by appropriate questions much of the time may be saved in many cases where it ultimately transpires that the witness lacks the requisite capacity and comprehension. The record of such preliminary examination if maintained, will enable the Appellate Court, which does not have the opportunity to watch the demeanour of the witness, to apply its own mind and the review the decision of the Trial Court Judge. If need arises, on these matters, it is for these reasons that *voir dire* and the maintenance of its formal record have been accepted as an established rule of practice in our courts.[3]

Although it is not necessary to have a preliminary examination of a child-witness in order to make his testimony admissible, nevertheless, it may be said that such a course is desirable and should be resorted to.

It is well known that child-witness can be tutored much better than adults and further that when once a child-witness has been properly tutored then such a child-witness cannot easily be shaken in cross-examination. A preliminary examination has the merit of leaving the child-witness in the hands of the Court

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1. Damber *v.* State, 1993 All. Cr. R. 1 at p. 6.
2. 1985 Cr. L.J. 602 at p. 609 (Raj.).
3. Sataji Nathaji *v.* State of Gujarat, (1976) 17 (Guj.) L.R. 254 at p. 256.

for it to discover by asking questions which have no relevance or connection with the facts about that witness was expected to give evidence, so that the evil effect of tutoring could not mar the assessment of the mental capacity of the witness by the Court.

No precise age to determine the competency of a witness.

It has been very rightly pointd out by Mr. Justice Brewer in *George L. Wheeler* v. *United States*,[1] that there is no precise age which determines the competency of a witness. He observes that—

> "This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former...."

In the case of *Ram Hazoor Pandey* v. *State*[2] the Allahabad High Court observed :

Desirability of keeping in records other questions asked from the child-witness.

> "....It is very desirable that a Trial Judge, who has a child-witness before him, should preserve on the record, apart from the child-witness's evidence in the case, some other questions and answers which could help the Court of Appeal to come to the conclusion whether or not the Trial Judge's decision in regard to the competency of the child-witness was right or erroneous."[3]

The section does not deal with the understanding of person in respect of the particular topics on which his deposition is to be recorded, but the section deals with the general intellectual capacity of the child, and, if the Court is satisfied about the general intellectual capacity of the child to give evidnece, then the witness would be a competent witness and it would be the duty of the Court to assess the evidence of that child on the particular topics deposed to by him, and decide for itself if the child had sufficient intellectual capacity to understand the matters deposed to by it and whether the evidence given by it was credible, reliable and trustworthy.

It is true that the law, as it stands, does not cast a duty upon a Judge, to ascertain by way of *voire dire*, the competency of a person to be a witness. In a large majority of cases, the presumption would be that the person is a competent witness. But, when the Court has got to deal with a child-witness who is only five years old, it would not be proper to rely on any such presumption. In such a case, it is desirable that the Judge should undertake a *voire dire* with a view to satisfy himself that the witness is a competent witness. Of course, the view which the Judge would form at this preliminary enquiry would not be the final view and the Judge might have to change that view if the examination and the cross-examination revealed his incompetency.[4]

Tutoring.

Though the evidence of a child-witness can be relied upon, Courts must be careful to examine the evidence to exclude the possibility of any tutoring.[5]

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1. (1895) 159 U.S. 523 at p. 524.
2. A.I.R. 1959 All. 409. at p. 412 : 1959 A.W.R. (H.C.) 248 : 1959 All. Cr. R. 209 : 1959 A.L.J. 239.
3. Shanker Lal *v.* Vijay Shanker Shukla, A.I.R. 1968 All. 58 at pp. 63-64.
4. Govind Natha *v.* State, A.I.R. 1961 Guj. 11 at p. 14 : (1961) 1 Cr. L.J. 57.
5. *In re* Kamya, A.I.R. 1960 A.P. 490 at p. 491 : (1959) Andh. L.T. 851 : (1960) 61 Cr. L.J. 1302 ; *see* also State of Assam *v.* Hafizuddin Ahmed, 1983 U.P. Cr. R. 148.

In the instant case in discarding the evidence of the brother of the deceased the learned Additional Sessions Judge was influenced by the tender age of witness (about 14 years) and was of the view that he was likely to be tutored. It was opined by the Supreme Court that a boy of about 14 years of age can give a proper account of the murder of his brother if he has an occasion to witness the same and simply because the witness was a boy of 14 years it will not be proper to assume that he is likely to be tutored. It was observed that High Court has given very convincing reasons for accepting the evidence of child-witness as an eye-witness of the murderous act and the Supreme Court upheld the same.[1]

8. Competency of person—What determines.—In determining the question of competency, the Court has only to ascertain, whether, from the extent of his intellectual capacity and understanding, witness is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or very advanced age can satisfy these requirements, his competency as a witness is established.[2]

A boy of tender years should be examined, unless the Courts thinks that he was prevented from understanding the question put to him, or from giving rational answers to them, by reason of such tender years.[3]

Boy of tender years.

Before a child of tender years is asked any question bearing on the *re gestae*, the Court should test his capacity to understand and give rational answers, and his capacity to understand the difference between truth and falsehood.[4]

Competency to be tested before examination as to *res gestae*.

The Judge must form his opinion as to the competency of a witness, before his actual examination commences.[5]

9. Mode of recording evidence of child-witness.—In a case of the kind, where the guilt or innocence of the accused depended almost wholly upon the evidence of one small boy, the Court would do well to take that evidence down in the form of question and answer.[6]

10. Modes of ascertaining whether a witness is competent.—Although there is no provision to have a preliminary examination, such a course is desirable and should be resorted to, because it offers an opportunity to the Court to assess the mental capacity of the child-witness. This view receives support in a recent decision of the Allahabad High Court in *Ram Hazoor Pandey* v. *State*.[7] Their Lordships followed the decision in *George L. Wheeler* v. *United States*.[8]

The law has also cast duty on the Court while recording the evidence of the child witnesses. The competency to testify depends on the witness's ability to understand questions put to him and to give rational answers to those question. Once a witness is found to be a competent witness, even if he is not competent witness to take an oath or if there is an omission to take an oath that will not invalidate proceedings or render inadmissible the evidence. The rule generally is in favour of admission of evidence though the weight to be attached to it will naturally be a matter for consideration by the Court. There is always competency unless the Court considers otherwise.[9]

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1. Prakash *v.* State of M.P., A.I.R. 1993 S.C. 65 at p. 70.
2. Queen-Empress *v.* Lal Sahai, I.L.R. 11 All. 183 at p. 185.
3. Queen-Empress *v.* Ram Sewak, I.L.R. 23 All. 90 : 20 A.W.N. 211.
4. Sheikh Fakir *v.* Emperor, 11 C.W.N. 51 : 4 Cr. L.J. 412; Tulsi Ram *v.* Emperor, A.I.R. 1928 Lah. 903 : 110 I.C. 799.
5. *Ibid.*
6. Emperor *v.* Haria Dhobi, A.I.R. 1937 Pat. 662 at p. 663 : 18 Pat. L.T. 857 : 172 I.C. 780.
7. A.I.R. 1959 All. 409 : 1959 A.W.R. 248 : 1959 All. Cr. R. 209 : 1959 A.L.J. 239.
8. (1895) 159 U.S. 523.
9. **Ghewar Ram *v.* State of Rajasthan, 2001 Cr.L.J. 4460 at p. 4463 (Raj.)**

Although legally there is not bar in accepting the uncorroborated testimony of a child-witness, yet prudence requires that Courts should not act on the uncorroborated evidence of a child whether sworn or unsworn. This was so held by their Lordships of the Privy Council in *Mohammad Sugal Esa Mamasan Rer Allah* v. *King*.[1] The same view was taken by their Lordships of the Supreme Court in *Rameshwar Kalyan Singh* v. *State of Rajasthan*.[2]

"The ordinary mode of ascertaining whether a witness is competent is by examining him on what is called the *voire dire* i.e. a sort of preliminary examination by the Judge,...when, if incompetency appears from his answers, he is rejected;[3] and even when they are satisfactory, the Judge may receive evidence to contradict them or establish other facts showing the witness to be incompetent.[4]

"Although, in regular order, the examiantion on the *voire dire* precedes the examination-in-chief, yet, when a ground of incompetency is unexpectedly discovered in the middle of a trial, the Judge may stop the proceedings, and examine on the *voire dire* with a view to ascertaining the fact."[5]

Under Sec. 118, Evidence Act, it is imperative that the Court should test the competency of a child-witness before examining him. And also judge the competency of the witness during the course of his examination.[6]

Court to test intelligence of a child-witness.

Before examining a child of tender years as a witness a Court should satisfy itself that the child is sufficiently intellectually developed to comprehend what he has seen and to give an intelligent account of it to the Court. If the Court is of opinion that by reason of tender years and defective or immature understanding the child could not have perceived the particular incident to prove which he is produced as a witness, the Court should not only refrain from administering the oath to him but should also decline to examine him as a witness.[7] On the other hand, if the child, though of tender years, is sufficiently intelligent to understand the questions put to him and to give rational answers to those questions, then his capacity to give evidence is on the same footing as that of any other adult. But in such cases it would be desirable if the Court, before examining the child as a witness, tests his intellectual capacity by putting a few simple and ordinary questions to him and to record a brief proceeding so that the Appellate Court may feel satisfied as to the capacity of the child to give evidence.[8]

In *Mst. Ram Sakhia* v. *Emperor*,[9] Varma J., quoted an observation of Bucknill, J., in *Panchu Choudhury* v. *Emperor*.[10]

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1. A.I.R. 1946 P.C. 3 : 1946 A.L.J. 100 : 1946 A.W.R. 7 (P.C.) : 48 Bom. L.R. 138 : 50 C.W.N. 98 : (1945) 2 M.L.J. 493 : 59 M.L.W. 7 : 1946 M.W.N. 101 : 222 I.C. 304.
2. A.I.R. 1952 S.C. 54 : 1952 Bh. L.R. 88 (S.C.) : 1952 S.C.A. 40 : 1952 S.C.J. 46 : 1952 S.C.R. 377 : (1952) 1 M.L.J. 440 : 65 M.L.W. 351 : 1952 M.W.N. 150 : 1952 M.W.N. (Cr.) 26; Krishnan Vasu *v.* State of Kerala, 1960 Ker. L.T. 80 at pp. 82-83.
3. Yardely *v.* Arnold, 10 M. & W. 141.
4. Bartlett *v.* Smith, 11 M. & W. 483 ; Best on *Evidence*, 9th Ed., Sec. 133, pp. 123, 124.
5. *Per* Rolfe, B., in Jacobs *v.* Layborn, 11 M. & W. 685 ; Best on *Evidence*, 9th Ed., Secs. 134, 135, p. 124.
6. Dhanna *v.* State, A.I.R. 1951 Raj. 37 at p. 42.
7. *Vide* Dhani Ram *v.* Emperor, I.L.R. 38 All. 49 : 31 I.C. 1005, 13 A.L.J. 1072; *see* also Sheikh Fakir *v.* Emperor, (1907) 11 C.W.N. 51.
8. Tulsi *v.* Emperor, A.I.R. 1928 Lah. 903 at pp. 903-04 : 101 I.C. 799.
9. 15 Pat. L.T. 586 : A.I.R. 1934 Pat. 651.
10. 3 Pat. L.T. 649 : A.I.R. 1923 Pat. 91.

The fact is that while there is no legal obligation to ask preliminary questions, it has been held to be a wise course in the case of very young children. The object of such preliminary questioning, however, is not to legalize the evidence but merely to save the time of the Court. Indeed, if the child is actually examined, the best test of his capacity to give evidence is the evidence itself and the manner in which it is given. If the Court satisfies itself in this way rather than by preliminary questioning, there is nothing illegal in its procedure, and no ground for interference in revision. If the Court has believed the evidence, it is obvious that the Court must have been completely satisfied as regards the capacity of the child to testify.[1]

There is no rule of law that a Judge or Magistrate before recording statement of a child-witness, should invariably put preliminary questions for the purpose of ascertaining the child's capacity to understand and give rational answers, and the mere fact that a Judge did not interrogate the child-witness before the examination will not render his evidence inadmissible. The object of putting questions is to enable the Judge to form his opinion whether the child has sufficient understanding to be qualified to be witness. But, in order to find this out, it is not obligatory that a preliminary investigation should be made. Another object of putting questions before examination is that time of the Court may not be wasted, if it found afterwards that the child is not intelligent enough to give evidence.

Object of putting question to a child-witness.

The object of putting questions to the witness is that the time of the Court may not be wasted if it is found, as a result of a preliminary enquiry, that the child is neither intelligent nor can he give evidence which may be acceptable. But if that is the only object of the preliminary enquiry, the accused is not at all prejudiced if the same result is obtained in the course of the examination of the witness during the trial. The holding of a preliminary enquiry is merely a rule of prudence and is nowhere laid down as a legal obligation upon the Judge.[2]

Competency of child-witness—Court's discretion to decide.

This section vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. It cannot be disputed that this discretion must be exercised in a judicial manner. In *Sheikh Fakir* v. *Emperor*,[3] the broad proposition was laid down that before a child of tender years is asked any questions bearing on the *res gestae*, the Court should test his capacity to understand and give rational answers, and his capacity to understand the difference between truth and falsehood. The proposition that the competency of the witness should be tested before his examination is commenced is not quite justified by the provisions of Sec. 118, Evidence Act.[4]

Preliminary examination, not on record—Effect of.

The preliminary examination of the witness in order to determine competency is known as *voire dire*. In this case the learned Judge did in fact resort to a preliminary examination

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1. Lakhan Singh *v.* Emperor, A.I.R. 1942 Pat. 183 at p. 184 : I.L.R. 20 Pat. 898 : 23 Pat. L.T. 332, 199 I.C. 638 : 43 Cr. L.J. 570; Nandeswar Kalita *v.* State of Assam, 1983 Cr. L.J. 1515 at pp. 1616-17 (Gau.).
2. Karu Singh *v.* Emperor, A.I.R. 1942 Pat. 159 at pp. 160-61 : I.L.R. 20 Pat. 893 : 23 Pat. L.T. 310 : 199 I.C. 200 ; Marianthony Mariasoosa *v.* State, A.I.R. 1955 T.C. 81 : 1955 Ker. L.T. 4.
3. (1907) 11 C.W.N. 51 : 4 Cr. L.J. 412 ; *see* also Tulsi Ram *v.* Emperor, A.I.R. 1928 Lah. 903 : 110 I.C. 799.
4. Krishna Kahar *v.* Emperor, A.I.R. 1940 Cal. 182 at pp. 183-84 : I.L.R. (1939) 2 Cal. 569 : 43 C.W.N. 1117 : 187 I.C. 129 : 41 Cr. L.J. 405.

although no record of what questions were put and what answers were given are preserved on the record. This, has not rendered the evidence inadmissible or doubtful. Keeping a record of the preliminary examination is not a condition precedent to the taking of evidence of a child-witness. It may be desirable but not an invariable requirement of law, that a record of the *voire dire* should be preserved on the record. The whole object behind such examination is to assess whether the witness has understood the questions put and has been able to give rational answers to them. That the witnesses have stood the test would be apparent from the evidence given by them in this case. In order to guard against possible adverse comments, the learned Judge took pains to record the evidence of these witnesses in question and answer form to make it possible for the Appellate Court to determine for itself whether they comprehended the questions and gave rational answers to them. In the instant case, it is clear from the evidence that the child-witnesses, understood the questions and gave rational answers to those questions. The statement should have been challenged in cross-examination if it was untrue. But nothing was asked with regard to it in cross-examination. Therefore, the Trial Judge was justified in believing their evidence.[1]

Where the Trial Judge has expressed himself unequivocally and very clearly on the question of the ability of the witness to understand and to distinguish between right and wrong, the High Court would not be justified in taking a different view of the witness's intelligence, of his capacity to distinghish between right or wrong, merely because the questions and answers which enabled the Trial Judge to say so have not been recorded.[2]

It has been held in *Dhani Ram* v. *Emperor*,[3] that a child of tender years should only be examined after the Court has satisfied itself that he or she is intellectually sufficiently developed to enable it to understand sufficiently what it has seen and to afterwards inform the Court thereof.[4]

Understanding is under this section the sole test of competency. A person, though of tender years if he can satisfy this test, is competent as a witness. In a case reported as *Nafar Sheikh* v. *Emperor*,[5] it was observed that the Court is not bound before taking the deposition of a child-witness to ascertain by so to say a preliminary inquiry whether the child has capacity to understand the questions put to it and give rational answers to them but the competency of such witness may be tested in the course of examination. The modern practice is to interrogate the witness either before affirming him or to elicit the facts upon the examination-in-chief, when, if his incompetency appears, he will be rejected.[6]

It is well settled that before the Sessions Judge can transfer a statement he must record a finding that any of the circumstances enumerated in Sec. 33 existed and unless he is so satisfied on evidence led before him the power vested in him under Sec. 33 cannot be exercised.[7]

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1. Santosh Mandal *v.* State, 1983 Cr. L.J. 773 at p. 776 (Cal.).
2. Birsingh Majhi *v.* State of Assam, 1977 Cr. L.J. 1349 at pp. 1352, 1353.
3. I.L.R. 38 All. 49 : 31 I.C. 1005 : 13 A.L.J. 1072.
4. *See* also Ghulam Hussain *v.* Emperor, A.I.R. 1930 Lah. 337 at p. 337 : 31 Punj. L.R. 612 : 127 I.C. 862. A somewhat different view was taken in a case reported in Nafar Sheikh *v.* Emperor, 18 C.W.N. 147 : I.L.R. 41 Cal. 406.
5. I.L.R. 41 Cal. 406 : 18 C.L.J. 582 : 20 I.C. 741 : 18 C.W.N. 147.
6. Taylor's *Law of Evidence*, paras 1392 and 1393 ; S. Rasul *v.* Emperor, A.I.R. 1930 Sind 129 at pp. 129-30 : 120 I.C. 514.
7. Saudagar Singh *v.* Emperor, A.I.R. 1944 Lah. 377 : 46 Punj. L.R. 135.

11. Grounds of incompetency when apparent to the Judge.—The grounds of incompetency are sometimes apparent to the senses of the Judge, as in the following cases :

(*i*) Where a witness presents himself in a state of intoxication.[1]

(*ii*) Where the witness is an obvious lunatic.[2]

(*iii*) Where the witness is of such tender years that the Judge deems a preliminary inquiry into his religious knowledge essential.[3]

12. Incompetency of witnesses—Presumption as to.—Incompetency of a witness is never presumed. It comes in the shape of an exception or objection to the witness; and if the facts on which it rests are disputed they must, like all other collateral questions of fact, be determined by the Judge.[4]

Presumption of incompetency of a witness.

And, as a matter of practice, the Judge, in cases of doubt, is always disposed to receive the witness and let the objection go to his credibility rather than to his competency.[5]

13. Testimony of infants—Omission to take evidence on oath or affirmation.—As was laid down in the case of *R.* v. *Brasier*,[6] an infant, even though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath.[7]

Section 13 of the Oaths Act, 1873 (10 of 1873), does not render the evidence of a child nine years of age inadmissible, if the evidence has been advisedly, and not by an omission, recorded without any oath or affirmation.[8]

The evidence of a child of immature age, who understood the questions put to her, taken on a simple affirmation, because she was not aware of the responsibility of an oath, was held to be admissible.[9] The evidence of a witness, who was examined on simple affirmation under the direction of the Judge, is admisible as evidence.[10]

At a trial on a charge of murder, one of the witnesses for the prosecution was a girl of about ten years of age. As it appeared that she did not understand the nature of an oath or solemn

Murder trial; evidence of a girl of ten years of age ; admissibility.

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1. Mansell *v.* Reg., 1 Dears L. & B. 405.
2. *Ibid.*
3. *See* Best on *Evidence*, 9th Ed., Sec. 133, p. 123.
4. Bartlett *v.* Smith, 11 M. & W. 483 ; R. *v.* Hill, 2 Den. C.C. 254 ; Best on *Evidence*, 9th Ed., Sec. 133, p. 122.
5. Best on *Evidence*, 9th Ed., Sec. 133, p. 123.
6. (1779) 1 Leach C.C. 199 : 1 East P.C. 443.
7. Nafar Sheikh *v.* Emperor, A.I.R. 1914 Cal. 276 at p. 277 : I.L.R. 41 Cal. 406.
8. 14 B.L.R. 295 (note) ; *see* also Queen *v.* Sewa Bhogta, 14 B.L.R. 294 ; Ram Samujh *v.* Emperor, 10 O.C. 337 ; but *see* Queen-Empress *v.* Maru, I.L.R. 10 All. 207 at p. 217—Section 6 of the Oaths Act, 1873, imperatively requires that no person shall testify as a witness, except upon oath or affirmation, and notwithstanding Sec. 13 of the same Act, the evidence of a child, eight or nine years of age, is inadmissible, if if has been advisedly recorded without any oath or affirmation; Queen-Empress *v.* Maru, I.L.R. 10 All. 207, cited in Queen-Empress *v.* Viraperumal, I.L.R. 16 Mad. 105 at p. 111— Where a child of about six years of age was called as witness, and the Court, being satisfied about his intellectual capacitiy to give evidene permitted him to be examined as a witness, but intentionally omitted to administer an affirmation, it was held that the child should have been affirmed.
9. Queen *v.* Mst. Itwarya, 22 W.R. (Cr.) 14.
10. Queen *v.* Sewa Bhogta, 23 W.R. (Cr.) 12.

affirmation, the Court allowed her to be examined without administering any oath or affirmation. *Held* that the girl's evidence was admissible.[1]

On administering of oath to a child-witness.

Where the Court does not administer oath on the ground that the child-witness does not understand its nature, his evidence is still admissible,[2] but unsworn evidence of a child must always be received with great caution.[3] It may be observed that proviso to Sec. 5, Indian Oaths Act, 1873,[4] which was added in 1939 by Oaths Amendment Act, 1939 (39 of 1939), makes it clear that Court may not administer the oath to child under 12 years of age if it thinks that the child does not understand the sanctity of an oath.

14. Evidence of prosecutrix in rape case.—Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unles there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence pending assurance to her accusation.[5]

A woman who is victim of rape is in the same position as an injured witness and her evidence should receive the same weight.[6]

When a minor, the child-witness is giving evidence against her very near relative, and that too in context with commission of heinous crime, the Court has to examine evidence of such child-witness with utmost caution because if such evidence is accepted and acted upon, it ruins the future life of the accused. In the case of such evidence Court has to search for reliable corroborative evidence either oral or documentary as a matter of prudence after getting satisfied that the evidence of such child-witness is itself free from infirmity and is sterling sound. In rape cases it is utmost necessary.[7]

15. Minor discrepancies in testimony of child-witness.—As pointed out by their Lordships in *Mohan Singh* v. *State*,[8] minor discrepancies in testimony of the child-witnesses are in proof of their truth rather than a badge of falsehood.[9]

16. Omission to take oath does not render inadmissible any evidence.—In India, the question has more than once arisen whether the omission to take an oath referred to in Sec. 13, Oaths Act, applies to a case where the Court deliberately refrains from administering the oath to a witness, or only to cases where the omission is due to some accident or negligence. In *R.* v. *Sewa Bhogta*,[10] a majority of the Full Bench, Bengal High Court, Jackson, J., dissenting, held that

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1. Queen-Empress *v.* Shava, I.L.R. 16 Bom. 359.
2. Queen *v.* Sewa Bhogta, 14 B.L.R. 294; Emperor *v.* Sashi Bhusan, 24 C.W.N. 767 : A.I.R. 1920 Cal. 414 : Queen-Empress *v.* Shava, I.L.R. 16 Bom. 359; China Venkadu *v.* Emperor, A.I.R. 1914 Mad. 293 : I.L.R. 38 Mad. 550 ; Fatu Santal *v.* Emperor, A.I.R. 1921 Pat. 109 : 6 Pat. L.J. 147 : 2 Pat. L.T. 288 : 61 I.C. 705 ; Budha *v.* Empress, I.L.R. 31 Pat. 1889 (Cr.); *In re* Dasi Viraya, A.I.R. 1938 Mad. 490 at p. 491 : (1938) 1 M.L.J. 289 : 47 M.L.W. 161 : 1938 M.W.N. 90 : 39 Cr. L.J. 585 : 175 I.C. 422; Hussain Khan *v.* Crown, A.I.R. 1923 Lah. 332 : 76 I.C. 1037.
3. Ah Phut *v.* King, A.I.R. 1939 Rang. 402 at p. 404 : 1940 Rang. L.R. 104 : 185 I.C. 205 : 41 Cr. L.J. 129.
4. The Indian Oaths Act, 1873 has been replaced by Oaths Act; 1969 (No. 44 of 1969.)
5. State of Maharashtra *v.* Chandraprakash Kewalchand Jain, A.I.R. 1990 S.C. 658 at p. 664.
6. State of Rajasthan *v.* Shri Narayan, 1993 S.C. Cr. R. 115 at p. 119 ; *see* also State of Maharashtra *v.* C.K. Jain, 1992 B.Cr. C. 395 (S.C.).
7. **Gajraj Singh *v.* State of M.P., 2001 (1) M.P.L.J. 202 at p. 204.**
8. A.I.R. 1965 Punj. 291.
9. Dharam Pal *v.* State, A.I.R. 1971 H.P. 17 at p. 19.
10. 14 Beng. L.R. 294 (F.B.).

the section being unqualified in terms did apply to a case where the Court accepted the evidence of a child to whom the oath was not administered on the ground that the witness did not understand its nature.[1]

The competence of a witness is determined by Sec. 118 of the Evidence Act, According to the said section, every person is competent to give evidence except when the Court considers that he or she is unable to understand the questions put to him or give rational answers. Such incompetency may arise from causes like tender years, old age, disease etc. The proviso to Sec. 5 of the Oaths Act prescribes that when a witness is a child under 12 years of age and the Court considers that though he understands the duty of speaking the truth, he does not understand what oath means, the Court may dispense with the administration of oath. But the Judge should always, when dispensing with an oath, make a clear record that he was satisfied that the child understands the duty to speak the truth and should also state his reason for thinking so.[2]

Under Sec. 118 of the Evidence Act all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. It is, therefore, obvious that a child who can understand the questions put to him or her and who can give rational answers to the same, is a competent witness. Giving oath to such a child-witness, before recording his evidence, however, depends upon the question whether he/she understands the sanctity of oath. In this connection reference may be made to Sec. 4 (1) of the Oaths Act, 1969.[3]

On the other hand, in Allahabad, Mahmood, J., in an elaborate judgment refused to follow that case, and preferred the view of Jackson, J., that in such circumstances the evidence was inadmissible.[4]

Failure to record requisite opinion under Sec. 4 Oaths Act, 1969—effect.

The net effect of Secs. 4 and 7 of the Oaths Act, 1969 is that oath must be administered to every witness unless the Court is of the opinion, in case of a child under twelve years of age, that he does not understand the nature of oath. However, in case of such a child, the omission to take oath will not affect the admissibility of his evidence and such evidence might be acted upon if the Court is of the opinion that he understands the duty to speak the truth. Even if there is failure on the part of the Court to formally record the requisite opinion, it would be merely an irregularity curable under Sec. 7 and might not in all cases affect the evidence. Thus, though it is the duty of the Court to form an opinion whether such a witness understands the sanctity of oath and the duty to speak the truth, failure on the part of the Court to formally record such an opinion may not by itself be fatal.[5]

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1. *See* also Emperor *v.* Sahdeo Ram, 1935 A.L.J. 618 : Ah Phut *v.* King, A.I.R. 1939 Rang. 402; Sheo Prasad *v.* Emperor, A.I.R. 1942 Oudh 193 ; Emperor *v.* Sashi Bhusan, A.I.R. 1920 Cal. 414 ; Queen-Empress *v.* Shava, I.L.R. 16 Bom. 359 ; G. China Venkadu *v.* Emperor, A.I.R. 1914 Mad. 293; Fatu Santal *v.* Emperor, A.I.R. 1921 Pat. 109; Budha *v.* Empress, (1889) 31 P.R. 1889 (Cr.); Sudhakaran Aniyan Kunju *v.* State of Kerala, (1983) 2 Cr. L.C. 315.
2. Badi Guravaiah *v.* State of A.P., 1994 (2) Crimes 886 at p. 889 : 1994 (2) Andh. L.T. 261 (A.P.) (D.B.).
3. **Sadashiv Tukaram *v.* State of Maharashtra, 2000 (1) Mah. L.J. 339 at p. 344.**
4. Queen-Empress *v.* Maru, I.L.R. 10 All. 207 ; Queen-Empress *v.* Lal Sahai, I.L.R. 11 All. 183 ; Queen- Empress *v.* Viraperumal, I.L.R. 16 Mad. 105 ; Daya *v.* Emperor, 1918 L.B. 22 : 9 L.B.R. 88.
5. Sataji Nathaji *v.* State of Gujarat, (1976) 17 Guj. L.R. 254 at p. 256.

It is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and why they think so. The question therefore is whether the opinion referred to above must be formally recorded or whether it can be inferred from the circumstances in which the deposition was taken. In this connexion a reference must be made to Sec. 13 of the Oaths Act, and Sec. 118 of the Evidence Act. In fact Sec. 13 of the Oaths Act says that no omission to take any oath or to make any affirmation and no irregularity whatsoever, in the form in which anyone of them is administered, shall invalidate any proceeding or render inadmissible any evidence. Section 118 of the Evidence Act deals with the competency of the witnesses.

Section 13 of the Oaths Act and Sec. 118 of the Evidence Act.

Thus, if an omission to take the oath does not by reason of Sec. 13 of the Oaths Act affect the admissibility of evidence, it follows that an irregularity arising from the fact, that the Trial Judge has failed to record the certificate as required by the proviso to Sec. 5 of the Oaths Act cannot alter the admissibility either. There was at one time a controversy as to whether Sec. 13 of the Oaths Act can be pressed into service even though the omission to administer the oath is not accidental. In *Queen Empress* v. *Maru*,[1] Mahmood, J., held that Sec. 13 of the Oaths Act is only applicable when the omission is accidental. On the other hand, the Calcutta High Court in *R.* v. *Sewa Bhogta*,[2] took a contrary view. This conflict or judicial opinion was, however, resolved by a decision of the Privy Council in *Mohammad Sugal Esa Mamasan Rer Allah* v. *King*,[3] in which their Lordships of the Privy Council observed that Sec. 13 of the Oaths Act is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission is accidental. It is to apply only where the omission to administer the oath occurs *per incuriam*.[4]

Whether Sec. 13 of the Oaths Act can be passed into service even though the omission to administer the oath is not accident.

In *Ram Samujh* v. *Emperor*,[5] an instructive judgment was given by Greeven, A.J.C., agreeing with that of the Bengal High Court.

In the opinion of the Lordship of the Privy Council the decisions of the Bengal High Court and in the case in *Ram Samujh* v. *Emperor*,[6] are right. Section 13, Oaths Act, (Sec. 7 Oaths Act, 1969) is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs *per incuriam*. It may be observed that this question can no longer arise in India because in 1939 the Legislature passed the Oaths (Amendment) Act, 1939 (39 of 1939), which settles the law in accordance with the Bengal and Oudh decisions referred to above.[7]

Omission to administer oath.

17. Minor contradiction in statement of the eye-witness.—The mere fact that there is some contradiction in the statements of the solitary eye-witness made at two stages as to some minor details cannot be a ground for holding that her statement is false.[8]

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1. I.L.R. 10 All. 207.
2. (1875) 14 Beng. L.R. 294 (F.B.).
3. A.I.R. 1946 P.C. 3.
4. Dhansai Sahu *v.* State, A.I.R. 1969 Orissa 105 at p. 107-108.
5. 10 O.C. 337.
6. *Ibid.*
7. Mohammad Sugal Esa Mamasan Rer Allah *v.* King, A.I.R. 1946 P.C. 3 at p. 5 : 1946 A.L.J. 100: 1946 A.W.R. (P.C.) 7 : 48 Bom. L.R. 138 : 50 C.W.N. 98 : (1945) 2 M.L.J. 493 : 59 M.L.W. 7 ; Rameshwar Kalyan Singh *v.* State of Rajasthan, A.I.R. 1952 S.C. 54.
8. Raju Das *v.* State, (1965) 32 Cut. L.T. 618 at p. 623; Contra *see* also State of Assam *v.* Mafizuddin Ahmed (1983) 1 Cr. L.C. 394.

18. Disease.— (1) *Blindness.*—Blindness may so far impair the powers of observations as to make the witness incompetent to testify.[1]

(2) *Deaf and dumb persons—English law.*—Deaf and dumb persons are not necessarily to be treated as idiots.[2] But so far as such persons are shown to be weak-minded, the principles applicable to lunatics will govern.[3]

(3) *Intoxication.*—Intoxication, even habitual, does not, in itself, incapacitate a person offered as a witness.[4] "It does not follow necessarily that, because the party was much intoxicated, his reason was so far dethroned as to disable him from comprehending the effect of his admissions, or from giving a true account of the occurrence to which they had reference".[5] "The Court will not suffer a person to be examined as a witness who is in such a state that he cannot understand the obligation of an oath,...yet such cases must depend on the sound discretion of the Court that hears the cause. There are degrees of intoxication, of which the Court alone can judge."[6]

19. Scope of explanation.—This explanation applies to the case of a monomaniac or person affected with partial insanity, who may be a very good witness as to all other points than that on which he is insane.[7]

Insanity of a witness.

Where a witness is declared incapable of giving evidence owing to insanity, it is the duty of the Court to record its finding that the witness is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.[8]

20. Limit of incapacity owing to defective intellect.— The incapacity of a witness labouring under a defective intellect is only co-extensive with the defect.[9]

Thus, a lunatic is competent during a lucid interval.[10]

21. Monomaniac—When competent.—A monomaniac is competent upon all subjects save the one in respect of which he is monomaniac.[11]

22. Drunkard—When competent.—A drunkard is competent upon his return to sobriety.[12]

23. Can accused person testify.—Section 342-A (now Sec. 313) of the Code of Criminal Procedure which was inserted into the Code by Sec. 61 of the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955) enables an accused person to be a competent witness on his own behalf.[13]

According to the provisions of the unamended Code an accused person could not appear as a witness in his defence although for the purpose of enabling him to explain circumstances appearing in the evidence against him the Court could put such questions as it considered necessary. Section 118 of the Evidence

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1. Wigmore's *Evidence*, 1905 Ed., Sec. 500 p. 637.
2. Hale Pl. Cr. I. 32 ; R. *v.* Rustoms, 1 Leach, Cr. L., 4th Ed., 408; Wigmore's *Evidence*, 1905 Ed., Sec. 498, p. 635.
3. *Ibid.*
4. Wigmore's *Evidence*, 1905 Ed., Sec. 499, p. 635.
5. *Per* Chilton, C.J., in Eskridge *v.* State, 25 Ala. 33.
6. *Per* Rogers in Gould *v.* Crawford, 2 Pa. St. 90.
7. Norton's *Evidence*, Secs. 306, 307 ; Wharton's *Evidence*, Secs. 401, 418, cited in A.A. & W., 4th Ed., p. 685.
8. Kanhaiya Lal Sewaram *v.* State, A.I.R. M.B. 262 at p. 263.
9. Phipson's *Evidence*, 4th Ed., p. 422.
10. R. *v.* Hill, 2 Den. P.C.C. 254.
11. Spitte *v.* Walton, L.R. 11 Eq., 420.
12. *See* Phipson's *Evidence*, 4th Ed., p. 422.
13. Subedar *v.* State, A.I.R. 1957 All. 396 at p. 398 : 1957 A.W.R. 381 : 1957 A.L.J. 263.

Act deals with persons who are competent to testify as witnesses but in view of Sec. 342 of the unamended Code no accused person could appear as a witness and therefore Sec. 118 was inapplicable to such person.

Accused as a witness.

Under Sec. 342A (Sec. 313 new) the accused person has become a competent witness for the defence but he cannot be compelled to be a witness and cannot be called as a witness except at his own request in writing and his failure to give evidence cannot be made the subject-matter of comment by the parties or the Court.[1]

Requirement of Sec. 342, Cr.P.C.

Section 342 (Sec. 313 new) Cr. P.C., requires that Court must question the accused for enabling him to explain the circumstances appearing in evidence against him.[2]

Under Art. 20 (3) of the Constitution "No person accused of any offence shall be compelled to be a witness against himself".

Question put to accused person by the Court—Effect of.

The gist of the provision of Sec. 342 of the Code is that the accused is put questions by the Court simply to enable him to explain any circumstances appearing in the evidence against him ; the object is to give him an opportunity to offer an explanation in defence of himself and not for the purpose of incriminating himself. Then he is not bound or compelled to answer any question or to answer any question truthfully. No oath is administered to him and he is not bound to speak the truth.

The answers given by him are not treated as evidence in that very inquiry or trial ; they can only be taken into consideration. It is clear from these facts that Sec. 342 (Sec. 313 new) does not convert the accused into a witness and certainly does not compel him to be witness against himself in infringement of the constitutional guarantee.[3]

Article 20 (3) of the Constitution of India not offended.

The answers given by the accused under Sec. 342 (2), (Sec. 313 new) Cr. P.C., would not offend Art. 20 (3) of the Constitution for two reasons : *First* of all, as has been held in *Ranjit Singh* v. *State*,[4] it is entirely a matter of option with the accused to answer or not when he is questioned under Sec. 342, Cr. P.C. *Secondly*, it is quite true that Sec. 342 (2), (Sec. 313 new) Cr. P.C., provides that the Court and the jury, if any, may draw such inference from the refusal of the accused to answer questions or his giving false answers, as the Court or the jury thinks just. This does not mean that this is a case of virtually compelling the accused to be a witness[5] against himself.

In *M.P. Sharma* v. *Satish Chandra*,[6] the Supreme Court observed as follows :

Supreme Court's view.

"The protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the courtroom but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal

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1. Anant Gopal Sheorey *v.* State of Bombay, A.I.R. 1958 S.C. 915 at p. 916-17 : 1958 S.C.J. 1231 : 1959 S.C.R. 919 : 1958 A.W.R. 842 : (1958) 2 Andh. W.R. (S.C.) 207 : 1960 Andh. L.T. 338.
2. Emperor *v.* Karuna Shankar, A.I.R. 1936 Oudh 16 at p. 17; Jaggu Naidu *v.* Emperor, (1932) M.W.N. 692 at p. 700.
3. Banwari Lal *v.* State, A.I.R. 1956 All. 341 at p. 344.
4. A.I.R. 1952 H.P. 81.
5. *In re* B.N. Ramakrishna Naidu, A.I.R. 1955 Mad. 100 at p. 118 ; *In re* Govinda Reddy, A.I.R. 1958 Mys. 150.
6. A.I.R. 1954 S.C. 300 : 1954 Cr. L.J 865.

accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution."[1]

Testimonial compulsion is the foundation of law of evidence.

Testimonial compulsion is the very foundation of the law of evidence, for without such compulsion every refusal to give evidence will render administration of justice impossible. It is a necessity. Testimonial compulsion is the general rule. The constitutinoal prohibition of self-incriminating evidence is an exception designed to defend justice and insure the accused against self-created criminal traps. Legal protection against self-incrimination, therefore, is one of the pillars of liberty of criminal justice in a civilized society. But such liberty should be confined within the limits of its doctrine and not expanded into the sentimentality that testimonial compulsion is always a kind of unproclaimed tyranny to be shunned in law.

Article 20 of the Constitution of India.

The context of Art. 20 of the Constitution of India leaves no room for doubt that the offence contemplated in that article of the Constitution is a criminal offence although it does not use the word "criminal" in a manner that is done in a comparable provision contained in Art. 5 of the American Constitution which says "nor shall he be compelled in any criminal case to be witness against himself.".[2]

Accused-witness and his statement in police custody.

An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not "compulsion".

"To be a witness" and "furnishing evidence" —Meaning of.

"To be a witness" is not equivalent to "furnishing evidence" in its widest significance, that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial, to determine the guilt or innocence of the accused.

Giving thumb-impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness".

"To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or out of Court by a person accused of an offence.

To bring the statement in question within the prohibition of Art. 20 (3) the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.[3] Where there are several persons jointly accused, the rule at one time followed in England was that any one of them might be called as a witness either for or against his co-defendants, and the rule has been

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1. *See* also Subedar *v.* State, A.I.R. 1957 All. 396 at p. 398 : 1957 A.L.J. 263 : 1957 A.W.R. 381.
2. *In re* Central Calcutta Bank Ltd., A.I.R. 1957 Cal. 520 at p. 523 : 61 C.W.N. 709.
3. State of Bombay *v.* Kathi Kalu Oghad, A.I.R. 1961 S.C. 1808 at pp. 1816-17.

approved of in India.[1] But now in England it has been settled by *Reg* v. *Payne*,[2] that where two prisoners are tried together, one is not a competent witness for the other. This is also the rule now followed in this country.[3] In *Mohesh Chandra Kapali* v. *Mohesh Chandra Das*,[4] a charge of theft was made against *A* and *B*. Process was issued against *A* only, and *B* was held to be a competent witness for *A*'s defence; and in *Queen-Empress* v. *Mona Puna*,[5] it was ruled that a person who had been arrested as an accused by the police but illegally discharged by them was competent to testify. In *Queen* v. *Bihari Lal Basu*,[6] it is pointed out that there is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution. An accused person who has been discharged by a Magistrate is a competent witness, although the discharge was improper.[7] Until an accused person who has pleaded guilty is convicted or acquitted he is still an accused person and is therefore not a competent witness against the co-accused.[8] Two or more persons are jointly tried, none of them is a competent witness for or against the others. But if two persons accused of complicity in the same matter are tried separately, each is a competent witness at the trial of the other.[9]

Competency of accused as a witness.

24. Competency of witnesses is the rule and their incompetency is the exception.—Under Sec. 118 all persons are competent to testify unless the Court considers that because of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind they are prevented from understanding questions put to them, or from giving rational answers. All grounds of incompetency have been swept away by Sec. 118 under which competency of witnesses is the rule and their incompetency is the exception. Only incompetency that the section highlights is incompetency from premature or defective intellect. As to infancy, it is not so much the age as the capacity to understand which is the determining factor. No precise age-limit can be given as persons of the same age differ in mental growth and their ability to understand questions and giving rational answers. The sole test is whether witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking truth. The general rule is that the capacity of the person offered as a witness is presumed, *i.e.*, to exclude a witness on the ground of mental or moral incapacity, the existence of the incapacity must be made to appear. Under Sec. 118, a child is competent to testify, if it can understand the questions put to it, and give rational answers thereto.[10]

The provison of Sec. 118 of the Evidence Act clearly lays down that the child is competent to testify provided he understands the questions put to him and gives rational answers to those questions. Age of the witness was 13 years. From the

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1. Queen *v.* Ashraff, 6 W.R. (Cr.) 91.
2. L.R. 1 C.C. 349.
3. *See* Reg. *v.* Hanmanta, I.L.R. 1 Bom. 618, where an option was expressed that a Magistrate cannot convert an accused person into a witness, except when a pardon has been lawfully granted to him under the provisions of the Code of Criminal Procedure, and the evidence of such a person was rejected as inadmissible. *See* also Reg. *v.* Remedies, 3 Bom. H.C. Rep. Cr. 59; Empress *v.* Asghar Ali, I.L.R. 2 All. 266; and Queen-Empress *v.* Dala Jiva, I.L.R. 10 Bom. 190.
4. 10 C.L.R. 533.
5. I.L.R. 16 Bom. 661.
6. 7 W.R. (Cr.) 44.
7. Emperor *v.* Hussain, I.L.R. 25 Bom. 422.
8. Sukdeb *v.* King-Emperor, 13 C.W.N. 552.
9. Akhoy Kumar Mookerjee *v.* King-Emperor, I.L.R. 45 Cal. 722 : 22 C.W.N. 405 : 16 C.L.J. 663.
10. **Dhani *v.* State, 1999 Cr. L.J. 2712 at pp. 2713-14 (Orissa).**

answers given by Chandramani, the trial Court found him of matured understanding and knowing the significance of the oath and the necessity to speak the truth. Hence, oath was administered to him. There is no quarrel over the preposition that child-witnesses are easily susceptible to tutoring and to telling imaginative stories and therefore, their evidence be scrutinized with extreme care and caution before being acted upon as true and dependable. Thus, for appraising the evidence of a child-witness, the first test is whether there is any evidence of tutoring. If some stretches suggest of tutoring, unless, the evidence of child-witness is corroborated in material particulars connecting the accused with the crime, not safe to lay trust on a serious charge like murder. In other words, all that is required is that there must be some additional evidence, though need not be direct evidence, rendering it probable that the story of the child-witness is true and it is reasonably safe to act upon it.[1]

25. Evidence of accomplice—Admissibility against co-accused.—A person arrested by the police as an accomplice in an alleged burglary was sent up to a Magistrate for trial. *Held* that the person in question was an accused person having been neither discharged nor acquitted, and could not be examined as a witness.[2]

Section 337, Cr.P.C. if offends Art. 14 of the Constitution.

Section 337 (Sec. 306 new) of the Code of Criminal Procedure does not offend Art. 14. Prosecution is not bound to prosecute self-confessed criminal in conspiracy with others if they think his evidence is necessary to break a smuggler's ring. There is no breach of Constitution in receiving his evidence. To hold otherwise would shut out accomplice evidence completely.[3]

26. Re-trial of one of two persons—Evidence of the other.—Where two persons are jointly charged and tried and are convicted, and a new trial is afterwards ordered of one of such persons, the other person can, upon such trial, be lawfully examined as a witness.[4]

27. Counsel in the case as a witness.—The true rule is that, though engaged in the case, counsel is in law competent to testify, whether the facts in respect of which he gives his evidence occurred before or after his retainer. The Court has no authority to exclude such evidence if tendered. At the same time it is recognized by both the Court and the profession that as a general practice, it is undesirable, when the matter to which counsel deposes is other than formal, that he should testify either for or against the party whose case he is conducting. Where from the circumstances it appears that counsel, because he was a material and necessary witness, ought not to have accepted the retainer, his client's opponent is entitled to ask the Judge to draw adverse inferences from the fact that he was not called as a witness.[5] Counsel is not debarred by any rule of professional ethics from appearing as a witness in a case in which he has accepted a retainer, and he ought to offer himself for examination if his evidence is found necessary.[6]

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1. Sanjay Ramchandra Tarare *v.* State of Maharashtra, 1996 Cr. L.J. 713 at p. 717 (Bom.).
2. 12 P.R. 1902 (Cr.).
3. Laxmipat Choraria *v.* State of Maharashtra, A.I.R. 1968 S.C. 938 at p. 947 : 70 Bom. L.R. 595.
4. 23 P.R. 1878 (Cr.).
5. *Per* Woodroffe and Coxe, JJ.
6. *Per* Chatterjee, J., in D. Weston *v.* Peary Mohan Dass, I.L.R. 40 Cal. 898 : 18 C.W.N. 185, doubting Sethna *v.* Mirza, 18 C.W.N. 185, doubting Sethna Mahomed Shirazi, 9 Bom. L.R. 1044; *see* also Lodd Govindoss Krishnadoss *v.* Rukmani Bai, 17 M.L.J. 382 : 29 I.C. 135.

The decisions bearing on the question of counsel giving evidence in a case in which they appear are *D. Weston* v. *Peary Mohan Dass,*[1] *Lodd Govindoss Krishnadoss* v. *Rukmani Bai,*[2] *Chandreshwar Prasad* v. *Bisheshwar Pratap,*[3] *Sabitri Thakurain* v. *Mrs. F.A. Savi,*[4] *Mool Raj* v. *Manohar Lal,*[5] *Sita Ram* v. *Ram Lal,*[6] *In re Kandan Padayachi,*[7] *Emperor* v. *Dadu Rama,*[8] and *Mohammad Ghazi* v. *U Tun Kywe.*[9]

Counsel giving evidence is not unprofessional.

In *D. Weston* v. *Peary Mohan Dass,*[10] it is stated that there is nothing necessarily unprofessional in counsel giving evidence in a case in which he appears as such. Under Sec. 118, Evidence Act, counsels though they may be engaged in the case are competent to testify whether the facts in respect of which they give their evidence occur before or after their retainer.

Madras High Court's view.

In *Lodd Govindoss Krishnadoss* v. *Rukmani Bai,*[11] Kumaraswami Sastri, J., held that though it was no doubt desirable that counsel ought not to appear in a case where it was probable that his evidence would be material there was no inflexible rule that his evidence ought not to be taken, if at any stage of the suit, it became necessary to do so.

In *Chandreshwar Prasad* v. *Bisheshwar Pratap,*[12] followed *D. Weston* v. *Peary Mohan Dass,*[13] it was observed that—

In *Sabitri Thakurain* v. *F.A. Savi,*[14] the following observations were made :

Patna High Court's view.

"Although it is undesriable that a lawyer should appear in a case in which he knows or has reason to believe that he would be an important witness, there is no harm in his giving evidence in the case.".

In *Sitaram* v. *Ramlal,*[15] it was held that it was improper for a counsel who was intending to appear as a witness for a party to conduct the case on his behalf. In *Mool Raj* v. *Manohar Lal,*[16] it was laid down that as a general practice it was undesirable that when a matter to which a counsel disposes is other than formal, he should testify either for or against the party whose case he was conducting.

In *Kandan Padayachi, In re,*[17] Pandurang Row, J., held that—

Lawyer's giving evidence —Madras High Court's view.

"No doubt it is not in accordance with professional etiquette for a lawyer who has given evidence as a witness for the prosecution to accept or continue to hold a brief from the accused, but the mere fact that a laywer has been cited as a witness by the prosecution will not disqualfiy him from appearing as counsel for accused in the case."

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1. I.L.R. 40 Cal. 898 : 23 I.C. 25.
2. 29 I.C. 135 : A.I.R. 1916 Mad. 5.
3. I.L.R. 5 Pat. 777 : A.I.R. 1927 Pat. 61.
4. I.L.R. 12 Pat. 359 : A.I.R. 1933 Pat. 306.
5. A.I.R. 1938 Lah. 204 : 178 I.C. 235.
6. A.I.R. 1930 Lah. 361 (2) : 117 I.C. 66.
7. A.I.R. 1938 Mad. 878 : 40 Cr. L.J. 92.
8. A.I.R. 1939 Bom. 150 : 40 Cr.L.J. 568.
9. A.I.R. 1939 Rang. 342 : 40 Cr. L.J. 936.
10. I.L.R. 40 Cal. 898 : 23 I.C. 25.
11. I.L.R. 29 I.C. 135 : A.I.R. 1916 Mad. 5.
12. I.L.R. 5 Pat. 777 : A.I.R. 1927 Pat. 61.
13. I.L.R. 40 Cal. 898 : 23 I.C. 25.
14. I.L.R. 12 Pat. 359 : A.I.R. 1933 Pat. 306.
15. A.I.R. 1930 Lah. 361 (2) : 117 I.C. 66.
16. A.I.R. 1938 Lah. 204 : 178 I.C. 235.
17. A.I.R. 1938 Mad. 878 : 40 Cr. L.J. 92.

In *Mohammad Ghazi* v. *U. Tun Kywe*,[1] Dunkley, J., recognized the authority of a Judge or Magistrate to restrain a pleader from appearing for a party in a case when it would be manifestly improper for the pleader to do so and laid down the following rule :

> "...The mere facts that the defence asserts that the pleader for the prosecution will be required as a witness for the defence, and that the Magistrate himself thinks that he will be a material witness for the defence, are not sufficient grounds. A pleader who is conducting a case is nevertheless a competent witness therein, and there is no harm in his having evidence in a case in which he is appearing. But it is desirable that a pleader should not appear in a case if he knows or has reason to believe that he will be an important witness in the case. If he accepts the brief not knowing or having reason to believe that he will be a witness, but discovers subsequently that he is a witness on material question of fact, he should retire from the case."

In *Emperor* v. *Dadu Rama Surde*,[2] Beaumont, C.J., and Wassoodew, J., laid down the following rule :

> "An accused is entitled to select the advocate whom he desires to appear for him and the prosecution cannot fetter that choice merely by serving a *sub poena* on the advocate to appear as a witness : but if the Court comes to the conclusion that the trial would be embarrassed by such appearance and in spite of expression of opinion by the Court to that effect, that advocate does not withdraw, the Court has inherent jurisdiction to require him to withdraw."

Accused right to select an advocate for his defence.

It will thus be seen that the Courts have consistently disapproved the practice of counsel continuing in a case if they are material witnesses. In the cases other than *Mohammad Ghazi* v. *U. Tun Kywe*,[3] and *Emperor* v. *Dadu Rama Surde*,[4] the inherent power of a court to direct withdrawal of a counsel was not raised as they had previously been examined as witnesses. The question that arises for consideration is whether a court has power to direct the withdrawal. In *All-India Reporter Ltd.*, v. *G.D. Moghe*,[5] the Nagpur High Court was held that the Court has the power. It agreed with the view in *Mohammad Ghazi* v. *U Tun Kywe*,[6] and *Emperor* v. *Dadu Rama Surde*,[7] that a court has inherent power to direct a counsel to withdraw from a particular case in the circumstances indicated in *Emperor* v. *Dadu Rama Surde*.[8]

Counsel as a material witness.

If a counsel is a material witness it will not be right for a court to ask a party not to examine him as a witness. The proper course would be to ask the counsel to withdraw provided the Court is fully satisfied that his evidence will not be of a formal character. It should bear in mind that this power is not to be lightly exercised. If the object is to prejudice his opponent the application should be turned down. If, however, the application is *bona fide* and the Court is satisfied that the evidence will be relevant and important, and the withdrawal will be conducive to the proper trial, it may direct withdrawal of the counsel.

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1. A.I.R. 1939 Rang. 342 : 40 Cr. L.J. 936.
2. A.I.R. 1939 Bom. 150 : 40 Cr. L.J. 568.
3. A.I.R. 1939 Rang. 342 : 40 Cr. L.J. 936.
4. A.I.R. 1939 Bom. 150 : 40 Cr. L.J. 568.
5. A.I.R. 1950 Nag. 110.
6. A.I.R. 1939 Rang. 342 : 40 Cr. L.J. 936.
7. A.I.R. 1939 Bom. 150 : 40 Cr. L.J. 568.
8. *Ibid.*

Withdrawal of a counsel; Court's authority.

A court has authority to direct withdrawal of a counsel if it comes to the conclusion that his evidence is material and his appearance in the Court in the capacity of a lawyer would embarrass the trial of the suit. A Court has also the power to punish a party by awarding heavy costs irrespective of the result if ultimately it does not examine the counsel whose withdrawal was ordered at its instance or the evidence turns out to be formal.[1]

28. Judge in the case as a witness.—A Judge is a competent witness, and can give evidence in a case which is being tried before himself.[2]

"But, it must also be admitted that a Judge, sitting without a jury, should not try a case, in which he himself is the complainant and principal witness ; and if he has any personal or pecuniary interest in the subject of the charge, he is disqualified from trying it."[3]

As to whether a Judge or Magistrate can give evidence in a case tried by himself, *see* also the note to Sec. 121, *post*.

In a case in which the Judge took an active part in the capture of parties charged with having been members of an unlawful assembly—parties whom he himself tried on that charge—it was held that he was bound to state to the accused, what were the facts he himself observed, and to which he himself could bear testimony; and the prisoner in such situation has a right, if he thought it desirable, to cross-examine the Judge, whose evidence should be recorded, and form part of the record of the case. The proper course for the Judge in the above case would be to decline to try the case, and to ask that it should be undertaken by some other Judge.[4]

29. Evidence of scribe as a witness.—No law says that the scribe of an endorsement should be examined as it is not one of the documents required by law to be attested or scribed. Endorsement can be written by the parties themselves. There is oath against oath in this regard.[5]

30. Executor as a competent witness.—No person, by reason of interest in, or of his being an executor of, a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.[6]

31. Power of attorney holder to depose before a Court.—Before a Court or a judicial tribunal which is entitled to record evidence, any person is competent to testify unless he falls within the exception provided by the explanation to Sec. 118 of the Indian Evidence Act, 1872. The power of attorney holder of a party, only on the ground that he holds the power of attorney, cannot be said to be in the category of persons who are incapable of being witnesses as provided by Sec. 118 of the Indian Evidence Act. Whether such a power of attorney holder has personal knowledge about the matters in controversy may be a question which can be thrashed out by cross-examining him and if it is found that the power of attorney holder has no personal knowledge about the facts in controversy, the evidentiary value of his deposition may be whittled down, but that has nothing to do with the competence of such a power of attorney holder to depose before a

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1. All-India Reporter *v.* G.D. Moghe, A.I.R. 1950 Nag. 110 at pp. 113-14 : 1950 N.L.J. 187.
2. Queen *v.* Mookta Singh, 4 B.L.R. 15 : 13 W.R. 60.
3. *Ibid*, *per* Norman, J.
4. 20 W.R. (Cr.) 76.
5. Musunuri Anjaneyulu *v.* Koona Lakshmi, A.I.R. 1998 A.P. 214 at p. 215 : 1998 (1) A.L.T. 254 : 1998 (1) A.L.D. 712 ; *see* also, Nagam Gangandher *v.* State, 1998 Cr. L.J. 2200 (A.P.).
6. *See* Sec. 68 of Act XXXIX of 1925 (succession).

Court or a judicial tribunal as a competent witness. Merely because in a given case it can be determined that power of attorney holder has no personal knowledge regarding the events or the matters on which he had deposed, it cannot be said that his evidence is inadmissible. The evidence would remain admissible in law but its evidentiary value will have to be judged after weighing the evidence and after considering all pros and cons of the situation.[1]

32. Evidence of police officers.—Where the prosecution case was fully supported by two witnesses who were police officers it was held that the mere fact that they are police officers was not enough to discard their evidence.

No reason was shown for their hostility to the appellant.[2]

33. Husband and wife.—For competency, *see* Sec. 120, *infra*.

34. Close relation.—That a person will never feel impelled or inclined to state the truth when it goes against the interest or desire of a close relation of his is a dangerous doctrine and is subversive of principles governing judicial consideration of testimony. It cannot be presumed that when a close relation of a complainant appears as a witness for the defence, he is invariably actuated by some feeling of animosity towards the complainant.[3]

When a witness holds a position of relationship favouring the party producing him or of possible prejudice against the contesting party, it is incumbent on the Court to exercise appropriate caution when appraising his evidence and to examine its probative value with reference to the entire mosaic of facts appearing from the record. It is not open to the Court to reject the evidence without anything more on the mere ground of relationship or favour or possible prejudice.[4]

35. The word "related" is not equivalent to "interested".—In the instant case, the eye-witnesses were related to the deceased and therefore it was submitted that they were interested witnesses. The term "interested" postulates that the witness must have some direct interest in having the accused somehow or the other convicted due to some *animus* or other reason. A close relative who is a natural witness, cannot be regarded as an interested witness. The word "related" is not equivalent to "interested". Close relationship of witness to the deceased would be no ground for rejecting his testimony, if it is otherwise reliable. In fact a close relative would normally not spare the real assailant and falsely implicate an innocent one. As held by the Supreme Court in *Dalipsingh* v. *State of Punjab*,[5] reported, ordinarily a close relative would be the last person to screen the real culprit and falsely implicate an innocent person and hence, the mere fact of relationship far from being the foundation for criticising of the evidence, is often a sheer guarantee of truth. Their Lordships are therefore not prepared to discard the testimony of the eye-witnesses simply because they are relatives. Their presence near about the scene of the offence was quite natural.[6]

It is trite law that when the label of hostility or interestedness is attached to a witness, the Court is not to start with the presumption that the evidence is tainted and has to be discarded. What is required is deeper scrutiny of evidence. If on elaborate analysis and deeper scrutiny, the Court finds the evidence to be cogent and credible same can be basis for conviction.[7]

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1. Parikh Amratlal Ramanlal *v.* Rami Mafatlal Girdharial, (1982) 23 Guj. L.R. 337 at pp. 342-43.
2. Nathusingh *v.* State of Madhya Pradesh, A.I.R. 1973 S.C. 2783 at p. 2784.
3. Birkesh *v.* State, 1969 A.W.R. (H.C.) 369 at p. 371 ; *see* also Dhanagal Meherani *v.* Baru Meher, (1984) 57 C.I.T. 168.
4. Madhusudan Das *v.* Smt. Narayanibai, (1983) 1 S.C.C. 35 at p. 44.
5. A.I.R. 1953 S.C. 364.
6. **State *v.* Chavda Manaji Chelaji, 2000 (1) G.L.R. 13 at p. 25 (Guj.).**
7. Kulamani Sahu *v.* State of Orissa, 78 (1994) C.L.T. (4) 270 at p. 273.

Witnesses who are friendly to deceased as well as accused cannot be termed as interested witnesses.

In the under-noted case criticism has been labelled against the witnesses that they were friends of the deceased and therefore, their evidence is tainted with hostility. Prosecution has established that they were also friendly with the accused persons and some of them were co-accused in several cases. It was held that they cannot be labelled as interested witnesses.[1]

36. Witness having strained relations with the accused.—The fact that some of those witnesses had been involved in cases of illcit liquor, or had strained relations with the accused, would not by itself justify the rejection of their testimony.[2]

In *Arjun Pradhan* v. *State of Orissa*,[3] the counsel appearing for the accused submitted P.W. 5 was an interested witness and admittedly she and her husband were not pulling on well with the accused persons. She had developed the story from stage to stage and her evidence is contradictory and she is not a reliable witness. It was further pointed out that in the Court below P.W. 5 had desposed that Durga put the poison into the mouth of her husband, but in the first information report she stated that Durga put something into the mouth of her husband by opening a bottle. It was held no doubt, there were some discrepancies here and there, but they did not materially affect the prosecution version. She had narrated that story in a straight forward manner. As the occurrence took place inside the house, she was the only natural witness to the occurrence and normally she being the wife of the deceased, will not distort the fact.

Hostile witness.—It has now been held by the Supreme Court in *Sat Paul* v. *Delhi Administration*,[4] that the discretion conferred on the Court under Sec. 154 of the Evidence Act is unqualified and untrammelled, quite apart from the question of any "hostility." The legal position both in England and in India have been discussed at great length[5], Sarkaria, J., who spoke for the Supreme Court (Bhagwati, J, with him) came to the conclusion that the mere fact of a witness being treated as hostile would not result in the testimony of the witness being squarely and totally discredited. It will be a matter for the Judge to consider in each case, whether the testimony of the said witness could be safely acted upon and whether there was sufficient corroboration in respect of the same.[6]

37. Maxim *"falsus in uno falsus in omnibus"*.—In *Nisar Ali* v. *State of Uttar Pradesh*,[7] Kapur, J., dealing with maxim *falsus in uno falsus in omnibus* observed thus :

> "This maxim has not received general acceptance in different jurisdictions in India : nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that in such cases the testimony may be disregarded and not that it must be disregarded..."[8]
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> "The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances but it is not what may be called 'mandatory rule of evidence'."

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1. Kedar Behera *v.* State, 1993 East Cr. C. 347 at p. 352 (Orissa).
2. Samson Hyam Kemkar *v.* State of Maharashtra, A.I.R. 1974 S.C. 1153 at p. 1156; *see* also Christian and Nahak *alias* Nawak *v.* State, 1985 (1) Cr. L.C. 17.
3. (1982) 53 Cut. L.T. 421 at pp. 424-25.
4. A.I.R. 1976 S.C. 294 : 1976 Cr. L.J. 295.
5. *Vide* paras 29 to 51.
6. Birsingh Majhi *v.* State of Assam, 1977 Cr. L.J. 1349 at p. 1351.
7. A.I.R. 1957 S.C. 366 at p. 368 : (1957) S.C.J. 392 : (1959) S.C.R. 657 : (1957) M.L.J. (Cr.) 314.
8. Wigmore on *Evidence*, Vol. III, para, 1008.

In *Ugar Ahir* v. *State of Bihar*,[1] Subba Rao, J. (as he then was), speaking for the Court in this behalf observed thus :

Verdict of the Supreme Court.

> "The maxim *falsus in uno falsus in omnibus* (false in one thing, false in every thing) is neither a sound rule of law, nor a rule of practice. It is, therefore, the duty of the Court to scrutinize the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff."

It may be said that merely because a large number of persons have been acquitted on the same evidence adduced by the prosecution, the accused in relation to whom the evidence is clear and convincing cannot merit acquittal.[2]

38. Testimonial appraisal of evidence of a witness about the hour of a minor event.—Where the witness swore that he himself and the deceased had taken food on the fateful day at about 10-00 or 10-30 a.m. it was held that the sluggish chronometric sense of the country-side community in India is notorious since time is hardly of the essence of their slow life; and even urban folk make mistakes about time when no particular reason to observe and remember the hour of minor event like taking a morning meal existed. 10-30 a.m. could well have been an hour or more one way or the other and too much play on such slippery facts goes against realism so essential in a testimonial appraisal.[3]

39. Summons for attendance of witness.—Under Order XVI, Rule 1 (2) of the Code of Civil Procedure a party desirous of obtaining any summon for the attendance of person shall file in Court an application stating therein "the purpose for which the witness is propsed to be summoned." The object of disclosing such purpose is to enable the Court to decide whether examination of such witness is of material benefit to decide the dispute. Court has to pass an order on the application and, therefore, a duty is cast on the Court to consider whether the purpose of citing the counsel of the opposite party as a witness is to speak to any material fact. If the Court is not so satisfied, the Court is not obliged to issue summons to him.[4]

119. Dumb witnesses.—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

SYNOPSIS

1. Scope ... 4579 2. When competent ... 4580

1. Scope.—While dealing with the manner in which the evidence of a dumb witness is to be recorded under Sec. 119, Evidence Act, it has been held by the High Court of Gujarat in *Kumbhar Musa Alib* v. *State of Gujarat*,[5] in the following terms :—

> "If evidence is recorded under that section, there must be a record of signs and not the interpretation of signs."

It was further held that if the trial Court fails to record the signs made by the witness in answer to questions put to him and records only the interpretation of such signs, there is no correct compliance of Sec. 119, Evidence Act. This also

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1. A.I.R. 1965 S.C. 277 at p. 279 : (1965) M.L.J. (Cr.) 105 : (1965) 1 S.C.J. 229.
2. Arav Nagireddi *v.* State, (1968) 1 Andh. W.R. 178 at p. 201.
3. Shivaji Sahebrao Bobade *v.* State of Maharashtra, A.I.R. 1973 S.C. 2622 at p. 2629.
4. N. Yovas *v.* Immanueal Jose, A.I.R. 1996 Ker. 1 at p. 3 ; *see* also Chandra Shekhar Rai *v.* State of Bihar, 1996 (2) Crimes 60.
5. A.I.R. 1966 Guj. 101.

does not enable the appellate Court to know whether the interpretation of the signs is correct or not.[1]

2. When competent.—A witness, who was deaf and dumb was not competent witness, and her evidence ought to have been struck out.[2] In murder case, one of the witnesses for the prosecution was deaf-mute. The Sessions Judge was satisfied that the deaf-mute could not understand the questions that were put to him, and for the most part, could not make his meaning intelligible. *Held* that he was not a competent witness.[3]

Deaf or dumb witnesses.

"To be a witness" is nothing more than "to furnish evidence" and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.[4] It was urged that the evidence of prosecution witness given in writing was not legally admissible. *Held* that was written in open Court in answer to the questions put to him, but it is argued that he was unable to speak. He had taken religious vow of silence. This witness's religion forbade him, in such circumstances to speak, in such a case the witness should be deemed unable to speak within the meaning of Sec. 119. The Magistrate adopted the correct course in taking this evidence in writing.[5]

Who can be a "witness"?

Taking one's evidence in writing.

120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.—In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

SYNOPSIS

1. Sections 120 to 132, Evidence Act, are not exhaustive ... 4580
2. Witness may be competent without being compellable ... 4581
3. Civil suits ... 4581
4. Suit for specific performance of contract ... 4581
5. Suits under the Divorce Act ... 4581
6. Proof of non-access ... 4582
7. Interested evidence ... 4583
8. Statement by mother as to legitimacy of child—Admissibility ... 4584
9. Parties to the suit ... 4584

1. Sections 120 to 132, Evidence Act, are not exhaustive.—Sections 120 to 132 in Chapter IX of Part III of the Evidence Act make provision as to when certain witnesses cannot be compelled to answer questions or when they may not be permitted to give evidence about or disclose certain types of communications. With regard to documents Sec. 162 of the Evidence Act provides that a witness summoned to prodcue documents shall, notwithstanding any objection to their production, produce them in Court and raise the objection before the Court, which objection the Court shall adjudicate upon. In determining questions of production of documents for inspection, the Court would undoubtedly follow the provisions of Secs. 120 to 132 of the Evidence Act. But these sections are not exhaustive of the grounds of objection to inspection.[6]

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1. **Parkash Chand *v.* State of Himachal Pradesh, 1999 (1) Crimes 675 at p. 677 (H.P.).**
2. Venkattan *v.* Emperor, 13, C.L.J. 271 (Mad.); *see* also Kudungoth *v.* State of Kerala, 1982 Cr.L.J.94 (Ker.).
3. 5. O.C. 246.
4. M.P. Sharma *v.* Satish Chandra, District Magistrate, Delhi, A.I.R. 1954 S.C. 300 at p. 304 : 1954 S.C.A. 449 : 1954 S.C.J. 428 : 1954 S.C.R. 1077 : 56 P.L.R. 366.
5. Lakhan Singh *v.* Emperor, A.I.R. 1942 Pat. 183 at p. 185 : I.L.R. 20 Pat. 898.
6. Registrar of Restrictive Trade Agreement *v.* Baroda Rayon Corporation Ltd., (1976) 46 Com. Cas. 192 at p. 196.

2. Witness may be competent without being compellable.— Section 118 declares all persons, speaking generally, to be competent witnesses; but a person may be a competent without being a compellable witness. His testimony may be admissible if he be examined, or if he offers himself as a witness, but he may have some protection or privilege, so that, if he be unwilling, he cannot be compelled to give evidence. This protection or privilege may be general as regards the whole of a case; or it may concern only some particular subject of evidence. Again, there are some rare instances in which the law goes still further and will not permit the witness to speak, even if he be willing. The eleven sections which follow will supply illustrations of these remarks.

Who could be competent witnesses

3. Civil suits.— Formerly, parties to civil suits and the husbands and wives of parties were not competent as witnesses. Under the old Code of Civil Procedure, if it was sought to call as a witness a party to the suit, who did not of his own accord appear in person, it was necessary to serve him with a notice to show cause why he should not attend and give evidence. This is no longer necessary and the position of parties to the suit is in no way different from that of other witnesses.

4. Suit for specific performance of contract.— A husband is undoubtedly competent to depose about his wife's knowledge of an agreement. When the husband says on oath that his wife had no knowledge of the agreement and that portion of the evidence is not challenged in cross-examination and it gains considerable strength from the admissions made by the plaintiff himself regarding the circumstances under which the negotiations prior to the execution of the agreement took place and the circumstances under which the agreement was attested, it is open to a court of fact to hold that the initial burden was discharged by the wife and that she had no knowldge of the agreement.[1]

5. Suits under the Divorce Act.— Parties to suits instituted in consequence of adultery and also their husbands and wives were formerly not competent as witnesses in such suits. The law on this point was altered in England by the 32 and 33 Vict., c. 68 Sec. 3, with this proviso, that no witness, whether a party to the suit or not, shall be liable,[2] to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery. Apart from the 32 and 33 Vict., c. 68, Sec. 3, the law in England appears to stand thus. On a petition presented by a wife, praying that her marriage may be dissolved by reason of her husband's adultery coupled with cruelty or desertion, the husband and wife respectively are competent and compellable to give evidence of or relating to such cruelty or desertion, but not as to the adultery;[3] this provision, however does not apply when the petition is for judicial separation on the ground of adultery; in all suits for nullity of marriage, for judicial separation on account of cruelty or desertion (not coupled with adultery), for jactitation of marriage or for restitution of conjugal rights—unless in the last case the respondent by answer asks for a judicial separation on the ground of adultery—the husbands and wives are competent and compellable to be examined as witness on either side;[4] but[5] the

Dissolution of marriage due to husband's adultery.

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1. Kesharmull Agarwala *v.* Rajendra Prasad, 1968 B.L.J.R. 28 at p. 31.
2. If the witness, without claiming the benefit of the proviso, gives the evidence it will be admissible, and it is not competent to counsel for either party to exclude it; Hebbletwaite *v.* Hebblethwaite, L.R. 2 P. & M. 29. The statements, written or verbal, or a respondent not examined as a witness are not evidence against a co-respondent ; Hay *v.* Gordon, 10 B.L.R. 301.
3. 22 & 23 Vict., c. 61, Sec. 6.
4. *See* Taylor, Secs. 1220-1221 ; Secs. 1353-1354, 8th Ed.
5. 20 & 21 Vict., c. 85, Sec. 43.

Court may, if it shall think fit, order the attendence of the petitioner, and may examine him or her, permit him or her to be examined or cross-examined on oath on the hearing of any petition[1] but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery. Sections 51 and 52 of "The Indian Divorce Act" enact.

That, though upon a petition by a wife for dissolution of the marriage on account of adultery coupled with cruelty or desertion, the parties are competent and compellable to give evidence as to the cruelty and desertion, they cannot in this case be examined or cross-examined as to facts relating to acts of adultery and cannot in other cases be examined at all, unless they offer themselves as witnesses,[2] or verify their cases by affidavit.[3] It will thus appear that the rule as to the parties to matrimonial cases being competent and compellable to give evidence is more restricted in India than in England. The co-respondent, in a suit by a husband for the dissolution of his marriage on the ground of adultery, was summoned by the petitioner as a witness. He was asked whether he had sexual intercourse with the respondent. He answered it in the affirmative. He would not have answered it, if he had been aware that he might have declined. It was held that he had not "offered" to give evidence and that his answer to the particular question was not admissible.[4]

Case-law.

6. Proof of non-access.— The word "access" can be explained as an indicia of opportunity for marital intercourse. Like any other physical fact it could be proved by direct or circumstantial evidence. Direct evidence can only be secured through the spouses concerned.[5] There was once a controversy in India—whether in a bastardy proceedings, evidence of either spouse is admissible. In fact, a moot question was raised, whether the rule in *Russell* v. *Russell*,[6] precluding such admission of the evidence of the husband is adaptable to India conditions. The final authoritative pronouncement is now rendered by the Supreme Court in *Venkasteswarlu* v. *Venkatanarayana*,[7] wherein their Lordships say that there is nothing in the Evidence Act to prevent the spouses giving evidence of non-access.

"Access".

In England, the positive rule at common law is clear that neither husband nor wife can be examined for the purpose of proving non-access during marriage.[8] The above is still the law, except as to any proceeding instituted in consequence of adultery.[9] In England non-access may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove physical fact, and the presumption as to the husband being the father of the child alleged to be illegitimate can be rebutted by the conduct of the parties (taking the whole *res gestae*), raising a strong and irresistible conclusion that the child born was not child of the husband, but the child of another.[10]

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1. *See* this power exercised in Tatham *v.* Tatham and Nutt, 33 L.J.P.M. & A. 140.
2. *See* Kelly *v.* Kelly and Saunders, 3 B.L.R. App. 6.
3. Section 45 of the Divorce Act further enacts that, "subject to the provisions herein contained, all proceedings under this Act between party shall be regulated by the Code of Civil Procedure".
4. De Bretton *v.* De Bretton and Holme I.L.R. 4 All. 49.
5. Dr. H.T. Vira Reddi *v.* Kistamma, A.I.R. 1969 Mad. 235 at p. 246.
6. (1924) A.C. 687.
7. (1954) 1 M.L.J. 152 : A.I.R. 1954 S.C. 176.
8. *Per* Candy, J., in Razario *v.* Ingles, I.L.R. 18 Bom. 468 at p. 472.
9. Guardians of Nottingham *v.* Tomkinson, 4 C.P.D. 343, cited in Razario *v.* Ingles, I.L.R. 18 Bom. 468 at p. 472.
10. Morris *v.* Davies, 5 C. & F. 163, cited in Rozario *v.* Ingles, I.L.R. 18 Bom. 472.

Examination of husband or wife as a witness on a plea of non-access.

The English rule that neither husband nor wife can be examined for purpose of proving non-access during marriage[1] does not apply in India because it is a rule of evidence, and all proceedings in India are governed by the rules in Evidence Act.

There is no rule in the Evidence Act which would exclude evidence of non-access by a husband or a wife in proceeding in which the legitimacy of a child was directly in issue. It was held by the Madras High Court in *Mayandi Asari* v. *Sami Asari*,[2] on the basis of the provisions of the Evidence Act that evidence of non-access by a husband or a wife was admissible in India. A contrary view in divorce cases has been expressed by the Calcutta High Court in the case in *Sweeney* v. *Sweeney*,[3] but the learned Judges did not give any reason for importing a rule of English law in India in the face of the provisions of Sec. 2, Evidence Act. The Bombay High Court has also held in *Prem Chand Hira* v. *Bai Gulal*,[4] that the rule in *Russell* v. *Russell*[5] does apply[6]. In Evidence Act there is nothing at all to show that the husband or the wife is precluded from giving evidence in order to show that they had no access to each other at any time when the child could have been begotten.[7] This view is fortified by a decision of the Bombay High Court reported in *Kamala Bai* v. *Babubhai Sivashankar*,[8] and a decision in *G.R. Sane* v. *D.S. Sonavane & Co.*,[9] and the decision of the Madras High Court in *Hanumantha Rao* v. *Ramchandrayya*.[10]

Husband or wife is not precluded from proving non-access.

English law.

It may be mentioned that even in England consequent on the enactment of the Matrimonial Causes Act, 1949, evidence of the partners has been rendered admissible in any proceedings to prove that after marriage intercourse did or did not take place between them during that period. Reading Sec.120 with Sec. 112 it will be clear that there is no prohibition to the partners of a child from deposing whether or not they had at any time when the child would have been begotten access to one another.[11]

7. Interested evidence.— The meaning of the expression "interested evidence" means clearing up. For, in the vast majority of cases, there can be none more interested in the success of their cause than the parties to the suit and the husband or wife of such party. Yet in all civil proceedings they shall be competent witnesses, as Sec.120 of the Evidence Act specifically prescribes. So the testimony of the parties on their spouses must be scrutinized in the same way as that of any other witness. The true test to determine, whether or not the evidence of the witness is interested, is to find out if he is an independent witness. But "independent" merely means independent of source which is likely to be tainted. The meaning of interested evidence is then this: it is that sort of evidence the source of which is likely to be tainted.[12]

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1. Russell *v.* Russell, (1924) A.C. 687.
2. A.I.R. 1932 Mad. 44 : I.L.R. 55 Mad. 292 : 135 I.C. 580.
3. I.L.R. 62 Cal. 1080.
4. A.I.R. 1927 Bom. 594 : I.L.R. 51 Bom. 1026 : 105 I.C. 871.
5. (1924) A.C. 687.
6. Capt. T.W. King *v.* Mrs. F.E. King, A.I.R. 1945 All. 190 at pp. 195-96.
7. Shyam Singh *v.* Saibalini Ghose, A.I.R. 1947 Cal. 183 at p. 184.
8. A.I.R. 1926 Bom. 384 at p. 349 : 95 I.C. 334 : 28 Bom. L.R. 607.
9. A.I.R. 1946 Bom. 110.
10. A.I.R. 1944 Mad. 376 at p. 377 : I.L.R. (1945) Mad. 53.
11. Mst. Shanta Bai *v.* Dalchand Sheoprasad Kaonra, A.I.R. 1953 Nag. 374 at p. 375 ; *see* also Mst. Saroo Mali *v.* Yeswant Narayan Mali, A.I.R. 1934 Nag. 124.
12. Binani Properties Private Ltd. *v.* M. Gulamali Abdul Hossain & Co., A.I.R. 1967 Cal. 390 at p. 401.

8. **Statement by mother as to legitimacy of child—Admissibility.**—Where the legitimacy of a child born in wedlock is in issue, previous statments by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness-box.[1]

So much of the section as declares husbands and wives competent witnesses against each other in criminal proceedings differs from the rule of English law, which does not allow the admission of this evidence, except when an injury to person or property has been committed by the one against the other[2] but is in accordance with the Full decision of the Calcutta High Court in the case of *Queen* v. *Khairulla*.[3]

Proceedings under Sec. 488, Cr.P.C. (Sec. 125 New)

Proceedings under Sec. 488 (Sec.125 new) of the Code of Crimimal Procedure are in the nature of civil proceedings within the meaning of Sec. 120 of the Evidence Act, and the defendant thereto may give evidence on his own behalf.[4] A wife can be examined as to non-access of her husband during her married life.[5] The effect of Sec. 118, *ante*, is to make the husband a witness for all purposes and he is competent to prove non-access.[6]

9. Parties to the suit.—There is presumption in favour of truth and a party who gives evidence is not necessarily suspected. The same tests have to be applied to him as to every other witness.[7]

Duty of a person to give evidence.

It is bounden duty of the persons personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance, as a witness, would be the strongest possible circumstances to discredit the truth of his case.[8]

121. Judges and Magistrates.—No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations

(*a*) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B* cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(*b*) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said, except upon the special order of the superior Court.

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1. Aylesford Peerage Case, 11 A.C. 1, cited in Rozario *v.* Ingles, I.L.R. 18 Bom. 468 at pp. 472-73.
2. Taylor, Secs. 1236-1237; Secs. 1371-1372, 8th Ed.
3. 6 W.R. (Cr.) 21 : B.L.R. Sup. Vol. App. 11 (F.B.).
4. *In the matter of* Toki Bibi *v.* Abdul Khan, I.L.R. 5 Cal. 536 ; Nur Mohammad *v.* Bismulla Jan, I.L.R. 16 Cal. 781 ; *see* also Hira Lal *v.* Sahed Jan, I.L.R. 18 All. 107.
5. Rozario *v.* Ingles, I.L.R. 18 Bom. 468.
6. John Howe *v.* Charlottee Howe, I.L.R. 38 Mad. 466 (F.B.).
7. Jogendra *v.* Kurpal, I.L.R. 49 Cal. 345, 35 C.L.J. 175.
8. Gurbaksh *v.* Gurdial, A.I.R. 1927 P.C. 230 : 105 I.C., 220 (P.C.) ; Gokal Dass *v.* Devinder Dass, A.I.R. 1949 H.P. 1 at p. 14; Shah Muhammad Khan *v.* Ahmad Ali Khan, A.I.R. 1935 Oudh 170.

(*c*) *A* is accused before the Court of Session of attempting to murder a police officer whilst on his trial before *B*, a Sessions Judge. *B* may be examined as to what occurred.

SYNOPSIS

1 Scope of the section ... 4585
2. Extent of the privilege ... 4585
3. Can a Judge be witness in a case tried by himself ... 4586
4. Statement of a Judge as to what took place at the trial ... 4587
5. Mode in which Judge can give evidence ... 4588
6. "Compelled"—Meaning ... 4588

1. Scope of the section.—The principle governing this section is the privilege of the witness, *i.e.* of the Judge, of whom the question is asked. If he waives such privilege, it does not lie in the mouth of any other person to assert it.[1]

Sections 121, Evidence Act empowers an Appellate Court to question the Trial Court on matters relating to be proceedings before him and the answers of such questions are certainly to be taken into account when deciding the appeal because reference to proceedings is permitted under the provisions of the Civil Procedure Code.[2]

Scope of Secs. 121 to 132.

Sections 121 to 132 declare exceptions to the general rules that a witness is bound to state the whole truth, and to produce any documents in his possession or power relevant to the matter in issue.[3]

In view of the provisions of Sec. 121 of the Evidence Act no Magistrate can be compelled to answer any questions as to his own conduct as such Magistrate.[4]

Promise by Judge not to disclose what the child told.

On 2nd July, 1973, the father made an application for custody of the two boys to be given to him. At the request of the parties, or one of them the Judge saw the two childern alone in the Judge's chambers at the hearing on 24th September. *Held* that while the Judge seeing the child privately must naturally do all he can to encourage the child to speak freely, frankly and without fear, he may not give the child a promise which would be such in its terms, or be understood by the child as meaning, that in no circumstances will anything that the child says he made known to anyone else.[5]

2. Extent of the privilege.—The privilege of the Judge or Magistrate extends only "to his own conduct in Court as such Judge or Magistrate, or to anything which came to his knowledge in Court as such Judge or Magistrate" and if he himself make no objection to answer the questions asked, no one else is entitled to object.[6]

Arbitrators.

Arbitrators are within the rule in England. The definition of "Court" in the Evidence Act (*ante* Sec. 3) does not include arbitrators. There is no definition of the word "Judge" in the Act.[7] It has been decided in England that a barrister cannot be called as a witness to prove what he said when conducting a case in Court.[8] An arbitrator would therefore seem not to

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1. Empress of India *v.* Chidda Khan, I.L.R. 3 All. 573 (F.B.).
2. Banke Bihari Lal *v.* Mahadeo Prasad, A.I.R. 1953 All. 97 at p. 99 : 1952 A.L.J. 580 : 1952 A.W.R. 527.
3. Queen *v.* Gopal Doss, I.L.R. 3 Mad. 271 at p. 277 (F.B.).
4. D.J. Vaghela *v.* Kantibhai Jethabhai, 1985 Cr. L.J. 974 at p. 977 (Guj.).
5. H. *v.* H. (Child : Judicial Interview) (1974) 1 All. E.R. 1145 at pp. 1145, 1146, 1148.
6. *Per* Lord Advanley in Martin *v.* Thorantan, 4 Expinasee's Rep. 181.
7. *See* the definition of "Judge" in Sec. 19 of the Penal Code.
8. Curry *v.* Walter, 1 Esp. 456.

come within the rule laid down by this section. An arbitrator selected by the parties comes within the general obligation of being bound to give evidence.[1]

When a court is requested to pass an order amending the decree passed an award on the ground that certain clerical mistakes had entered into the proceedings of the arbitrators it is open to the Court to examine the arbitrator and to form an opinion for itself, whether the slip or omission had occurred.[2]

Exercise of power to summon arbitrator

It is seen that the learned Judge before whom objection was taken under Sec. 151, C.P.C., to the arbitrator dismissed the petition on the score that he saw no ground to refuse to summon the arbitrator as a witness. The approach should have been the other way round. When an arbitrator has given an award, if grounds justify his being called as a witness are affirmatively made out, the Court may exercise its power, otherwise not. The short point is that the Court must realise that its process should be used sparingly and after careful deliberation, if the arbitrator should be brought into the witness box. In no case can he be summoned merely to show how he arrived at the conclusions he did. Of course, if a party has a case of *mala fides* and makes out *prima facie* that it is not a frivolous charge or has other reasonably relevent matters to be brought out, the Court may, in given circumstances, exercise its power to summon even an arbitrator, because nobody is beyond the reach of truth of trial by court.[3]

Examination of jurors by a Judge.

The Calcutta High Court had laid down that a Judge is not entitled to examine the jurors as to the grounds upon which they have based their verdict.[4]

3. Can a Judge be witness in a case tried by himself.—"A Judge before whom the case is tried," says Mr. Taylor, "must conceal any fact within his own knowledge, unless he be first sworn; and consequently, if he be the sole Judge it seems that he cannot depose as a witness, though, if he be sitting with others, he may then he sworn and give evidence. In this last case, the proper course appears to be that the Judge, who has thus become a witness, should leave the Bench, and take no further judicial part in the trial.[5] In the case of *Queen* v. *Mukta Singh*,[6] it was held that a Sessions Judge was a competent witness in a case tried by himself with the aid of assessors, provided that he had no personal or pecuniary interest in the subject of the charge. In the case of *Haro Chandra Pal*,[7] Deputy Magistrate had taken an active part in the capture of certain persons alleged to be members of an unlawful assembly; and then proceeded to try them. Phear, J., said: "...while a person is not necessarily disqualified from presiding as a Judge, because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation, if he does do so, he is bound to state to the prisoner... what are the facts which he himself observed, to which he himself can bear testimony. And moreover the prisoner... has a right, if he thinks it desirable,

Whether a Magistrate helping capture of certain persons can subsequently try them.

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1. Amir Begum *v.* Khwaja Sayad Badruddin Hussain, I.L.R. 36 All. 336 (P.C.) : 18 C.W.N. 755 : 19 C.L.J. 494.
2. Chingoron Keloth Narayana Nair *v.* Chingoran Keloth Devaki Amma, A.I.R. 1945 Mad. 230 at p. 230.
3. Union of India *v.* M/s Orient Engg. and Commercial Co. Ltd., A.I.R. 1977 S.C. 2445 at p. 2446.
4. Emperor *v.* Derajitulla Sheikh, A.I.R. 1930 Cal. 443 at p. 444.
5. Section 1244 ; Sec. 1379, 8th Ed.
6. 4 B.L.R. (Cr.) 15 : 13 W.R. (Cr.) 60.
7. 20 W.R. (Cr.) 76.

to cross-examine the Judge, who under these circumstances and to this extent, must be viewed as a witness. ...The awkwardness of a Criminal Judge being the principle witness in the case which he has to try is... reason for his declining to try the case, etc." In the case of *Empress* v. *Donnelly*,[1] Markby, J., said: "As to the point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me resolve itself into this : Is a sole Judge of a law and fact competent to decide a case in which he has himself given evidence ?

Evidence by a Judge, etc.

The English cases (they are very few and very old) do not go further than to establish that a person having to exercise judicial functions may give evidence in a case pending before him, when such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same time.[2] Two cases are cited as having occurred in this country—one the case of *Queen* v. *Tara Pershad Bhattacharya*, in the N.A. Rep. for 1857, Pt. 2, p. 83, and the other the case before Mr. Justice Norman above referred to. That learned Judge went into the matter on that occasion very fully, and having carefully considered his judgment, I have come to the conclusion that he did not intend to carry the law beyond that which he lays down as the result of the English cases. In the absence, therefore, of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness. I refuse to give any countenance to what appears to me to be a most objectionable proceeding. I am, therefore, of opinion that a Judge who is sole Judge of law and in fact cannot give his own evidence and then proceed to a decision of the case which that evidence is given."[3] When a Magistrate sitting with other Magistrates is a witness, or when he has himself initiated the proceedings, unless there is an absolute necessity for his doing so, he should abstain altogether from exercising judicial functions.[4] So where a Magistrate had inspected the *locus in quo* the scene of an alleged riot, it was held that he cannot give evidence before himself, or import matters into his judgment not stated on oath before the Court in the presence of the accused.[5]

If by the conduct or word of a Judge any party has reasonable cause to apprehend bias he may apply for transfer of the suit.[6]

As to the inadmissibility of the statement of a juror as to what happened in the jury-room, see *E.* v. *Hur Kumar Burman Roy*.[7]

4. Statement of a Judge as to what took place at the trial.—A Judge cannot import his own knowledge into a case, or base his judgment on what he himself knows, without making such knowledge evidence by giving his testimony in the usual way.[8] The statement of the Judge who presides at a trial, whether it be in a criminal or civil case, is, as to what took place at the trial, conclusive. Neither the

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1. I.L.R. 2 Cal. 405.
2. *Per* Norman, J., in Queen *v.* Mukta Singh, 4 B.L.R. Cr. 15 : 13 W.R. (Cr.) 60.
3. *See* also Queen *v.* Bholanath Sen, I.L.R. 2 Cal. 23.
4. *See* also Girish Ghose *v.* Queen-Empress, I.L.R. 20 Cal. 857 ; Hari Kishore Mittra *v.* Abdul Baki Miah, I.L.R. 21 Cal. 920.
5. Queen-Empress *v.* Manikram, I.L.R. 19 Mad. 263 ; *see* also Mangani Lal Marwari *v.* Emperor, 20 Cr. L.J. 45 : 48 I.C. 685 (Pat.) ; *see* as to local inspections, the new Sec. 539-B (Sec. 310 new) added to the Code of Criminal Procedure of 1898 by the Amending Act XVIII of 1923, Sec. 150. *See* also Sec. 556 (Sec. 979 new) of the same Code as to matters which will disqualify a Magistrate or Court from trying a case.
6. Lalit Mohun Moitra *v.* Surja Kanta Acharjee, I.L.R. 28 Cal. 709.
7. I.L.R. 40 Cal. 693 : 17 C.W.N. 787.
8. Kishore Singh *v.* Ganesh Mukharji, 9 W.R. 252 ; and Rousseau *v.* Pinto, 7 W.R. 190.

affidavits of by-standers, nor of jurors, nor the notes of Council, nor of short-hand writers, are admissible to controvert the notes or statement of the Judge".[1] And in *Reg. v. Aaron Mellor*,[2] Coleridge, J., at page 131, says: "I apprehend that we are bound to give credence to the statement of the Judge and to take what the Judge so states to be incontrovertibly the fact...," and Martin, B. (p. 137) says : "We ought to take his statement precisely as a record and act on it the same manner as on a record of Court which of itself imports absolute verity."[3] The rule of law is that a judgment deliberately recording the admission of a pleader is to be taken as correct unless it is contradicted by an affidavit or the Judge's own admission that the record he made was wrong.[4]

5. Mode in which Judge can give evidence.—A Judge cannot give evidence in a case merely by making a statement of fact in his judgment.[5] If he wants the Courts to act upon his statement, he is bound to make that statement in the same manner as any other witness.[6]

A Judge is not compelled to answer any question as to his own conduct in Court as a Judge or Magistrate or as to anything which came to his knowledge in Court as Judge or Magistrate, but he may be examined as to other matters which occurred in his presence while he was so acting. The protection under Sec. 121 of the Evidence Act therefore is only to the conduct of a Judge. But if something happens in his presence in the Court, he may be examined.[7]

It is not proper of a Magistrate, in disposing of a case, to rely on statements made to him out of Court.[8]

6. "Compelled"—Meaning.—In Sec.121 to 132, the terms "compelled" and "permitted" are so used as to pre suppose a public officer having authority to compel or to permit and exercising it at the time the necessity for such compulsion or permission arises.[9]

122. Communications during marriage.—No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative-in-interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

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1. R. *v.* Grant, (1807) 5 B. & Ad. 1081 : 3 Ne. & M. 106 ; Everett *v.* Youells, 4 B. & Add. 683 at p. 684 ; Gibbs *v.* Pike, 9 M. & W. 351.
2. 27 L.J.N.S. 121 Mag. Cas.
3. Reg. *v.* Pestonji Dinsha, 10 Bom. H.C. Rep 81.
4. Har Doyal Singh *v.* Hira Lal, 16 W.R. 107.
5. Rousseau, Mrs. *v.* Mrs. Pinto 7 W.R. 190.
6. Rousseau Mrs. *v.* Mrs. Pinto, 7 W.R. 190 ; Thomas Kallonas *v.* Gunga Gobind Roy Choudhry, 25 W.R. 121 ; R. Sykes *v.* Municipality of Dharamsala, 1895 P.R. 4 (Civil) ; Alimuddin Howladar *v.* Emperor, I.L.R. 29 Cal. 392 ; Hurpurshad *v.* Sheo Dayal, 21 P.L.R. 1904 ; 3 I.A. 259, followed in Queen-Empress *v.* Manikram, I.L.R. 19 Mad. 263 at p. 265.
7. **Registrar (Vigilance), High Court of A.P. Hyderabad *v.* Station House Officer, Police Station Annasagar, Mahaboobnagar District, 2001 (2) A.L.D. (Cri.) 617 at p. 621 (A.P.).**
8. Queen-Empress *v.* Sahadev, I.L.R. 14 Bom. 572 ; I.L.R. 22 Mad. 427.
9. Queen *v.* Gopal Doss, I.L.R. 3 Mad. 271 at p. 277 (F.B.).

SYNOPSIS

1. Principle ... 4589
2. Scope of section ... 4589
3. Communication by husband to his wife ... 4590
4. Extent of the protection ... 4591
5. Expressions "compelled to disclose" and "permitted to disclose" ... 4593
6. Consent under the section must be express and cannot be implied ... 4593

1. Principle.—Under Sec. 120, Evidence Act, the wife of an accused person is a competent witness. Under Sec. 122 the wife is not permitted to disclose any communication made by the husband during marriage unless the husband who made it consents. The prohibition is extended to all communications of whatever nature which pass between husband and wife.[1]

The prohibition under Sec. 122 of the Indian Evidence Act is based on the ground that the admission of such testimony is likely to disturb the peace of the family and weaken the feeling of mutual confidence. It rests on no technicality that can be waived at will but is founded on a principle of high import which no Court is entitled to relax. It is further not confined to cases where communication is of strictly confidential character. In fact, it extends to all communications of whatever nature, which pass between the husband and the wife unless the spouse making the communications consents to its disclosure.[2]

This section is based upon the supposed necessity of rendering the intercourse between husband and wife as free as possible from restraint.[3]

2. Scope of section.—The expression in the English statutes on evidence of material communications is substantially different from that in Sec.122 of the Indian Evidence Act; and there was no common law rule in England which may be said to have been the foundation for our Sec.122. Under the English statutes it is a privilege enuring to the recipient of the communications and not to the maker thereof, which the recipient may waive to make a disclosure thereof when the maker cannot object. It avails husbands and wives but not widowers, widows and divorcees. But under the Indian statutes (Sec.122) it is a privilege of the maker waivable by the maker, and a prohibition against the recipient which cannot be contravened by the recipient even after the maker's death. In view of such vast difference in the statutes concerned, the English precendents are of little assistance here.

What the law in Sec.122 of the Evidence Act inhibits is disclosure of marital confidence. It cannot be contravened by spouse through the medium of his or her parent.

Absence of the words "to the Court" in Sec. 122 of the Evidence Act.

The absence of the words "to the Court" in Sec. 122 and their enactment in Sec. 129 appear to be significant. Section 122 of the Evidence Act is of general application and anything done contrary thereto should not be heard or accepted in evidence in a Court of law. The fact that a motion for divorce or for declaration of nullity of marriage has been made by the wife will not save the wife from her obligation under Sec.122 of the Evidence Act, which by the very wording of the Act, is to continue beyond the subsistence of the marriage.[4]

Under Sec. 122 of the Evidence Act, the wife cannot be compelled to disclose any communication made by the husband during the marriage. Communications between the husband and wife during converture is privileged and its disclosure cannot be enforced.[5]

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1. Ramchandra Shankarshet Uravane *v.* Emperor, A.I.R. 1933 Bom. 153 at p. 157.
2. Col. S.J. Chaudhary *v.* State, 1984 (2) Crimes 487 at p. 489 (Delhi) : 1985 Cr. L.J. 622 (Delhi).
3. Mark on *Evidence*, p. 93.
4. T.J. Ponnen *v.* M.C. Varghese, A.I.R. 1967 Ker. 228 at pp. 231, 232, 233.
5. Appu *v.* State, A.I.R. 1971 Mad. 194 at p. 196 : (1971) 2 M.L.J. 53.

The section protects the individuals (i.e.) the husband and the wife, and not the communication, if it can be proved without putting into the box, for the purpose, the husband or the wife to whom the communication was made.[1]

This section was applied in *Nawab Howladar* v. *Emperor*.[2]

Disclosure of husband's communication to wife.

It was alleged that murders had been committed by a party of persons consisting of one Hamju and others. Hamju, a few days after the murders committed suicide and it was said that before he committed suicide Hamju made certain statements to his wife Jaytun implicating certain persons in the murders. It was held that Jaytun's disclosure of Hamju's communications must be excluded for consideration in virtue of Sec. 122, Evidence Act. In *Mst. Fatima* v. *Emperor*,[3] the Sessions Judge admitted the previous alleged confession by her to her husband. *Held* that the evidence should never have been admitted.

3. Communication by husband to his wife.—On the question as to whether a communication by a husband to his wife would amount to publication in law, the precedent in *Wennhak* v. *Morgan*[4] appears pertinent. The question there was whether the handing over of a letter with a libellous imputation by the libeller to his wife was publication. Baron Huddleston, with concurrence of Manisty, J., held "that the uttering of a libel by a husband to his wife is not publication". Though the reason for that dictum was the common law recognition of unity of spouses, the same result must follow when communications between husband and wife are precluded by statute from being disclosed; for that which cannot be or is not proved in Court has to be assumed as non-existent in the eye of law.[5] In *M.C. Varghese* v. *T.J. Ponnon*,[6] one Rathi, daughter of Verghese was married to one Ponnon, Ponnon wrote some letters to Rathi which according to Verghese were defamatory. Verghese filed those letters and objection was taken that those letters are inadmissible in evidence. The Supreme Court held :

> "Section 122 of the Evidence Act only prevents disclosure in giving evidence in Court of the communication made by the husband to the wife. If Rathi appears in the witness-box to give evidence about the communications made to her by her husband, *prima facie*, the communications may not be permitted to be deposed to or disclosed unless Ponnon consents. That does not however, mean that no other evidence which is not barred under Sec.122 of the Evidence Act or other provisions of the Act can be given."

In the present case when the plaintiff was deposing as a witness the defendant was confronting her with letters allegedly written by plaintiff's husband to the plaintiff. The learned Sub-Judge held that they are inadmissible and he therefore directed those letters to be excluded from considerations. *Held* that it is no doubt true that the plaintiff cannot be asked about the letters in question but it is a different thing to say that the letters are totally inadmissible in evidence and have to be excluded from considerations. The Magistrate is therefore directed not to permit the cross-examination Counsel to confront the plaintiff with letters but allow the revision-petitioner to prove letters by such other means as are available to him.[7]

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1. *Per* Boddam, J., in Queen-Empress *v.* Donaghue, I.L.R. 22 Mad. 1 (3).
2. I.L.R. 40 Cal. 891 : 23 I.C. 511 : 15 Cr. L.J. 303.
3. A.I.R. 1914 Lah. 380 at pp. 380-81 : 25 I.C. 525.
4. (1888) 20 Q.B.D. 635.
5. T.J. Ponnon *v.* M.C. Varghese, A.I.R. 1967 Ker. 228 at p. 233 : 1966 Ker. L.T. 1010.
6. A.I.R. 1970 S.C. 1876.
7. A. Manibhushana Rao *v.* Alapati Suryakantam, A.I.R. 1981 A.P. 58 at p. 59 ; *see* also S.J. Choudhary *v.* The State, 1985 Cr. L.J. 622.

Extra-judicial confession by the husband to his wife

Communication between spouses during marriage cannot be disclosed and deposed to by the spouse without the consent of the other. Consent cannot be implied. It is incumbent upon the Court to ask a party against whom the evidence is to be given whether he or she would consent to the evidence being given and not to admit unless such consent is given. Where no such consent is given by the accused, the extra-judicial confession said to have been made to the witness by her husband is clearly inadmissible under Sec. 122 of the Evidence Act.[1]

4. Extent of the protection.—The protection afforded by this section is greater than that conferred by the English law, because in India, the witness is not permitted to disclose communication, so that the person making it, as well as the witness to whom it is made, is protected. But, in England, the witness only is protected.[2] "The protection", says Mr. Taylor, "is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated 'during the marriage'; and consequently if a man were to make the most confidential statements to a women before he married her, the wife be bound to disclose what she knew of the matter".[3] Not merely is the married person protected from being compelled to disclose; but further, even if he be willing, he is not to be permitted to disclose any communication made during the marriage, unless the person who made it or his representative-in-interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other. With this exception should be read Sec. 120 *ante*.

But a communication between a husband and his wife are not protected if they can be proved without their assistance. So on a trial for breach of trust by a public servant a letter from the accused to his wife which had been found by the police was held admissible in evidence against him.[4] Where there is no "representative-in-interest" who can consent to the disclosure of communications made by a deceased husband to his wife during marriage, the wife should not be permitted, even if willing, to disclose such communications.[5] The confession of a wife to her husband that she had murdered her step-son is not admissible, as the crime was not committed by the wife against the husband within the meaning of this section.[6]

The argument of the appellant was that of his statements to P.W. 2 that he would give her jewels, and that he had gone to the middle house to get them were inadmissible under Sec.122 of the Evidence Act, being communications made to his wife. *Held* that this was plainly so, and the Courts below ought not to have taken this evidence into consideration.[7]

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1. Ataka Dhobala *v.* State of Orissa, 1989 (31) O.J.D. (Cr.) 193 at p. 197.
2. *See* Stephen's *Digest*, Art. 110 ; Mark on *Evidence*, p. 93.
3. Section 830 ; Sec. 909, 8th Ed., and *see* 16th and 17th Vict., cap. 83 Sec. 3.
4. Queen *v.* Donaghue, I.L.R. 22 Mad. 1.
5. Nawab Howladar *v.* E., I.L.R. 40 Cal. 891.
6. Mst. Fatima *v.* E., 15 Cr. L.J. 613 (Punj.) 25 I.C. 525 (Punj.) ; *see* also Ihsanan *v.* E., 81 I.C. 271..
7. Ram Bharosey *v.* State of Uttar Pradesh, (1954) Cr. L.J. 1755 at pp. 1756, 1757 : A.I.R. 1954 S.C. 704.

In *Daniel Youth* v. *King*,[1] the appellant relied upon Secs. 99 and 102 of the Evidence Ordinance 3 of 1901 of the Revised Laws of the Turks and Caicos Islands, 1909,[2] as precluding the giving in evidence of the statement of his wife in those proceedings. *Held* that both deal only with witnesses called to give evidence in Court. But apart from this consideration Sec.99, where it says "the wife,... of the accused...shall not be called as a witness without his consent", points to the same result. Moreover, the section has, in their Lordships' view, no bearing on a case where husband and wife are being jointly tried. The statement under consideration was neither given in evidence nor disclosed as evidence against the husband. It was admissible for and against the wife, and was rightly used as evidence in her case. The appellant has no cause of complaint under the sections. The statement was not put in against him, but was properly used in the case of his co-accused, and the jury were carefully warned against paying any regard to it in his case. In their Lordships' view, therefore, the sections do not avail the appellant.[3]

Letter between husband and wife—Admissibility.

A document in hands of third parties even though it may contain communications from the husband to the wife, or *vice versa*, is admissible in evidence, for, in producing it, there is no compulsion or permission to the wife or husband to disclose any communication.[4] A letter from husband to wife taken by police on search of wife's house can be admitted in evidence against the husband.[5]

Privilege of continuation of.

The privilege conferred by this section continues even after the marriage has been dissolved by death or divorce.[6]

Wife cannot be compelled to give evidence against husband's communication.

The wife cannot be called as a witness and compelled to disclose what communication was made by the husband to her. Section 122, Evidence Act, prevents such disclosure. Communication between the husband and wife during coverture is privilege and its disclosure cannot be enforced. The protective provision under Sec.122, Indian Evidence Act, is based on the wholesome principle of preserving domestic peace and conjugal confidence between the spouses during coverture. The exceptions also are based on common sense. Such protection obviously cannot exist in suits between married persons when one of the spouses is litigating against the other or when one of the spouses commits any crime against the other, for to prevent disclosure in that event will be to defeat justice.[7]

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1. A.I.R. 1945 P.C. 140.
2. "99. In all criminal proceedings the accused, and the husband or wife of the accused, as the case may be, may be called as a witness, but subject to the following provisions : (i) The accused shall not be called as a witness without his consent ; (ii) the wife or husband of the accused shall not be called as a witness without the consent of the accused, except in any case in which the wife or husband might have been compelled to give evidence before the commencement of this Ordinance."
   "102. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married ; nor shall be permitted to disclose any such communication unless the person who made it or his representative-in-interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other and except in the cases mentioned in Secs. 99 and 100."
3. Daniel Youth *v.* King, A.I.R. 1945 P.C. 140 at pp. 143, 144 : 1945 A.L.J. 269.
4. Queen-Empress *v.* Donaghue, I.L.R. 22 Mad. 1 at p. 3.
5. Queen-Empress *v.* Donaghue, I.L.R. 22 Mad. 1 ; Reg. *v.* Pamenter, 12 Cox. C. 177 ; Commonwealth *v.* Griffin, 110 Mass, 181 ; State *v.* Carter, 35 Kern. 378 ; Rex *v.* Simons, 6 C. & P. 540.
6. *See* Taylor's *Evidence*, Sec. 910 ; Whitley Stokes, Vol. II, p., 918.
7. Norendra Nath Mozumdar *v.* State, A.I.R. 1951 Cal. 140 at pp. 141-142 : I.L.R. 1 Cal. 239 : 87 C.L.J. 58 : 52 Cr. L.J. 1241.

Wife—when can be compelled to give evidence against husband?

In the present case the appellant was convicted of wounding Janis Scrimshaw with intent to do her grievous bodily harm. At the time of the alleged offence the appellant and Janis Scrimshaw were not married. They were however lawfully married to each other before the trial. When she was called by the Crown to give evidence against her husband, she made it plain that she did not wish to do so. The learned Trial Judge who considered that he was bound by the Court of Criminal Appeal's decision in *R.* v. *Lapworth*[1] ruled that she was not only a competent but also a compellable witness. On appeal Viscount Dilhorne observed as under:

"The conclusion to which I have come in the light of the authorities to which I have referred and to which the Court in *R.* v. *Lapworth*[2] was not referred is that the decision in that case was wrong. In my view the fundamental principle was correctly stated by Lord Loreburn, L.C. and Lord Atkinson in *Leach*[3] and I would conclude this speech with two citations and one observation. The first citation is from the reply by counsel in *Leach* v. *R.*[4]

"In the case of an ordinary person if he may be called as a witness, the usual consequences follow, i.e. he must give evidence, but the wife has never, as regards her husband, been in the position of an ordinary witness by reason of the common law, and she can no more be compelled than the prisoner himself can be compelled.

"The other citation is from the judgement of Griffith, C.J. in *Riddle* v. *R.*[5]

'The old doctrine of the unity of husband and wife and the importance of preserving confidence between them and the other reasons which have been variously given, have still a great deal of weight.'

Therefore the wife should not have been compelled to give evidence.[6]

5. **Expressions "compelled to disclose" and "permitted to disclose".**—The expressions "compelled to disclose" and "permitted to disclose" clearly imply that the party concerned is made or allowed to say or do something by way of disclosing a communication made during marriage. Where the husband or the wife has not to do any act in the case, there is no objection to the reception of the evidence.[7]

The plaintiff wanted to examine arbitrator's wife to prove certain communications, alleged to have been made by her husband to her shortly before his death admitting that he had made the award after receiving a bribe from the defendant and under pressure, from some of his friends.

Held that such communications even if they were in fact made could be permitted to be disclosed in evidence only if the requirements of Sec.122, Evidence Act, had been fulfilled.[8]

6. Consent under the section must be express and cannot be implied.—The principle underlying Sec.122 of the Evidence Act would make it clear that though Sec.120 of the Evidence Act enables a spouse to tender evidence in a case against

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1. (1931) 1 K.B. 117 : (1930) All. E.R. Rep. 340.
2. (1931) 1 K.B. 117 : (1930) All. E.R. Rep. 340.
3. (1912) A.C. 305.
4. (1912) 7 Cr. App. Rep. 157 at p. 168.
5. (1911) 12 C.L.R. 622 at p. 630.
6. Hoskyn *v.* Commissoner of Police for the Metropolis, (1978) 2 All. E.R. 136 at p. 148.
7. Queen-Empress *v.* Donaghue, I.L.R. 22 Mad. 1 at p. 4.
8. J. Kaikabad *v.* Khambatte, A.I.R. 1930 Lah. 280 (2) at p. 282 : 120 I.C. 494.

the other spouse except in litigation between themselves either arising out of the marital relations or in a criminal prosecution and in all other cases bars the disclosure of any statements made by one spouse to another during subsistence of the marriage. The privilege under Sec.122 of the Evidence Act extends to all communications made to a spouse during subsistence of marriage by the other spouse. Such communications need not be confidential and applies to all communications. The privilege is not to the witness, but to the spouse who made the communication and therefore the witness cannot waive it at his or her will nor can the Court permit disclosure even if he or she is willing to do. The protection extends only to communication, that is utterances and not acts. The Courts have taken the view that before admitting evidence under Sec.122 the party against whom it has to be given must be asked by the Court his consent of evidence being given. The consent must be express and cannot be implied. It is incumbent upon the Court to ask whether he or she would consent to the evidence being given. It makes no difference that no objection was raised by the accused at the trial. The law being very clear that communications between husband and wife cannot be permitted to be disclosed unless the spouse other than the one in the witness box has consented to such disclosure. In this case such consent is absent. Therefore, the evidence tendered by PW. 17, Honnamma in so far it relates to the disclosure of the statements made to her by the accused is concerned is held to be inadmissible.[1]

Section 122 bars acceptance of communication made during marriage. The first part of the section speaks of a bar against compulsion of a wife or a husband to speak against the husband or the wife on communications made during marriage, except in a litigation between themselves. The second part of the section is very important so far as this case is concerned. It enunciates that no such husband or wife shall be permitted to disclose the communications received from the other spouse during marriage unless consented to by him or her. In the present trial neither in the order sheet nor in the deposition or elsewhere there is any indication that Fateh Singh had ever consented to the disclosure of the communications allegedly made by him to his wife, Kamlesh. It is true that under Sec. 120 of the Indian Evidence Act, in a criminal proceeding the wife would be a competent witness against the husband but this alone may not save the situation for the prosecution in this case. Kamlesh is certainly a competent witness to be examined in the trial against her husband. But the provisions of Sec.122 of the Indian Evidence Act were absolute and the learned Sessions Judge should not have permitted Kamlesh to disclose the communication she received from Fateh Singh, such communications under the law may be of any nature and need not necessarily be confessions.[2]

The consent to the evidence being given cannot be implied. It is incumbent upon the Court to ask the party against whom the evidence is to be given whether he or she could consent to the evidence being given and not to admit it unless such consent is given.[3]

In *Bishen Das* v. *Crown*,[4] it was held that the mere fact that the evidence given by a wife against her husband was admitted in the Sessions Court without any objection being taken by or on behalf of the husband does not do away with the bar created by Sec.122, Indian Evidence Act. In Criminal Appeal No.140 of 1913,

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1. Nagaraj *v.* State of Karnataka, 1996 Cr. L.J. 2901 at p. 2907 (Kant.).
2. Fateh Singh *v.* State, 1995 Cr. L.J. 88 at p. 89 (All.) (D.B.); Ram Bharose *v.* State of U.P., A.I.R. 1954 S.C. 704 : 1954 Cr. L.J. 1755 relied on.
3. Nga Tin *v.* Emperor, A.I.R. 1937 Rang. 347 at p. 349.
4. 27 P.R. 1913 (Cr.) : 1914 Cr. L.J. 316.

decided on the 24th April, 1913, it was held by a Division Bench of the Chief Court of the Punjab that such evidence was inadmissible where the appellant or his representative-in-interest had not consented to the statements being disclosed. In *Reg.* v. *Amirta Govinda*,[1] where a confession made by an accused person had been wrongfully admitted in evidence by the Sessions Judge, it was held by the High Court that it was the duty of the Judge to prevent the production of inadmissible evidence whether it was or was not objected to by the parties. The same view was taken in *Abbas Peada* v. *Empress*.[2]

123. Evidence as to affairs of State.—No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

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Public interest—Basis of the rule.

1. Principle.—Public interest lies at the foundation of the claim for protection against disclosure enacted in Sec.123 and it seeks to prevent production of a document where such production would cause public injury. It is the public interest in fair administration of justice that comes into clash with the public interest sought to be protected by non-disclosure and the Court is called upon to balance these two aspects of public interest and decide which aspect predominates.[3] It is no doubt true that Sec.123 is a recognition of the principle that interest of all subjects of the State is superior to the interest of any one of them, but at the same time, the State must show that the claim of privilege strictly falls within the four corners of the provisions of law which tends to deprive the subject of evidence on matters directly in issue.[4]

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1. (1873) 10 Bom. H.C.R. 497.
2. (1898) 2 C.W.N. 494.
3. S.P. Gupta, V.M. Tarkunde, J.L. Kalra, Iqbal M. Chagla *v.* President of India, A.I.R. 1982 S.C. 149 at p. 235.
4. Union of India *v.* Raj Kumar Gujral, A.I.R. 1967 Punj. 387 at p. 389.

It is well-known that in the administration of justice it is a principle of general application that each party to the dispute must produce all the relevant and material evidence in its possession or power which is necessary to prove its contention. Failure on the part of a party to comply with this rule would attract the provisions of Sec.114 of the Act under which the Court would be justified in drawing an adverse inference against such a party that in case the document had been so produced, it would not have supported that contention of the party. The principle on which this departure for the ordinary rules of evidence can be and is justified, is the Doctrine of the Over-riding and Paramount Character of Public Interest. The claim for privilege is founded on the theory that in case the production of particular document would cause prejudice or injury to public interest and its non-production would result in prejudice or injury to some private interest, the latter must yield to the former.[1]

Section 123 of the Indian Evidence Act protects from judicial scrutiny "evidence derived from unpublished official records relating to any affairs of State", except with the permission of the officer at the head of the department concerned.

The law provides that State secrets and communications to, from and between public officers relating to affairs of State are privileged against disclosure. This broad principle is reflected by Sec.123 of the Indian Evidence Act.

A non-disclosure of matters involving secrets of State in military or international affairs is a well-recognised and a genuine ground, for claiming testimonial exemption. Secrecy is legitimately invoked for acts of pending international negotiations or military directions against foreign enemies. There can be no two opinions, that such matters ought to be protected on the ground that these are secret affairs of the State.

Views of Professor Wigmore.

According to Professor Wigmore under a system of representative government and removeable officials, there can be no facts which require to be kept secret with that solidity which defies even the enquiries of a Court of Justice.[1] Wigmore approved of the observations that to cover with the veil of secrecy the common routine of business is an abomination as it was generally desired for the purpose of "parties and politics" or personal self-interest or bureaucratic routine. He said "the responsibility of officials to explain and to justify their acts, is the chief safeguard against oppression and corruption."

If privilege is a narrow one.

There is a long catena of decisions in which warnings have been given by Courts of the menace which the supposed privilege implies to individual liberty and private right, and to the potency of its abuse. The highest Courts consider that the privilege is a narrow one and most sparingly to be exercised.[2]

In *Robinson* v. *State of South Australia*,[3] a privilege was claimed for communication between certain departmental officers on the ground that disclosure would be "contrary to the interests of the State" in an action by a bailor who had placed wheat under control of the State for wheat damaged by negligence. The Privy Council cited with approval Taylor on *Evidence* observing "the principle of the rule is concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires". Lord Blanesburgh observed that while the Courts—

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1. State of Himachal Pradesh *v.* Manmohan Bhardwaj, 1982 Sim. L.C. 281 at p. 284.
2. *Vide* Wigmore on *Evidence*, Vol. VIII, Sec. 2378a.
3. (1931) A.C. 704.

"must duly safeguard genuine public interests, they must see to it that scope of the admitted privilege is not in such litigation extended. Particularly must it be remembered in this connection that the fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such plain overruling principle of public interest as to justify any claim of privilege ... In truth, the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself of compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security."

Court safeguarding public interests must see the admitted privilege.

The documents in that case were primarily commercial and in the view taken by Lord Blanesburgh, the Minister,

"should have condescended upon some explanation of the particular and far from obvious danger or detriment to which the State would be exposed by their production."

These observations have been followed in a large number of decisions of the High Court in this country.

In *Mohan Singh Bath* v. *Emperor*,[1] after referring to the view of their Lordships of the Privy Council in the case cited above, it was remarked:

"....That some indication should be given to the Court as to why privilege is claimed or what affairs of State are involved in the matter. Without such indication there is always a danger that the Court may draw an adverse inference from the non-production of the document..."

Indication to be given why privilege is claimed.

In *Bhalchandra Dattaraya* v. *Chanbassappa Mallappa*,[2] after bringing out the distinction between the law in India and in England it was remarked:

"but it is essential to bear in the mind the cardinal fact that privilege does not attach to a document merely because it is a State or official document. The foundation of the claim rests on the consequences of disclosure of a communication made in official confidence whose publication the officer to whom it is made, considers contrary to the public interests."

There is authority in support of the proposition that departmental enquiry papers are not unpublished documents relating to affairs of State.[3]

Bhagwati, J., in *Chamarbaughwalla* v. *Parpia*,[4] animadverting to Sec.123 of the Indian Evidence Act said:

'Affairs of State' is a very wide expression. Every communication which proceeds from one officer of the State to another officer of the State is not necessarily relating to the affairs of State.. What are the affairs of State within the meaning of that expression as used in Sec. 123 of the Act have therefore got to be determined by a reference to the grounds on which privilege can be claimed in respect of a particular document."

A clue to the same is furnished in the observations of their Lordships of the Privy Council in *Robinson* v. *State of South Australia*.[5]

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1. A.I.R. 1940 Lah. 217.
2. A.I.R. 1939 Bom. 237.
3. *Vide* Harbans Sahai *v.* Emperor, (1912) 16 C.W.N. 431 ; D. Weston *v.* Peary Mohan Dass, I.L.R. 40 Cal. 898 at p. 918 ; Ibrahim Shariff *v.* Secretary of State, A.I.R. 1936 Nag. 25.
4. A.I.R. 1950 Bom. 230.
5. (1931) A.C. 704.

After referring to the decision of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.*,[1] Bhagwati, J., said:

> "Production should only be withheld when the public interest would otherwise be indemnified as where disclosure would be injurious to national defence or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

Same view has been taken in *Governor-General in Council* v. *H.Peer Mohammad, Khuda Bux*.[2] Chagla, C.J., in *Lady Dinbai Dinshaw Petit* v. *Dominion of India*[3] said:

Bombay High Court's view.

> "If therefore having considered the document he tells the Court that the document is one relating to affairs of State and that its disclosure will be injurious to public safety, the Court ordinarily would accept his statement if made on oath. He must not only indicate the nature of the document he must also state what injury to public interest he contemplates as would result from the disclosure of the document."

When the probity of the conduct of a public servant is a matter in issue, the State cannot screen his conduct from the purview of the Court on the ground that it is an affair of State.[4]

Adjudication of documents as official records for which privilege is claimed.

Before privilege can be claimed there must be an adjudication that the documents in respect of which privilege is claimed are official records relating to affairs of State. The principle of the section is that it is not all records relating to the affairs of State that are privileged, but only those the disclosure of which would result in an injury being caused to public interests.[5] In a recent decision of the Supreme Court in *State of Punjab* v. *Sodhi Sukhdev Singh*,[6] the principle underlying the privilege in Sec.123 of the Evidence Act was stated as follow :

Supreme Court on privilege under Sec. 123, Evidence Act.

> "A valid claim for privilege made under Sec. 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that where a conflict arises between public interest and private interest, the latter must yield to the former...."

Documents summoned even if privilege is claimed be produced in Court for adjudication.

A person who is summoned to produce the document should bring it into Court even if there is any objection to its production or to its being admitted in evidence under Sec.123 or Sec.124 of the Evidence Act. The Court will decide on the validity of the objection and he is not entitled to withhold the evidence if the objection is over-ruled. If it is a claim or privilege under Sec.124 the Court may inspect the document in its discretion. If the Courts comes to the conclusion that the communication in question was made to a public officer in official confidence, it will have to uphold

Court's discretion to inspect privilege documents.

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1. (1942) A.C. 624.
2. A.I.R. 1950 E.P. 228 (F.B.).
3. A.I.R. 1951 Bom. 72.
4. Niranjan Das Sehgal *v.* State of Punjab, A.I.R. 1968 Punj. 255 at pp. 259, 260, 261, 262 : 70 Punj. L.R. 65.
5. Lady Dinbai Dinshaw Petit *v.* Dominion of India, A.I.R. 1951 Bom. 72 at p. 80.
6. A.I.R. 1961 S.C. 493 : (1961) 2 S.C.R. 371.

the privilege claimed under Sec. 124 and leave the public officer concerned to decide whether or not to disclose the communication. The final decision of both the departmental head who had been summoned to produce the document as well as the presiding Judge should be governed by only one consideration, namely whether the disclosure would result in any injury being caused to the public interest.[1]

It was laid down by the Privy Council in *Henry Greer Robinson* v. *State of South Australia*,[2] that the principle and foundation of the rule contained in Sec. 123, Evidence Act, is concern for the public interest and the rule will be applied no further than the attainment of the object requires.[3]

2. Applicability of Secs. 123 and 124.—Sections 123 and 124 as well as Secs. 121, 122, 125, 126, 127, 128, 129, 130 and 131 are applicable equally to oral and to documentary evidence (*see* definition of "Evidence", and the second proviso to Sec. 165.)

The provisions of the Indian Evidence Act, 1872, would apply to the trial of an election petition, subject to the provisions made in this behalf in the Act.

The provisions of Secs.123 and 124 will, therefore, apply to and govern the trial of election petitions.[4]

Section 123 puts an embargo on any one from giving evidence derived from unpublished official record relating to any affairs of the State except with the permission of the head of Department. This provision, therefore, obviously relates to the privilege of a witness under restricted circumstances. Section 124 of the Act stipulates that a public officer cannot be compelled to disclose the publications made to him in his official capacity with the qualification that if he considers that public interest would suffer by such discloser. In the instant case not only there is no such formation of opinion by the concerned public officer but, on the contrary the prosecution wants and which is supported by the concerned public officer that such a disclosure is necessary to be made in the interest of justice, as also such disclosure would not be against the public policy. Further, there is no question in the instant case of compelling any public officer to make such a disclosure. The situation is, therefore, entirely different. Similar would be the case *vis-a-vis* the provisions contained in Sec.125 of the Act as there is no question of any Magistrate or a Police Officer or revenue officer being compelled to give any evidence about the commission of any offence.[5]

3. Pre-requisite conditions of claim of privilege.—A reading of bare Sec. 123 of the Evidence Act clearly indicates that in order to claim privilege there must be certain pre-requisite conditions: (1) the document must be an unpublished official record, (2) it should relate to the affairs of State, and (3) it can be admitted in evidence with the permission of the head of the department concerned who shall give or withhold such a permission.[6]

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1. Kunjanam Antony C. Kalliath *v.* State of Kerala, A.I.R. 1964 Ker. 274 at p. 277 : 1963 Ker. L.T. 107 : I.L.R. (1963) 1 Ker. 346; *see* also Sewakram Sobhani *v.* R.K. Karanjia, 1981 S.L.L. (Cri.) 698.
2. A.I.R. 1931 P.C. 254.
3. I.M. Lal *v.* Secretary of State, A.I.R. 1944 Lah. 209 at p. 212.
4. Chadalavada Subba Rao *v.* Kasu Brahmananda Reddy, A.I.R. 1967 A.P. 155 at p. 171 : (1966) 2 Andh. W.R. 401.
5. Hasmukh Balubai Shah *v.* State of Maharashtra, 1986 (1) Cr. L.C. 70 at pp. 76, 77 (Bom.).
6. Raj Narain *v.* Smt. Indira Nehru Gandhi, A.I.R. 1974 All. 324 at p. 326. Reversed in another point in State of Uttar Pradesh *v.* Raj Narain, A.I.R. 1975 S.C. 865.

To claim privilege document must be sent in sealed cover to Court.

It should be noted that when privilege is to be claimed, the document must be sent in a sealed cover accompanied by an affidavit. For this reference be made to *Narayanaswami* v. *State of Madras*.[1] In order to claim privilege, the document must be produced in obedience to the summons in a sealed cover and along with it, the privilege under Sec.123 of the Evidence Act should be claimed. If the privilege is claimed by an affidavit and the reasons are not fully detailed therein, the Court may call for a fresh affidavit and even examine witnesses as required under Sec.162 of the Evidence Act. But, in no circumstance, a witness can say that he has no permission to produce the document. He has to produce it and then claim privilege. Mere saying that he has no permission to file the document would not amount to a claim of privilege.[2]

Court may direct filing of affidavit or further affidavit.

The Supreme Court has said that where no affidavit was filed an affidavit could be directed to be filed later on. The *Grosvenor Hotel, London group of cases*,[3] in England shows that if an affidavit is defective an opportunity can be given to file a better affidavit. It is for the Court to decide whether the affidavit is clear in regard to objection about the nature of documents. The Court can direct further affidavit in that behalf. If the Court is satisfied with the affidavits the Court will refuse disclosure. If the Court in spite of the affidavit wishes to inspect the document, the Court may do so.[4]

4. Scope.—Section 123 of the Evidence Act is in the nature of an exception to the general rule of admissibility which is found in the Evidence Act.[5]

Confidential documents relating to territorial dispute between sovereign States.

It is in the public interest of the State that the contents of the confidential documents addressed to or emanating from sovereign States, or concerning the interests of the sovereign States arising in connection with international territorial dispute between two sovereign States, shall not be ordered by the Courts to be disclosed by a private litigant without the consent of the sovereign States concerned. Such an immunity is a public interest of the State and it outweighs the public interest that justice shall be administered on the basis of full disclosure of all relevant unprivileged documents.[6]

From a perusal of Sec.123 of the Evidence Act it is clear that only those unpublished official records could be withheld on the ground of privilege which relate to affairs of State. Register No.8 of the Registration Department certainly cannot be said to be a record relating to any affairs of State or to public policy.[7]

A perusal of Sec.123 of the Indian Evidence Act makes it clear that it is for the head of the department to permit or not to permit giving in evidence any documents which are unpublished official records relating to the affairs of the State.[8] In *State of Punjab* v. *Sodhi Sukhdev Singh*,[9] the Supreme Court, after analysing Sec.123 of the Evidence Act, declared that while it was not open to the Court to

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1. A.I.R. 1953 Mad. 228.
2. Raj Narain *v.* Smt. Indira Nehru Gandhi, A.I.R. 1974 All. 325 at pp. 334, 335. Reversed in another point in State of Uttar Pradesh *v.* Raj Narain, A.I.R. 1975 S.C. 865.
3. (1963) 3 All. E.R. 426 : (1964) 1 All E.R. 92 : (1964) 2 All. E.R. 674 and (1964) 3 All. E.R. 354.
4. State of Uttar Pradesh *v.* Raj Narain, A.I.R. 1975 S.C. 865 at p. 876.
5. State of Jammu and Kashmir *v.* Anwar Ahmad Aftab, A.I.R. 1965 J. & K. 75 at p. 76.
6. Bulles Gas and Oil Co. *v.* Hammer, (1980) 3 All. E.R. 475 at p. 500 (C.A.).
7. Lagan Singh *v.* Khadar Singh, 1969 A.W.R. (H.C.) 494 at p. 496.
8. Joti Prasad Sharma *v.* Additional Civil Judge, Dehradun, 1967 A.L.J. 469 at p. 470.
9. A.I.R. 1961 S.C. 493.

hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question and that was a matter for the authority concerned to decide, the Court was bound to hold a preliminary enquiry and determine the validity of the objection to its production and that that necessarily involved an enquiry into the question as to whether the evidence related to an affair of the State under Sec.123. After observing that the affairs of the State would ordinarily refer to matter of political or administrative character whose disclosure would affect the national defence or public security or good neighbourly relations, it further remarked:

Enquiry whether actually the document relates to the affairs of the State.

> "There may be another class of documents which would claim the said privilege. In this class may legitimately be included notes and minutes made by the respective officers on the relevent files, opinions expressed, or reports made, and gist of official decisions reached in the course of the determination of the said questions of policy."

It would seem that if the documents related to questions of public policy, they could be said to relate to the affairs of the State.[1]

The Supreme Court has held that though under Secs. 123 and 162 of the Evidence Act, the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question, the Court is competent to hold a preliminary enquiry and determine the validity of the objection to its production. In view of the fact that Sec.123 confers wide powers on the head of the department, the Supreme Court took the precaution of sounding a warning that the heads of departments should act with scrupulous care in exercising their right under Sec.123 and should never claim privilege only or even mainly on the ground that the disclosure of the document in question may defeat the defence raised by the State.

Supreme Court on scope of this section.

It was also stated in that case that the claim should generally be made by the Minister-in-charge who is the political head of the department concerned and the affidavit made in that behalf should show that each document in respect of which the claim is made has been carefully read and considered, and the person making the affidavit is *bona fide* satisfied that its disclosure would lead to public injury.[2]

Manner in which privilege be claimed.

The mere fact that the record was made by a police officer, and confidentially forwarded to his superior, would not render the document privileged under Sec.123, read with Sec.162 of the Evidence Act. The situation at law, even in the United Kingdom now is that the documents have to be produced for inspection by the Court, and that disclosure would be ordered if the Court was satisfied that there was no prejudice to public interest, or the possibility of such prejudice.[3]

Record made and forwarded to his superior by the police officer—If privileged document.

It is clear that the entries in the reports made by the officers stating the dates and places of the public meetings covered by them and the names of the speakers at those public meetings could not possibly be privileged and in fact, as appears

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1. Joti Prasad Sharma *v.* Additional Civil Judge, Dehradun, 1967 A.L.J. 469 at p. 470.
2. Amar Chand Butail *v.* Union of India, A.I.R. 1964 S.C. 1658 at p. 1661 : 67 Punj. L.R. 90 ; Sub-divisional Officer, Mirzapur *v.* Raja Srinivasa Prasad Singh, (1966) 1 S.C.A. 556 : (1966) 2 S.C.R. 970 : A.I.R. 1966 S.C. 1164.
3. R. Ramasrinivasan *v.* P. Shanmugham, A.I.R. 1969 Mad. 378 at p. 379 : 1968 L.W. (Cr.) 211.

clearly from the affidavit claiming privilege, the Inspector General of Police did not claim privilege in respect of these particulars entered in the reports.[1]

That State documents are frequently absolutely privileged from production if not disputed. It is now recognized that the privilege is a narrow one, most sparingly to be exercised.

As the protection is claimed on the broad principle of the State policy and public convenience, the papers protected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official which alone is no reason for their non-production.[2]

In *Wadeer* v. *East India Company*,[3] Turner, L.J., in the course of his judgment says at page 189 :

Political communications.

"My learned brother has already read.. the passages contained in the answers with reference to the nature of the documents now sought to be protected. It is sufficient to say that they are stated....to be political communications which in fulfilment of the public political duties of the East India Company and of their several governments in India have passed between them and their Governments respectively solely with a view to the good Government of India and to the performance of a public duty."

It must not be assumed from these observations of the Lord Justice that documents relating to the trading, commercial or contractual activities of a State can never be claimed to be protected under this head of privilege. It is conceivable that even in connection with the production of such documents there may be "some plain overruling principle of public interest concerned which cannot be disregarded."[4]

In *Duncan* v. *Cammell Laird & Co. Ltd.*,[5] it was stated by Viscount Simon, L.C.:

Object of privilege in time of peace.

"The rule that the interest of the State must not be put in jeopardy by producing documents which would injure, it is a principle to be observed in administering justice, quite unconnected with the interest of claims of the particular parties in litigation, and indeed, is a rule upon which the Judge should, if necessary, insist even though no objection is taken at all. This has been pointed out in several cases, e.g., in *Chatterton* v. *Secretary of State*."[6]

The Lord Chancellor continuing says:

"....In a word it is not enough that the Minister or the department does not want to have the documents produced. The Minister, in deciding whether, it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production, except in cases where

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1. Kanwar Lal Gupta *v.* Amarnath Chawla, A.I.R. 1975 S.C. 308 at p. 325.
2. Henry Greer Robinson *v.* State of South Australia, A.I.R. 1931 P.C. 254 at p. 257 : 35 C.W.N. 1121 ; *see* Asiatic Petroleum Co., Ltd. *v.* Anglo-Persian Oil Co., (1916) 1 K.B. 822 at pp. 829, 830 : 8 S.L.J.K.B. 1075 ; Smith *v.* East India Company, (1841) 1 Ph. 50 ; 11 L.J. Ch. 71.
3. 8 D.M. & G. 182.
4. Henry Greer Robinson *v.* State of South Australia, A.I.R. 1931 P.C. 254 at pp. 257-58 : 34 M.L.W. 575 : 35 C.W.N. 1121 : 61 M.L.J. 943 : 135 I.C. 625.
5. (1942) 1 All. E.R. 587 at p. 595 : (1942) A.C. 624.
6. (1896) 2 Q.B. 189 at p. 195 : 64 L.J. Q.B. 676, *per* A.L. Smith, L.J.

the public interest would otherwise be damnified, e.g where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

The principle enuciated in *Duncan* v. *Cammell Laird & Co. Ltd.*[1] was quoted with approval and applied in construing Secs. 123, 124 and 162 of the Indian Evidence Act in *Governor-General-in-Council* v. *H. Peer Mohammad Khuda Bux*[2] and *Lady Dinbai Dinshaw Petit* v. *Dominion of India*.[3]

Court's difficulty in determining whether a document is privileged or not

It will be apparent that a difficulty arises as to how a Court is to determine whether a document refers to the affairs of State contemplated by Sec.123. If the Court is not to look at the document at all the therefore the authorities laid down that it must be left to a responsible government officer, either a Minister or a person at the head of a department to look at the document, to consider it, and to decide for himself whether the document falls in the category of documents of State referred to in Sec.123. If, therefore, having considered the document he tells the Court that the document is one relating to affairs of State and that its disclosure will be injurious to public safety, the Court ordinarily would accept his statement if made on oath. But the statement must not be of a vague or indefinite character. He must not only indicate the nature of the document, but he must also state what injury to public interests he contemplates would result from the disclosure of the document. The ultimate adjudication is always by the Court,

Statement of officers are often sufficient to prove a claim of privileged document.

but the Court under the peculiar circumstances of the case accepts the view of the responsible officer as conclusive, provided that the conditions which have been just referred are satisfied.

It is unnecessary to state that a privilege of this nature should be rarely claimed and should only be claimed after the responsible Minister or the head of the department has fully satisfied himself that the document whose disclosure is being resisted is really a document relating to the affairs of State and whose disclosure will result in injury to public interests. Even if disclosure of a document may result in the subject succeeding or in getting heavy damages or compensation against the Government that is no reason why a material document should not be disclosed.[4]

Information regarding affairs of State.

Under Sec. 123, information about the affairs of the State is protected from disclosure except with the permission of the head of the department on the ground of public policy in the interest of public. It is for the Court to decide if the documents relate to the affairs of the State while it is for the head of the department concerned to decide if the disclosure would be against public interest.[5]

Section 162, Evidence Act—Effect of.

Under Sec. 162, Evidence Act, ordinarily a document is bound to be produced in the Court unless it relates to the affairs of the State and even if the latter, it must be produced for inspection

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1. (1942) A.C. 624.
2. (1950) E.P. 228.
3. 53 Bom. L.R. 229 : A.I.R. 1951 Bom. 72.
4. Lady Dinbai Dinshaw Petit *v.* Dominion of India, A.I.R. 1951 Bom. 72 at pp. 80-81 : 53 Bom. L.R. 229.
5. Ijatali *v.* Emperor, A.I.R. 1943 Cal. 539 : I.L.R. (1944) Cal. 410 : 47 C.W.N. 928 : 20 I.C. 124 ; Bhaiya Saheb *v.* Pandit Ramnath, A.I.R. 1938 Nag. 358.

of the Court and the Court may obtain other evidence, if it relates to the affairs of the State.

After examining the rules governing the privilege their Lordships of the Judicial Committee in *Henry Greer Robinson* v. *State of South Australia*,[1] have held:

Duty of the Court to protect the privilege.

that is the supreme duty of the Court to protect the privilege when it exists, but in order to determine the validity of the objection, the Court has power to inspect the document in appropriate cases. *Robinson's case*[2] is the leading authority on the principles involved in the question of privilege.[3]

Court calling records under Sec. 94 (1), Cr.P.C., a rule of caution.

There can be no doubt that the Court while exercising its discretionary power under Sec.94(1), (Sec.91 new), Cr. P.C., for calling the record, has to see that the protection given under Sec.123 of the Evidence Act should not be infringed. But it will appear from the reading of Sec.123 of the Evidence Act that even if a document forms part of an unpublished official record and relates to any affairs of the State, the same may be given in evidence, if the head of the department concerned grants permission for the purpose.[4]

5. Evidence contemplated by this section.—The term "evidence" in this section refers to both oral and documentary evidences.[5]

It is well settled that the privilege should not be claimed under Sec.123 because it is apprehended that the document if produced would defeat the defence raised by the State. In the supplementary affidavit when privilege is claimed concerning a particular document, the Court has to determine the character of class of the document. If it comes to the conclusion that the document does not relate to the affairs of the State then, it should reject the claim for privilege and direct its production.[6]

6. Affairs of the State.—Coming to the question as to whether the document relates to the affairs of the State, the expression "affairs of state" has not been defined by the legislature. Attempts have been made in a number of decisions to show what the expression "affairs of State" means. The term "affairs of State" is of very wide amplitude and it will cover every business activity of the State in even day-to- day routine administration as also highly confidential matters pertaining to defence, foreign affairs, Cabinet minutes, and advice or notes exchanged between Ministers and other heads of departments of the government. The State activities now cover many other fields of trade, commerce etc. which would also be covered in the definition of the expression "affairs of State". But simply because the matter relates to affairs of the State it would not be protected under Sec.123 of the Evidence Act unless evidence is derived from the unpublished.[7]

The words "affairs of State" have been defined as matters of a public nature in which the State is concerned and the disclosure of which will be prejudicial to the public interest or injurious to national defence, or detrimental to good diplomatic relations.[8] When the State is a party to the litigation and documents

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1. A.I.R. 1931 P.C. 254 : 34 M.L.W. 575 : 35 C.W.N. 1121 : 61 M.L.J. 943 : 135 I.C. 625.
2. *Ibid*.
3. Iqbal Ahmed *v.* State of Bhopal, A.I.R. 1954 Bhopal 9 at p. 11.
4. Pulin Behari Biswas *v.* State, A.I.R. 1965 Tripura 33 at p. 35.
5. Whitley Stokes, Vol. II, p. 919.
6. Orient Paper Mills *v.* Union of India, A.I.R. 1979 Cal. 114 at p. 123.
7. Raj Narain *v.* Smt. Indira Nehru Gandhi, A.I.R. 1974 All. 324 at p. 335, over-ruled in another point in State of Uttar Pradesh *v.* Raj Narain, A.I.R. 1975 S.C. 865.
8. Sodhi Sukhdev *v.* State of Pujnab, A.I.R. 1960 Punj. 407 at p. 408 : I.L.R. 2 Punj. 54 ; Governor-General-in-Council *v.* H. Peer Mohammad Khuda Bux, A.I.R. 1950 E.P. 228.

relate to commercial or contractual activities of the State privilege can be claimed in respect of such documents but privilege should not be claimed unadvisedly, lightly or capriciously.[1]

The term "affairs of State" cannot include all that is contained in the record. Statement recorded during the open enquiry cannot be deemed to be confidential and similarly, any application or complaint made by a person cannot be held to relate to the "affairs of State". The Courts may take a different view where the application contains a secret matter which it shall not be in the public interest to disclose.[2]

The words "affairs of State" may cover the case of documents in respect of which the practice of keeping them secret is necessary for the proper functioning of the public service.[3]

"Affairs of State" defined.

It is, therefore, sufficiently clear that one may define "affairs of State" as matters of a public nature in which the State is concerned and the disclosure of which will be prejudical to the public interest or injurious to national defence, or detrimental to good diplomatic relations. Words very similar to these were used by Viscount Simmon in *Duncan v. Cammell Laird & Co. Ltd.*[4] The plaintiff's account-books are certainly not State documents and so *prima facie* it is impossible to see how copies of them can assume this important shape simply because they were written by a sub-inspector in the course of a police investigation.[5]

Accounts.

Meaning of "affairs of State."

The meaning of "affairs of State" will be rendered more intelligible by some account of the manner in which the rule has been applied in the other countries. No witness, whether a Peer, member of the House of Commons, officer of either House or shorthand writer, can, without the permission of the House be examined as to what took place within walls of Parliament. On similar grounds, the official transactions between the *heads of the departments of Government and their subordinate officers* are in general treated as secrets of State. Thus, communications between a Colonial Governor and his Attorney-General on the condition, of the colony,[6] or the conduct of its officers, or between such Governor and a military officer under his authority; the report of a military commission of enquiry made to the Commander-in-chief and the correspondence between an agent of the Government and a Secretary of State; or between the Directors of the East India Company and the Board of Control under the old law or between an officer of Customs and the Board of Commissioners are confidential and privileged matters, which the interest of the State will not permit to be revealed. The proceedings of the Grand Jurors are in England regarded as privileged communications, and would doubtless have been so regarded in the Presidency Towns before the abolition of the Grand Jury system. The testimony of Petty Jurors is, on similar grounds, inadmissible to prove mistake or misbehaviour in the jury in regard to

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1. State of Bihar *v.* Kasturbhai Lalbhai, A.I.R. 1978 Pat. 76 at p. 80.
2. Mahabirji Birajman Mandir *v.* Prem Narain Shukla, A.I.R. 1965 All. 494 at p. 496 : 1964 A.L.J. 950.
3. S.B. Choudhury *v.* I.P. Changkakati, A.I.R. 1960 Assam 210 at p. 216.
4. (1942) 1 All. E.R. 587 : (1942) A.C. 624.
5. Bhaiya Saheb Dajibabhau Kunbi *v.* Pandit Ramnath Rampratap, A.I.R. 1938 Nag. 358 at p. 362,
6. As to communications of a defamatory nature sent by a foreign Counsel to his own Government. *See* Pobet Charriol *v.* Lambard, 1 Ind. Jur. N.S. 192.

the verdict. But the Court will admit evidence of such misconduct either from the officer-in-charge of the jury, or some other person who actually witnessed the transaction. Communications between Collectors and Commissioners and between Commissioners and the Board of Revenue, or the Government, would be within the rule in India. Instructions to Settlement Officers in the Punjab not only fall within the rule as to privilege, but Sec.9 of Act XXXIII of 1871 enacts that no Courts of justice shall permit evidence to be given of the contents of such instructions. The President of the United States and the Governors of the several States are not bound in America to produce papers or disclose information communicated to them, when in their own judgment, the disclosure would, on public considerations, be inexpedient. And the same doctrine, as it would seems, prevails in England, whenever Ministers of State are called as witnesses for the purpose of producing public documents. In the case of the *Rajah of Coorg* v. *East India Company*,[1] it was decided that, in a suit instituted against the East India Company to enforce a private right, the Company was not bound to produce certain documents the possession of which they admitted but resisted the production of them on the ground that some of them were political communications which, in the fulfilment of the political duty of the Company and its Governments in India, had passed between the Company and those governments solely with a view to the Government of India, to enable the Company to perform its duty in that behalf; and that the rest of them were political communications, which passed between the official agents of the Company in fulfilment of their public political duty, and for the purposes of the public government in India. When the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from receiving secondary evidence of their contents. It has, however, been held that in an action of trespass brought against the Governor of a colony, a military officer under his control might be asked general terms, whether he did not act by the direction of the defendant, though the written instructions could not be given in evidence. Communications, though made to official persons, are not privileged, where they are not made in the discharge of any public duty.[2]

Political communications are privileged documents.

Secondary evidence of privileged document are inadmissible.

Actions brought against government on production of certain documents.

It will be observed that it is not the Judge, but the public officer concerned who is to decide as to whether the evidence referred to in Secs.123 and 124 shall be given or withheld. This is in accordance with the rule laid down in the English case of *Beatson* v. *Skene*[3] as to documents connected with affairs of State, Sec. 162, post shows that the Court, although it may not inspect a document relating to matters of State, may yet take other evidence to enable it to *determine on its admissibility*, and from this it may be inferred that it was intended to give the Court power to determine on such admissibility.[4]

Duty of the public officer to decide a claim of privilege.

It has now been held that under Sec.123 it is the public officer concerned and not the Judge, who is to decide whether the evidence referred to shall be given or withheld.[5] As regards Sec.124, it has been held that it is for the Court to decide

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1. 20 Jur. 407.
2. Taylor, Secs. 864, 865, 866 ; Secs. 945-48, 8th Ed.
3. 6 Jur. N.S. 780 : 29 L.J. Ex. 430.
4. *Id.*
5. W.S. Irwin *v.* D.J. Reid, I.L.R. 48 Cal. 304 : 25 C.W.N. 150.

whether or not a particular document for which privilege is claimed under Sec.124, is a communication made to a public officer in official confidence. If the Court decides that it was so made, then it cannot compel its disclosure and the public officer himself is the sole Judge whether its disclosure would or would not be in the public interest.[1] When the production of a document is resisted on the ground of privilege, the Court must first determine whether there is privilege or not. But after the Court has once held that a document or subject-matter of enquiry is privileged, it is not open to the Court to draw adverse inferences from its non-production.[2]

Objection taken to production of documents are conclusive.

A further elaboration of this point of view is to be found in the judgment of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.*[3] It was there observed that an objection validity taken to production on the ground that it would be injurious to the public interest is conclusive. In such a case the Court should not require to see the document for the purpose of ascertaining whether disclosure would be injurious to the pubic interest.

These are the criteria for the purpose of determining whether a document in respect of which privilege is claimed relates to any affairs of State.[4]

There are two categories of documents which can be said to relate to affairs of the State. Documents whose contents, if disclosed, would affect national defence or public security or good neighbourly relations of the country belong to one category, the other category comprises of such documents, disclosure of whose contents would not affect the national defence, public security or good neighbourly relations but would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies. This second category would include notes and minutes made by respective officers on the relevant files, opinion expressed or reports made gist of official decisions reached in course of determination of the said questions of policy. Privilege in regard to this second category of documents can be claimed in the interest of efficient administration of public affairs. In other words, the said category may claim the status of documents relating to public affairs if their disclosure would cause possible injury to public interest or impair the proper functioning of the public service.[5] The privilege in respect of opinion notes and minutes made by officers on the principle of freedom and candour of expression can be claimed only if such opinion, notes and minutes relate to determination and execution of public policies or if their disclosure would otherwise injure public interest. The affidavit does not give any indication that the opinion, notes and minutes made by officer relate to or involve determination and execution of any public policy.

Since there is always is likelihood that obliquely motivated officers might push forward interest other than that of the public masquerading in the garb of public interest and take undue advantage under Secs. 123 and 124 of the Evidence Act, it is incumbent that they should disclose the aspect of public interest which would be jeopardized or impaired by such disclosure where there is no such

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1. Collector of Jaunpur *v.* Jamna Prasad, I.L.R. 44 All. 360.
2. Donald Weston *v.* Peary Mohan Das, I.L.R. 40 Cal. 898 : 18 C.W.N. 185.
3. (1942) A.C. 624 : 111 L.J.K.B. 406.
4. R.M.D. Chamarbaughwalla *v.* Y.R. Parpia, A.I.R. 1950 Bom. 230 at pp. 232-33 : 52 Bom. L.R. 231.
5. *Vide* State of Punjab *v.* Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493, relied upon in State of Orissa *v.* Jagannath Jena, (1973) 1 C.W.R. 661.

indication in the affidavit of the Home Secretary, such opinion, notes and minutes are not privileged documents.[1]

7. Unpublished official record relating to the affairs of State.—The scope of Sec. 123 and 162 of the Evidence Act has been considered elaborately by their Lordships of the Supreme Court, in the case of *State of Punjab* v. *Sodhi Sukhdev Singh*,[2] and in the case of *Amar Chand Butail* v. *Union of India*.[3]

Scope of Secs. 123 and 162 of the Evidence Act—Verdict of the Supreme Court.

The main conclusion of the earlier case is to be found in the judgment of Gajendragadkar, J. (as he then was), in the following words:

> "Thus our conclusion is that the Cout is competent, and indeed is bound to hold a preliminary enquiry and determine the validity of the objections to its (documents) production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Sec. 123 or not."

The Supreme Court stated further that if the Court, comes to the conclusion that the document does not relate to affairs of State, it should reject the claim for privilege and direct its production. If the Court comes to the conclusion that the document relates to affairs of State, it should leave it to the head of the department to decide whether he should permit its production or not. The Supreme Court repeated this conclusion in the second case.

If cases of all eligible officers were considered on merit, then documentary evidence, if any, showing the steps taken for the selection, can hardly be held to be documents relating to "affairs of State".[4]

It is only such documents which relate to the affairs of the State the disclosure of which would be detrimental to the public interest that come within the category of unpublished official records relating to the affairs of State entitled to the protection under Sec. 123, Evidence Act.[5]

Unpublished records of affairs of State may include (1) documents that passed between two States; (2) documents between the State and its own subject; (3) documents between the State and a subject of another State; (4) documents between subjects of more than one State; and (5) documents that passed between heads of departments or between Ministers of a State, etc.[6]

What are unpublished records of affairs of State.

In (*Sardar Sahib*) *Mehtab Singh* v. *Secretary of State for India*,[7] the Executive Engineers claimed privilege only for certain letters addressed to the plaintiff. *Held* that the letters to the plaintiff, if duly received by him would not be unpublished documents within the meaning of Sec. 123.

The documents in respect of which exclusion from production is claimed are the blue book being rules and instructions for the protection of the Prime Minister when on tour and in travel. Under Secretary came to Court and gave evidence that the blue book was a document relating to the affairs of State and was not to be disclosed. The Secretary filed an affidavit on 20th September, 1973 and.

Whether blue book is a published official record.

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1. State of Orissa *v.* Jagannath Jena, (1975) 41 Cut. L.T. 363 at pp. 367-68, 369.
2. A.I.R. 1961 S.C. 493.
3. A.I.R. 1964 S.C. 1658.
4. N.P. Mathur *v.* State of Bihar, A.I.R. 1972 Pat. 93 at p. 107.
5. R.M.D. Chamarbaugwalla *v.* Y.R. Parpia, A.I.R. 1950 Bom. 230 at pp. 232-33 : 52 Bom. L.R. 231.
6. Iqbal Ahmed *v.* State of Bhopal, A.I.R. 1954 Bhopal 9 at p. 11.
7. A.I.R. 1933 Lah. 157.

claimed privilege in respect of the blue book by submitting that the document related to affairs of State and should, therefore, be excluded from production. The question is whether the learned Judge was right in holding that the blue book is not an unpublished official record. On behalf of the election petitioner, it was said that a part of the document was published by the Government, viz., paragraph 71 (6) in a writ proceeding. It is also said that the respondent to the election petition referred to the blue book in the answer filed in the Court. In the *Cammell Laird*[1] case it was said that though some of the papers had been produced before the Tribunal of Enquiry and though reference was made to those papers in the Enquiry Report yet a privilege could be claimed. Two reasons were given. One is that special precaution may have been taken to avoid public injury and the other is that portions of the Tribunal's sittings may have been secret. In the present case, it cannot be said that the blue book is a published document. Any publication of parts of the blue book which may be described as innocuous parts of the document will not render the entire document a publised one.[2]

Official records relating to the affairs of the State—Question of permission.

It is within the province of the Court to determine whether a certain document sought to be let in evidence relates to affairs of State. It may not be open to it to inspect that document brought to the Court for determining the same. But it can take other evidence in that behalf. It is only when the Court holds that the document is of the kind, the question of permission would arise. It is then left to the head of the department to decide whether he should permit its production or not.[3]

In *I.M. Lall* v. *Secretary of State*[4], the plaintiff presented an application for the discovery and production of certain documents in possession of the Chief Secretary to Government, Punjab. The Chief Secretary claimed privilege in respect of the documents.

When Court is bound to uphold the privilege claimed.

The privilege claimed by the Chief Secretary was upheld. It is clear, from the perusal of the judgment that the documents in respect of which the privilege was claimed were admittedly unpublished official records. In such a case the *ipse dixit* of the head of department would be conclusive and the Court would be bound to uphold the privilege claimed.

Lahore High Court view.

In *Nazir Ahmad* v. *Emperor*,[5] it was held that privilege can only be claimed in respect of unpublished official records, and once it is held that the documents are unpublished official records the statement of the head of department that they relate to affairs of State is conclusive and the Court can hold no further enquiry into the matter for the simple reason that the Court is precluded from examining the document.

In this case, a reference was made to a Calcutta ruling reported in *Ijjatali Talukdar* v. *Emperor*.[6] Where a document in respect of which privilege is claimed is not an official document or is not an unpublished document the question whether it relates to affairs of State or does not even arise.[7]

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1. 1942 A.C. 624.
2. State of Uttar Pradesh *v.* Raj Narain, A.I.R. 1975 S.C. 865 at pp. 875, 876.
3. Chadalavada Subba Rao *v.* Kasu Brahmananda Reddy, A.I.R. 1967 A.P. 155 at p. 172 : (1966) 2 Andh. W.R. 401.
4. A.I.R. 1944 Lah. 209 : 216 I.C. 89.
5. A.I.R. 1944 Lah. 434 : I.L.R. (1945) Lah. 219.
6. A.I.R. 1943 Cal. 539 : 209 I.C. 124.
7. Emperor *v.* Ch. Raghunath Singh, A.I.R. 1946 Lah. 459 at p. 461.

Examples.

The diary of a foot-constable who was shadowing the movements of a suspect was held not to be a document relating to affairs of State.[1] Records evidencing government intervention unauthorised by law in a pending judicial or quasi-judicial matter were held not to relate to affairs of State.[2] Statements made to and recorded by a Forest Range Officer in the course of an investigation were held not to relate to any affair of State in *Re Kaliyappa Udayan*.[3] An entry in the register of postings showing that certain Customs Preventive Officers were ordered to be at their stations at a particular hour were held not to be affairs of State in *Rokun Ali* v. *Emperor*.[4] The matter was considered by a Division Bench of the Bombay High Court in *Re Mantubhai Mehta*,[5] Wadia, J., in pronouncing judgment observed :

> "....It is not every official record or register or every official communication which can be regarded as privileged."

The learned Judge then referred to the observations of Viscount Simon in *Duncan* v. *Cammell Laird & Co. Ltd*.[6]

> "The....documents must not be produced if the public interest requires that they should be with held."

Income-tax returns.

In *Venkatachella Chettiar* v. *Sampathu Chettiar*,[7] it was held that the returns made to an income-tax officer are not documents of State.

The Posting Register showing the posting of officers of Customs Preventive Service at different places and at different times is not a privileged record within the meaning of this section.[8]

The report of the enquiry held by the railway administration into a fire accident is a privileged document.[9]

As to claim of privilege of an "unpublished" paper, etc.

If the person against whom privilege is claimed under Secs. 123 and 124 has been permitted lawfully to see papers and also to take copies of the same it will be futile for the authorities to claim privilege under either of those sections.[10]

American law.

According to the law in the United States of America it is within the power of a Court to overrule the claim of privilege on the ground that the disclosure is essential for determination of the evidence of the accused and where government insists on claiming privilege the Court can, if it so deems fit, acquit the accused. The law in this country is contained in Secs. 123, 124 and 162 of the Indian Evidence Act and it does not even suggest that an accused is entitled to acquittal when privilege has been claimed with respect to unpublished official records relating to any affairs of State.[11]

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1. Mohan Singh *v.* Emperor, A.I.R. 1940 Lah. 217 : 41 Cr. L.J. 667 ; Ibrahim Sheriff Yazdani *v.* Secretary of State, A.I.R. 1936 Nag. 25.
2. Emperor *v.* Rais Rasulbaksh, A.I.R. 1944 Sind 145 : 45 Cr. L.J. 740.
3. A.I.R. 1937 Mad. 492 : 38 Cr. L.J. 619.
4. 45 I.C. 284 : A.I.R. 1918 Cal. 138 : 19 Cr. L.J. 524.
5. A.I.R. 1945 Bom. 122 : 46 Cr. L.J. 562.
6. (1942) 1 All. E.R. 587 : (1942) A.C. 624.
7. I.L.R. 32 Mad. 62 at p. 65 : 1 I.C. 705 : 19 M.L.J. 263.
8. Rukumali *v.* E., 22 C.W.N. 451.
9. North Eastern Railway *v.* Ram Lal Golcha, A.I.R. 1960 Pat. 489 at p. 497.
10. Union of India *v.* Sudhir Kumar Roy, A.I.R. 1963 Orissa 111 at p. 115 : 29 Cut. L.T. 179 : I.L.R. (1963) Cut. 213.
11. Harbhajan Singh *v.* State of Punjab, A.I.R. 1961 Punj. 515 at p. 229.

8. Documents relating to public affairs.—An application was made on behalf of the petitioners for production of files and minutes of Delhi Administration in which the petitioners were considered and found to be not fit for posts in which they were officiating. The application was resisted by Delhi Administration on the ground of privilege both under Secs. 123 and 124 of the Act. *Held* that the documents belong to a class, the disclosure of which cause injury to public interest. The High Court did not order the production of the documents by the Delhi Administration.[1] The reason why such documents are not allowed to be disclosed was expressed by the Supreme Court in *State of Punjab* v. *Sodhi Sukhdev Singh*.[2]

Where employees were reverted from their posts.

Verdict of the Supreme Court why documents relating to files and minutes are not allowed to be disclosed.

The crime directory, enjoined by rule 355 of the Bihar Police Manual, is a confidential unpublished record relating to the affairs of the State, and consequently, is a privileged document within the meaning of Sec. 123 of the Indian Evidence Act.[3]

Crime directory.

The internal notes file of the Government maintained according to the rules of business, is a privileged document. If the Government claims privilege or quasi-privilege regarding the notes file, the Court will not be justified in rejecting the claim outright. The Court can always look into it. The right of the Court to look into any files, can never be denied.[4]

Notes files of the Government maintained according to rules is a privileged document.

9. Departmental enquiry.—Statements made by witnesses in the course of departmental enquiry into the conduct of police officers, who were subsequently put upon their trial on charges of taking illegal gratification are not privileged under Secs. 123, 124 or 125 of the Evidence Act.[5]

10. Character rolls and confidential reports.—Character rolls and confidential reports are maintained for the purpose of providing an appraisal of the merit of State servants by their superiors from time to time. They are in the nature of confidential communications from one official to another and are meant to serve as part of the material designed to maintain the efficiency of the public service. The disclosure of the contents of such documents would certainly affect materially the freedom and candour of expression of opinion of those officers, whose duty it is to make entries therein. The carrying on of the public administration in a proper manner cannot but be regarded as an "affair of State" and therefore, documents which are maintained for the purpose of so carrying on the administration would relate to "affairs of State". This follows directly from the wider meaning given to the expression "affairs of State" by Gajendragadkar, J. in *State of Punjab* v. *Sodhi Sukhdev Singh*.[6] This was also the view taken by Pandit .J. in *Bhanu Parkash* v. *State of Punjab*.[7] The same view was expressed in *H.L. Radhey* v. *Delhi Administration*.[8] The character rolls and confidential reports which the plaintiff seeks to have produced at the trial are documents, evidence derived from which cannot be given

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1. H.L. Rodhey *v.* Delhi Administration, A.I.R. 1969 Delhi 246 at p. 257.
2. A.I.R. 1961 S.C. 493.
3. Lakshmi Kant Mishra *v.* State of Bihar, 1987 P.L.J.R. 475 at p. 479.
4. State of Bihar *v.* Kripalu Shankar, 1987 Cr. L.R. 521 at p. 526 (S.C.).
5. Harbans Sahai *v.* E., 16 C.W.N. 431 ; *see* Ibrahim Sheriff Yazdani *v.* Secretary of State, A.I.R. 1936 Nag. 25.
6. A.I.R. 1961 S.C. 493.
7. 1968 Cur. L.J. 990.
8. A.I.R. 1969 Delhi 246.

in view of the provisions of Sec.123 of the Indian Evidence Act. As the head of the department concerned has claimed privilege in respect thereof, evidence derived therefrom cannot be given.[1]

The minutes of the Departmental Promotion Committee which is the other category of documents in respect of which privilege has been claimed by the State, are generally based upon the records of the Annual Confidential Reports would equally apply for disallowing privilege claimed in respect of the minutes of the Departmental Promotion Committee. Thus the disclosure of the minutes of the Departmental Promotion Committee also is not likely to cause any injury or prejudice to any public interest nor is it likely to adversely affect the functioning of the public service.[2]

In the under-mentioned case the Trial Court was conscious of the plea that merely by labelling the letters in question as "Confidential Letters" the same cannot be excluded from the purview of Order XI, rule 12 of Civil Procedure Code. The Trial Court was also aware of the specific contention that no specific or particular privilege in respect of the letters in question had been claimed by the defendant, and that there was no claim or contention on the part of the defendant that disclosure would be prejudicial to public interest and or to national security and or opposed to public policy and or detrimental to the interest of the defendant in any other manner. In fact there is no reason (for the confidentiality) disclosed by the defendant nor any explanation and or clarification offered in respect of the nature of confidential letters. Thus the plea that letters were 'confidential letters' was rejected by the High Court.[3]

In the instant case, the Supreme Court observed that where the learned Judges of the High Court have freely used the documents which are said to be secret and confidential and not only referred but also quoted certain portion of those documents in extenso, the line or course taken by the High Court to its conclusion on the seriously disputed questions of law and fact taking its cue from the original records cannot be contenanced. The documents from their very nature could have never been in possession of any third party much less with the respondent and in such a case, the High Court was not at all justified in making use of those documents for its finding especially in a case of the nature where there are serious and outrageous allegations.[4]

11. Proceeding before Income-tax officers.—Statements made and documents produced by assessees before Income-tax officers for the purpose of showing the income of such assessees do not refer to matters of State and are not privileged.[5]

In *Kunjanam Antony C. Kalliath v. State of Kerala*,[6] it was held that the valuation statement given by the Revenue Inspector cannot be said to be communication made in official confidence.

12. Income-tax schedules.—Income-tax schedules do not come within the scope of this section.[7]

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1. State of Punjab *v.* Surjit Singh, A.I.R. 1975 Punj. 11 at pp. 12, 13, 15; *See* however, S.P. Gupta *v.* President of India, A.I.R. 1982 S.C. 149; wherein State of Punjab *v.* Sodhi Sukhdev Singh A.I.R. 1961 S.C. 493 has been over-ruled on certain points.
2. State of Himachal Pradesh *v.* Manmohan Bhardwaj, 1983 Lab. I.C. 469 at pp. 470, 471-72.
3. M/s. Kamalla Broz & Co. *v.* State, 1992 (1) Guj. 310 at p. 312 (Guj.).
4. Union of India *v.* W.N. Chadha, 1993 S.C.C. (Cr.) 1171 at p. 1213.
5. Venkata Chella *v.* Sampathu, I.L.R. 32 Mad. 62 ; *see* Sec. 54 of the Indian Income-tax Act, 1922 (now Sec. 280, Income-tax Act, 1961).
6. A.I.R. 1964 Ker. 274 at p. 277 : 1963 Ker. L.T. 107 : I.L.R. 1 Ker. 346.
7. R. *v.* Yakataz Khan (Unreported) mentioned in Mayne's *Penal Code*, p. 146 ; Whitley Stokes, Vol. II, p. 919.

13. Report of the Conciliator.—There is nothing in any provision of the C.P. and Berar Industrial Disputes Settlement Act or the Rules to hold that a report made by the Conciliator to the State Government, is a privileged document to which a party may not have access or that it is a confidential document in the sense that a copy of the same is not to be made available to either parties.[1]

14. Reports made by officers of C.I.D. who covered the election meetings.—In the instant case, Inspector C.I.D. stated in his evidence that during the election period his staff used to cover election meetings held by various political parties and they included public meetings held by the first respondent. He further stated that the officers who were sent to cover the public meetings used to attend them and then submit, either on the basis of the shorthand notes taken down by them or from memory, reports of the speeches made at these public meetings. He was then asked to state from his records as to what were the public meetings held in Sadar Parliamentary constituency which were covered by his staff. He, however, claimed privilege in respect of the records brought by him.

The learned Trial Judge, by an order dated 12th January, 1972 upheld the claim of privilege. The result was that the reports made by the officers who covered the public meetings of the first respondent, which comprised *inter alia* the mental notes made by them, were shut out from the petitioner and a very valuable piece of evidence which would have established beyond doubt what were the public meetings held by the first respondent was denied to the petitioner. The petitioner contended before the Supreme Court that the learned Trial Judge was in error in upholding the claim of privilege and that the reports should have been made available to the petitioner. The Supreme Court observed :

> "There is great force in this contention of the petitioner because it is diffficult to see how, barring any observations or notings made by the officers by way of comment or opinion, the rest of the reports containing factual data could possibly be regarded as privileged. The learned trial Judge himself could have looked at the reports for the purpose of satisfying himself as to what was the nature of the statements contained in the reports and whether they were privileged, and if so, to what extent, but the learned Trial Judge apparently did not choose to do so. However, it is not necessary for us to decide this question of privilege and we need not express any final opinion upon it, since we find that the officers who covered these public meetings and made reports have themselves given evidence on behalf of the petitioner and though they did suffer from the handicap that they could not refresh their memory by looking at the reports, they have given fairly reliable evidence in regard to the public meetings covered by them and the exclusion of the report from the evidence is, therefore, really of not much consequence."[2]

15. Documents produced or statements made under process of law.—Documents produced or statements made under process of law cannot be said to be made or given "in official confidence".[3]

16. Decision of the Cabinet.— In *Orient Paper Mills* v. *Union of India*,[4] it was held that a decision of the Cabinet relates to the affairs of the State as it affects the integrity of the Cabinet in determination and execution of public policies and for

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1. Haralal Sadasheorao Bande *v.* State Industrial Court, Nagpur, A.I.R. 1967 Bom. 174 at p. 181 : 68 Bom. L.R. 731.
2. Kanwar Lal Gupta *v.* Amarnath Chawla, A.I.R. 1975 S.C. 308 at pp. 324, 325.
3. 4 M.L.J. 317.
4. A.I.R. 1979 Cal. 114 at p. 124.

non-production of the same privilege can be claimed under Sec.123 of the Evidence Act.

Cabinet papers.

Cabinet papers are protected from disclosure not by reason of their contents but because of the class to which they belong. Cabinet papers also include papers brought into existence for the purpose of preparing submission to the Cabinet. *See* Geoffrey Wilson—*Cases and Materials on Constitutional and Administrative Law*, 2nd Edn. pages 462 to 464 at page 463, para 187, it was observed :

> "The real damage with which we are concerned would be caused by the publication of the actual documents of the Cabinet for consideration and the minutes recording its discussions and its conclusions. Criminal sanctions should apply to the unauthorised communication of these papers."[1]

17. Document indicating the advice given by the Minister.—The document which embodies the minutes of the discussion and which indicates the advice given by the Minister is certainly protected under Sec.123 of the Evidence Act and if such a document is not produced and protection under Sec. 123, Evidence Act, is claimed, the Court cannot compel the State to produce it. On account of the changed conception of the functions of the State purely commercial activities undertaken by the State are apt to claim the privilege relating to the "affairs of the State" in accordance with Sec.123 of the Evidence Act.[2]

18. Information received by Minister in confidence.—When a cabinet minister receives information in confidence the improper publication of such information can be restrained by the Court, and his obligation is not merely to observe a gentleman's agreement to refrain from publication. The Court should intervene only in the clearest of cases where the continuing confidentiality of the material can be demonstrated. In less clear cases reliance must be placed on the good sense and good taste of the minister or ex-minister concerned.[3]

An advisor to the Governor during President's rule enjoys the status of a Minister and his note addressed to the Governor embodies his advice and a claim for privilege regarding it is sustainable in terms of Art.163(3) of the Constitution and Sec.123 of the Evidence Act because of the class to which it belongs.[4]

19. Is the correspondence exchanged between the Law Minister, the Chief Justice of the State and the Chief Justice of India protected from Judicial scrutiny by reason of Art. 74 (2) of the Constitution.—There can be no doubt that the advice tendered by the Council of Ministers to the President is protected against judicial scrutiny by reason of Cl. (2) of Art. 74 of the Constitution. But can it be said that the views expressed by the Chief Justice of the High Court and the Chief Justice of India on consultation form part of the advice. The advice is given by the Council of Ministers after consultation with the Chief Justice of the High Court and the Chief Justice of India. The two Chief Justices are consulted on "full and identical facts", and their views are obtained and it is after considering those views that the Council of Ministers arrives at its decision and tenders its advice to the President. The views expressed by the two Chief Justices precede the information of the advice merely because they are referred to in the advice which is ultimately tendered by the Council of Ministers, they do not necessarily become

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1. Doypack Systems Pvt. *v.* Union of India, 1988 (2) S.C.C. 299 at p. 328.
2. *Vide* State of Punjab *v.* Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 ; Kotah Match Factory, Kotah *v.* State of Rajasthan, A.I.R. 1970 Raj. 118 at p. 124 : I.L.R. 19 Raj. 461.
3. Attorney General *v.* Jonathan Cape Ltd. (1975) 3 All. E.R. 484 at pp. 495, 496.
4. State of Punjab *v.* Mr. B.R. Bajaj, 1989 (1) All India Cr. L.R. 883 at pp. 886, 887 (P. & H.).

part of the advice. What is protected against disclosure under Cl. (2) of Art. 74 is only the advice tendered by the Council of Ministers. The reasons which have weighed with the Council of Ministers in giving the advice would certainly form part of the advice, as held by the Supreme Court in *State of Rajasthan* v. *Union of India*[1] where all the three learned Judges took the view that by reason of Cl. (2) of Art. 74 the Court would be barred from inquiring into the grounds which might weigh with the Council of Ministers in advising the President to issue a proclamation under Art. 356, because the grounds would form part of the advice tendered by the Council of Ministers. But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form the part of advice. The correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in Cl. (2) of Art. 74.[2] The Court may now refer to the decision of the Constitution Bench of the Supreme Court in the *State of Punjab* v. *Sodhi Sukhdev Singh*[3] on which the greatest reliance was placed by the learned Solicitor General in support of his plea based on Cl. (2) of Art. 74. Gajendragadkar, J., (as he then was) speaking on behalf of the majority of the Court unheld the claim of privilege put forward on behalf of the State and so far as the Report of the Public Service Commission was concerned, the learned Judge held that it was protected against disclosure both under Cl. (3) of Art. 163 and Sec.123 of the Indian Evidence Act. The Court is at present concerned only with the claim for protection under Cl. (3) of Art.163 because that is an article which correspondence to Cl. (2) of Art. 74 in so far as advice by the Council of Ministers to the Governor is concerned. The learned Judge speaking on behalf of the majority accorded protection to the report of the Public Service Commission under Cl. (3) of Art. 163 on the ground that it formed part of the advice tendered by the Council of Ministers to the Rajpramukh. The Court is unable to appreciate how the report of the Public Service Commission which merely formed the material on the basis of which the Council of Ministers came to its decision as recorded in the proceedings dated 11th August, 1956 could be said to form part of the advice tendered by the Council of Ministers to the Rajpramukh. The Court does not think the learned Solicitor General can invoke the aid of this decision in support of his claim for protection under Cl.(2) of Art. 74.

In this case the injury which would be caused to the public interest in administration of justice by non-disclosure of the correspondence between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India and the relevant notings made by them in regard to non-appointment of S.N. Kumar and the correspondence between the Law Minister and the Government of India and the relevant notings made by them in regard to transfer of the Chief Justice of Patna, far outweighs the injury which may, if at all, be caused to the public interest by their disclosure and hence these documents were liable to be disclosed in response to the demand of the learned counsel appearing on behalf of the petitioners and S.N. Kumar. A decision not to direct disclosure of the documents would result in graver public prejudice than the decision to direct such disclosure

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1. (1978) 1 S.C.R. 1 : A.I.R. 1977 S.C. 1361. *Vide* the observations of Beg C.J. at p. 46 (of S.C.R.) : (at page 1392 of A.I.R.) Chandrachud, J. (as he then was) at page 91 (of S.C.R.) : (at page 1420 of A.I.R.) Fazal Ali, J., at pages 120 and 121 (of S.C.R.) : (at pages 1440, 1441 A.I.R.).
2. S.P. Gupta *v.* Union of India, A.I.R. 1982 S.C. 149 at pp. 230-31.
3. A.I.R. 1961 S.C. 493.

and that the public interest involved in the administration of justice should prevail over the public interest of the public service in the peculiar circumstances of the case. Moreover in the circumstances of this case if disclosure was not ordered, there would be room for many undesirable conjectures and surmises about the entire process of consultation under Art. 217 (1). Accordingly the order to disclosure was made.[1]

20. Head of the department.—The "head of the department" mentioned in Sec. 123 of the Evidence Act must be given a restricted meaning as referring to the Secretary to the department who is the departmental head. The expression does not include the head of a department as defined either in the Supplementary Rules or in the service code of the respective Government.[2]

In England.

Ordinarily, the head of the department will mean the officer who is in control of the department and in whose custody records of that department remain. It will usually be the Secretary to the Provincial Government in Provincial Department or the Secretary to the Government of India in the departments of the Government of India. In England it is the political head or the Minister who has been held to be the head of the department, but, under the Indian Evidence Act it is either the Minister or the permanent head of department who has the right to grant or withhold permisssion to the production of a document relating to affairs of State.[3] There is

Affidavit in support of claim of privilege.

nothing in Order XI, rule 19, C.P.C., which requires a party to file an affidavit to support the claim of privilege. Judicial decisions, however, emphasize that affidavits should be filed when privilege is claimed. The Provincial Government can authorize any of its officers to swear an affidavit on its behalf. The Provincial Government where it is a party has to decide whether it should claim privilege in respect of documents of

As to who should claim a privilege; State or head of the department.

which inspection or production is sought. The objection has to be raised in the Court by the Provincial Government and not by the head of the Department. It is only where the Provincial Government (now State Government) is not a party that the contention may be raised that the privilege should be claimed by the head of the department concerned.[4]

Sufficiency of the claim to privilege.

In *I.M. Lall* v. *Secretary of State*,[5] a Bench of the Lahore High Court had to deal with the sufficiency of the claim to privilege under Sec. 123 of the Evidence Act supported by an affidavit by the Chief Secretary to the Government of Punjab and by the Secretary to the Government of India, Home Department, in respect of certain documents in their respective custody. An objection was raised that the affidavit by these officers was insufficient and that the Minister in the Provincial Government and the member of the Viceroy's Executive Council had to file the affidavits if the claim was to be upheld. Reliance was placed for this contention on the decision of the Privy Council in *Henry Greer Robinson* v. *State of South Australia*[6] and of the House of Lord in *Duncan* v. *Commell Laird & Co. Ltd.*[7] Abdul Rashid, J., proceeded :

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1. S.P. Gupta *v.* Union of India, A.I.R. 1982 S.C. 149 at pp. 231-32, 235, 237, 253, 643.
2. Union of India *v.* Sudhir Kumar Roy, A.I.R. 1968 Orissa 111 at pp. 113, 114 : 291 Cut. L.T. 179.
3. Governor General-in-Council *v.* H. Peer Mohammad Khuda Bux, A.I.R. 1950 East Punj. 228 at p. 237.
4. Miss Rajul Raoji Bhai Shah *v.* Provincial Government of C.P. and Berar, A.I.R. 1951 Nag. 212 at p. 214.
5. A.I.R. 1944 Lah. 209 at p. 211 : 216 I.C. 89.
6. (1931) A.C. 704.
7. (1942) A.C. 624.

"In England also permanent heads of departments are placed on the same footing as the Ministers in respect of an affidavit relating to production of documents."

English law.

and thus overruled the objection to the privilege claimed.

In *Din Bai* v. *Dominion of India*,[1] a Bench of the Bombay High Court upheld the claim of privilege under Sec.123 of the Evidence Act based on affidavits filed by the Secretaries to the Bombay Government in the Home and Revenue departments.

Claim of privilege based on affidavits filed.

Under Sec. 123 of the Evidence Act, the officer at the head of the department concerned is the authority to decide whether to permit or to withhold the evidence. The question as to who is the head of the department depends on the particular facts. In *State of Madras* v. *Sayed Abdurahiman Baffakki Thangal*,[2] the affidavit was filed by a Secretary to the Government who stated that he was the head of the department concerned of Food and Agriculture.

Affidavit by Secretary to the Government.

In *In re Boddu Sanyasi Patrudu*,[3] the Registrar of Co-operative Societies said in his affidavit that he was the head of the Department of Co-operation and there was nothing to show *contra*. The statute does not say that the evidence of the head of the department shall be conclusive proof. The affidavit of the head of the department is only a piece of such evidence.[4] In *Debajyoti Burman* v. *Dr. Nalinakshya Sanyal*,[5] it was held that the Secretary of the Board of Secondary Education, West Bengal, to whom a summons had been issued to produce the document called the "Reviewer's Report" had no power to claim privilege.[6]

The terms of the notification dated 2nd April, 1959, make it clear that the Chief Personnel Officer, as such, is not, "head of a department" and that therefore he is given the status of a head of a department. He is not head of the department for purposes of Sec.123 of the Evidence Act as he has been conferred the status of "head of department" for particular purposes only and those purposes do not include the purpose of claiming privilege under Sec. 123 of the Evidence Act.[7]

21. Foundation for the privileges.— The basis or the foundation of the claim of privilege under Sec.123 is whether the evidence sought to be given is "derived from unpublished official records relating to any affairs of the State" and that condition must be present before any privilege can be claimed. Sections 123, 124 and 162 have to be read together while deciding the question of privilege relating to evidence of unpublished official records relating to any affairs of the State or confidential communications to public officers.

While issuing a rule *nisi* there is no question of any witness being summoned to produce a document which is in his power and any objection being taken at the time when it is produced by the witness. The privilege claimed under Sec.123 is based on public policy or as being detrimental to public interest or service. The interests of the State prevail over the interests of an individual if, by producing the document in respect of which privilege is claimed, it would cause injury to the interests of the State or its services.

Issuing a rule *nisi*.

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1. A.I.R. 1951 Bom. 72 at pp. 83-84 : 53 Bom. L.R. 229.
2. A.I.R. 1954 Mad. 926 : (1954) 2 M.L.J. 236 : 67 M.L.W. 533.
3. A.I.R. 1957 A.P. 482.
4. Public Prosecutor, Andhra *v.* Damera Venkata Narasayya, A.I.R. 1957 A.P. 486 at p. 489 : I.L.R. (1957) A.P. 174 : (1957) 1 Andh. W.R. 106 : 58 Cr. L.J. 939.
5. A.I.R. 1954 Cal. 216.
6. Debajyoti Burman *v.* Dr. Nalinakshya Sanyal, A.I.R. 1954 Cal. 216 at p. 217.
7. Union of India *v.* Indra Deo Kumar, A.I.R. 1964 S.C. 1118 at p. 1120.

It may be useful to refer to some of the important English and Indian decisions to decide the question as to what extent the State can claim privilege when the Court, in exercise of its powers under Art. 226 of the Constitution calls for records. One of the earliest case is *Smith* v. *East India Co.*[1] Privilege was claimed on the ground that certain correspondence between the Board of Directors of the East India Company and the Commissioners for the Affairs of India was confidential in nature. It was held that the communications are privileged, inasmuch as they cannot be subjected to production without infringing policy of the Act of Parliament and without injury to the public interests.

Document injurious to the public service if Courts can compel witness to produce such documents.

The next important case is *Beatson* v. *Skene*,[2] where it was held that the Court has no power to compel a witness to produce documents connected with affairs of the State if their production would be injurious to the public service. Pollock, C.B., on the question of privilege observed :

> "Under these circumstances we are all of opinion that the non-production of these documents furnished no ground for a new trial...We are all of opinion that it cannot be laid down that all public documents, including treaties with foreign powers, and all the correspondence that may precede or accompany them, and all communications to the heads of departments, are to be produced and made public whenever a suitor in a Court of justice thinks that his case requires such production."

It is obvious from what has been stated by Pollock, C.B., that there are certain public documents of the nature referred to by him which cannot be produced and made public where a suitor requires their production without causing injury to the affairs of the State. It was further observed by Pollock, C.B. that the Judge would be unable to determime it without ascertaining what the document was and why the publication of it would be injurious to the public service and an enquiry which cannot take place in private and which taking place in public may do all the mischief which it is proposed to guard against.

Action for slander.

The facts in *Beatson* v. *Skene*[3] are totally different as it was an action for slander and the Secretary of State for War who was summoned took exception to the production of the document on the ground that it would be injurious to the public service. Further, that was a case where there was other evidence inasmuch as the defendant himself had admitted that he had spoken the words as was stated by the witnesses at the trial. Therefore, the facts of that case are distinguishable, as, this case, the production of the documents in question are not from the War Office, nor were they called for, for the purpose of using them as evidence. The stage of using them as evidence has not at all arisen in this case.

Action for libel.

The case of *Hennessy* v. *Wright*[4] may be referred to in this connection. That was a case where an action for libel was brought by a Governor of a Crown colony against a defendant for an alleged statement made by the defendant in a newspaper. The defendant asked for discovery of the document which the Governor had sent to the Secretary of State for the Colonies. Having regard to the facts of that case, it was held by Wills, J., that the documents in question were privileged for discovery.

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1. (1841) 41 E.R. (Reprint) 550 at p. 552 : (1841) 1 Ph. 50 at p. 55.
2. (1860) 5 H. & N. 838 at pp. 852, 853, 884, 885 : (1843-60) All. E.R. 882.
3. (1843-60) All. E.R. 882 : (1860) 5 H. & N. 838.
4. (1888) 21 Q.B.D. 509.

As would appear from the facts, the correspondence undoubtedly related to the affairs of the State and therefore the claim for privilege was upheld.

Another case which may be noticed is *Attorney General* v. *Newcastle-upon-Tyne Corporation.*[1] Rugby, L.J., who concurred with Lopes, L.J., at page 395 said :

> "...Now I know that there has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in the position of a subject unless there be some plain overruling principle of public interest concerned which cannot be disregarded..."

What follows from the view expressed by the Law Lord is that unless there is some overriding consideration of public interest, the production of the documents cannot be withheld from evidence.

Another case is *Asiatic Petroleum Co. Ltd.* v. *Anglo-Persian Oil Co. Ltd.*[2] In that case it was held that the protection of documents from discovery upon the broad ground of State policy and public convenience is not limited to public and that the foundation of the rule is that the information cannot be disclosed without injury to the public interest, and not that the documents are confidential or official, which alone is no reason for their non-production. Whether the production in evidence of a particular document would be detrimental to the interests of the State or not, has to be judged from the nature of the action brought, the nature and character of the document and its effect on the public service or on the affairs of the State.

Foundation of the rule for documents injurious to the public interests.

Another oft-quoted case is *Henry Greer Robinson* v. *State of South Australia.*[3] The South Australia Rules of Court provided that where privilege is claimed for any document, it shall be lawful for the Court to inspect it for the purpose of deciding as to the validity of the claim. Objection was taken in the affidavit made by a civil servant that the documents were State documents consisting of communications between officers administering the department in the course of official duties and that the disclosure would be contrary to the interests of the State and of the public. The Judicial Committee held that the "minute" was inadequate to support the claim of privilege, as it was too vague in the circumstances of the case and was not a statement on oath showing that the Minister had himself considered each of the documents, or indicating the nature of the suggested injury to the interests of the public.

This decision of the Privy Council recognized the power of the Court to examine the claim of privilege as made out in the affidavit and see whether the circumstances mentioned therein justify the ground usually taken by the State that production in evidence of the document summoned would injure the interests of the public or the service. The ultimate authority in such cases, as has been held by the Privy Council, would be the Court which has to inspect the documents and see whether the objection taken is really well-founded.

Dealing with *Henry Greer Robinson* v. *State of South Australia,*[4] Gajendragadkar, J., (as he then was) in *State of Punjab* v. *Sodhi Sukhdev Singh,*[5] observed at page 508 :

Verdict of the Supreme Court.

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1. (1897) 2 Q.B.D. 384.
2. (1916) 1 K.B. 822.
3. (1931) A.C. 704.
4. (1931) A.C. 704.
5. A.I.R. 1961 S.C. 493.

"It only remains to add that so far as Australia is concerned it does not appear that there is any statutory provision corresponding to Sec. 162 of the Act, and so, even after this judgment was pronounced by the Privy Council, Courts in India have not given effect to the operative part of the order in regard to the inspection of the document by Courts having regard to the statutory prohibition imposed by Sec. 162 in that behalf."

The principle laid down in *Henry Greer Robinson* v. *State of South Australia*[1] did not find acceptance with Viscount Simon, L.C., who pronounced the judgment of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.*[2] In the words of Viscount Simon (at page 632).

"There is thus express authority in this House that a Court of law ought to uphold an objection taken by a public department when called on to produce documents in a suit between private citizens that, on grounds of public policy, the documents should not be produced.

Again at page 641 the Lord Chancellor observed:

Practice in Scotland and England.

"The practice in Scotland, as in England, may have varied, but the approved practice in both countries is to treat a ministrial objection taken in proper form as conclusive. The reasons given by Pollock, C.B., by Lord Dunedin and by Lord Kinner cannot be gainsaid. As Lord Parker said in another connexion: 'Those who are responsible for the national security must be the sole judge of what the national security requires.'[3]

The decision in *Duncan* v. *Cammell Laird & Co, Ltd.*[4] it may be pointed out, has since become obsolete as it has not been followed by the House of Lords in *Conway* v. *Rimmer*.[5] The House of Lords approved *Henry Greer Robinson* v. *State of South Australia*[6] and *Glasgow Corporation* v. *Central Land Board*,[7] and disapproved *Smith* v. *East India Company*[8] and *Beatson* v. *Skene*.[9] Dealing with *Glasgow Corporation* v. *Central Land Board*[10] and *Duncan* v. *Cammell Laird & Co. Ltd.*[11] Gajendragadkar, J., (as he then was) in *State of Punjab* v. *Sukhdev Singh*[12] observed at page 509, para 38) :

Verdict of the Supreme Court dealing with an English case.

"In the decision in *Duncan* v. *Cammell Laird & Co. Ltd.*,[13] Viscount Simon has assumed that the law as laid down by the said decision was equally applicable to Scotland. This assumption has been seriously challenged by another decision of the House of Lords in *Glasgow Corporation* v. *Central Land Board*.[14]

Untimely, this is how their Lordships summed up the result of the decisions of the English Courts at pages 510 and 511 (para. 39) :

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1. (1931) A.C. 704.
2. (1942) A.C. 624.
3. The "Zamora" (1966) 2 A.C. 77 at p. 107 : A.I.R. 1917 P.C. 225.
4. (1942) A.C. 624.
5. (1968) 1 All. E.R. 874.
6. (1931) A.C. 704.
7. (1956) S.C. (H.L.) 1 at p. 11.
8. (1841) 1 Ph. 50 at p. 55 : (1841) 41 E.R. 550.
9. (1843-60) All. E.R. 382 : (1860) 5 H. & N. 838.
10. (1956) S.C. (H.L.) 1 at p. 11.
11. (1942) A.C. 624.
12. A.I.R. 1961 S.C. 493.
13. (1942) A.C. 624.
14. 1956 S.L.T. 41.

"The result of these decisions is that in England a valid certificate issued by the Minister in support of the privilege claimed is conclusive, while in Scotland, though it would normally be treated as such, Courts reserve to themselves an inherent right to revise or review the certificate in a proper case."

Result of the decisions.

The following opinion expressed by Lord Reid in *Conway* v. *Rimmer*[1] may now be noticed as it lays down the law in that country in regard to the Crown's privilege to withhold disclosure of documents from evidence in Courts:

"The Court has jurisdiction to order disclosure of the documents for which Crown privilege is claimed. Accordingly, a Minister's certificate that disclosure of a class of documents (or the contents of particular documents) would be injurious to the public interest is not conclusive against disclosure, particularly when the privilege is claimed for routine documents."

The proper test, according to Lord Reid is:

"Whether when privilege is claimed for a document as being one of a class of routine documents which it will be injurious to the public interest to disclose, is whether the withholding of the document is really necessary for the proper functioning of the public service."

The trend on the development of law in England, as may be seen from the latest case in *Conway* v. *Rimmer*[2] on the point is that Courts have the inherent power to inspect the documents and override the certificate of a head of a department or a Minister concerned and to see whether the production of the document would be injurious to public interest. The latest view of the House of Lord's in *Conway* v. *Rimmer*[3] accords with the view expressed by the Privy Council in *Henry Greer Robinson* v. *State of South Australia*[4] that Judges ought to have some reserved authority and not to be left powerless whenever the Government chooses to claim privilege.

If the Courts have the inherent power to inspect the documents.

So far as the position of law in India is concerned, it has been explained by Gajendragadkar, J. (as he then was), per majority in *State of Punjab* v. *Sodhi Sukhdev Singh*,[5] which was subsequently relied upon in *Amarchand Butail* v. *Union of India*.[6] It is therefore, necessary to see the ratio rate of the decision in the leading case of *State of Punjab* v. *Sodhi Sukhdev Singh*.[7]

It is recognized that the power conferred upon the Indian Courts under Sec.162 of the Evidence Act is wider than the power under the Crown Proceedings Act, passed in British Parliament in 1947.

It is not every document relating to "affairs of State" which would fall within the class of privileged document. It is the duty of the Court in order to hold the scales even, where a citizen is pitted against the State, to determine the question whether there is any over-ruling principle of public interest to allow the privilege claimed and permit the non-producton of the documents.

In the words of Blackstone,[8] the writ jurisdiction is very high and "transcedent". The supervisory jurisdiction exercised by the High Court under

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1. (1968) 1 All E.R. 874.
2. *Ibid.*
3. *Ibid.*
4. (1931) A.C. 704.
5. A.I.R. 1961 S.C. 493.
6. A.I.R. 1964 S.C. 1658.
7. A.I.R. 1964 S.C. 493.
8. Blackstone's *Commentaries on the Laws of England*, Vol. 3, 4th Ed. (1876), p. 44.

Art. 226 of the Constitution is of very wide amplitude. The powers are no doubt, discretionary and the High Court should not allow itself to turn into a court of appeal or revision to set right mere errors of law, which do not occasion injustice in a general sense or affect the fundamental rights of a citizen. In the words of Lord Sumner in *In re Nut Bell* case,[1] supervision goes to two points, one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise, the other is the observance of the law in the course of its exercise.

Power of writ jurisdiction conferred upon the High Courts.

It is needless to emphasize that the writ should run so as to reach injustice wherever it is found and that can be achieved only when the records called for are submitted to the Court for its scrutiny and perusal.

The foundation of the law behind Secs. 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that Courts should have the fullest possible access to all relevant materials. When public interest outweighs the later, the evidence cannot be admitted. The Court will *propria motu* exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be managing to the national interest to divulge but rather that the documents would be of class which demand protection.[2] To illustrate, the class of documents would embrace Cabinet Papers, Foreign officer despatches, papers regarding the security of the States and High level inter-departmental minutes. In the ultimate analysis the contents of the document are so described that it could be seen at once that in the public interest the documents are to be withheld.[3]

Foundation of law behind exclusion from disclosure of documents—View of Supreme Court.

Where a citizen moves the High Court under Art. 226 of the Constitution for issue of a writ of *certiorari* for quashing an order of the Government and when it issues a rule *nisi* calling for records, the Government cannot withhold production of documents for perusal of the Court claiming absolute privilege.[4]

22. How privilege should be claimed.—The English law on the question of privilege has been admirably stated by their Lordships of the Privy Council in *Henry Greer Robinson* v. *State of South Australia*.[5] Under the English law their Lordships point out that it is for the Court to determine the question whether a particular document is privileged on the ground that it concerns itself with affairs of State. Their Lordships point out that in certain cases the Court would be willing to take the word of a responsible Minister from whose department the document was to be produced that the said document was privileged. In other cases, their Lordships

Under English law.

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1. (1922) 2 A.C. 128 at p. 156 : (1922) All. E.R. 335.
2. *See* Rogers *v.* Home Secretary, 1973, A.C. 388 at p. 40.
3. *See* Merricks *v.* Notto Bower, (1964) 1 All. E.R. 717 ; State of Uttar Pradesh *v.* Raj Narain, A.I.R. 1975 S.C. 865 at pp. 875-76.
4. Sri Rambhotla Ramanna *v.* Government of Andhra Pradesh, A.I.R. 1971 A.P. 196 at pp. 201-6, 209-10 : (1970) 2 Andh. W.R. 323.
5. A.I.R. 1931 P.C. 254 : 135 I.C. 625 : (1931) A.C. 704 : 100 L.J.P.C. 183 : 145 L.T. 408 : 75 S.J. 458 : 47 T.L.R. 454 (P.C.).

point out that they would demand an affidavit from the Minister. Their Lordships point out that even in such cases some indication should be given to the Court of the nature of the document and why it is necessary to claim privilege for it. The Indian law is of course different and under Sec. 123, Evidence Act, the matter is left to the discretion of the head of the department concerned. The law requires that before privilege is claimed the head of the department should have the document in front of him, should give his attention to the matter, should weigh carefully whether the privilege should or should not be claimed and unless he is satisfied that affairs of State are concerned he should not claim privilege for a document or withhold from a Court the means of judging whether a particular witness's statement is true or not true. It is true that it is for him to decide whether the matter is one in which privilege should be claimed or should not be claimed, but some indication should be given to the Court as to why privilege is claimed or what affairs of State are involved in the matter. Without such indication, there is always a danger that the Court may draw an adverse inference from the non-production of the document.[1] When a Government official desires to claim privilege under Sec. 123, Evidence Act, it is desirable, even if it is not essential that he should put in a statement stating that he has considered the documents carefully and has come to the conclusion that they cannot be produced without injury to the public interests.[2] The sort of grounds which would not afford adequate justification for objecting to production are stated by Lord Simon, L.C. in *Duncan* v. *Cammell Laird & Co. Ltd.*,[3] as follows.

Essentials as to claim of privilege.

"It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential'. It would not be a good ground that, if they were produced, the consequences might involve the department or the Government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties eleswhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the Minister of the department does not want to have the documents produced.

"State documents", "confidential" etc. when privileged.

It is not proper for an authority claiming privilege to claim privilege without considering particular papers, then coming to a decision, whether privilege should or should not be claimed.[4] When the head of the department concerned makes an affidavit it is necessary that he should indicate the nature of the suggested injury to the interests of the public.[5]

Duty of the officer claiming privilege on a document for its production.

An affidavit on behalf of the State said :

"Without prejudice to the claim of privilege under Secs. 123 and 124 of the Indian Evidence Act, I am prepared to make available to this Hon'ble Court the file relating to the report of the Deputy Inspector General of Police on the basis of which the Govenment's conclusions regarding the character and

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1. Mohan Singh Bath *v.* Emperor, A.I.R. 1940 Lah. 217 at pp. 224, 225 : 42 Punj. L.R. 484 : 188 I.C. 717.
2. Tukaram Prithamji Patil *v.* Emperor, A.I.R. 1946 Nag. 256 at p. 256 : I.L.R. (1946) Nag. 385 : 1946 N.L.J. 205.
3. (1942) A.C. 624 : 111 L.J.K.B. 406 : 166 L.T. 366 : (1942) 1 All. E.R. 587.
4. Chandra Dhar Tewari *v.* Deputy Commissioner, Lucknow, A.I.R. 1939 Oudh 65 at p. 68 ; *See* also Mohammod Abubukar Marwari *v.* Union of India, 1982 Cr. L.J. 53 (Bom.).
5. R.M.D. Chamarbaughwalal *v.* Y.R. Parpia, A.I.R. 1950 Bom. 230 at p. 234 : 52 Bom. L.Q. 231.

antecedents of the petitioner were arrived at. The file would be produced at the hearing, if necessary."

Held that no access to the file could be extended to the petitioner in a matter like this.[1] If privilege is to be claimed, the grounds on which the claim is based should be clearly set out by a Minister or at least a Secretary to Government.[2] It is also desirable but not indispensable that the record should be sent in a sealed cover through an officer of the department.[3]

Court when not to entertain any claim of privilege.

Where no claim of privilege in the proper form or according to the proper procedure as required by law has been made by the proper authority, disclosing the reason for the claim, Court will not entertain any claim of privilege.[4]

In the case reported in *Muhammad Yusuf* v. *State of Madras*,[5] the Secretary to the Government of Madras, Public Works Department filed an affidavit claiming privilege on the ground that the file contained unpublished official records relating to the affairs of the State, the disclosure of which will be prejudicial to public interests. It was also stated that the file contains official communications between the Government of Madras and Travancore in respect of the distribution of water in Papparkal, office notes and other inter-departmental communication made in official confidence between the subordinate officials and their superiors.

It was held that the claim for privilege in respect of correspondence between the two States was fully justified. The privilege in respect of the reports by the subordinate officials and the statements records could not be upheld.

23. How objection against the production of document should be raised under Sec. 123.—It must be clearly realized that the effect of the document on the ultimate course of litigation or its impact on the head of the department or the Minister-in-charge of the department, or even the Government in power, has no relevance in making a claim for privilege under Sec. 123. The apprehension that the

Apprehension of disclosure—Effect of.

disclosure may adversely affect the head of the department or the department itself or the Minister or even the Government, or that it may provoke public criticism or censure in the Legislature has no relevance in the matter and should not weigh in the mind of the head of the department who makes the claim. The sole and the only test which should determine the decision of head of the department is the injury to public interest and nothing else. In such cases the privilege should be

Privilege when be claimed by a Minister-in-charge.

claimed generally by the Minister-in-charge who is the political head of the department concerned; if not, the Secretary of the department who is the departmental head should make the claim; and the claim should always be made in the form of an affidavit. When the affidavit is made by the Secretary the Court may, in a proper case, require an affidavit of the Minister himself. The affidavit should show that each document in question has been carefully read and considered and the person making the affidavit is satisfied that its disclosure would lead to public injury.[6]

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1. V. Dasan Vazheyil Veedu *v.* State of Kerala, A.I.R. 1965 Ker. 63 at p. 64 : 1964 Ker. L.T. 36: I.L.R. 1 Ker. 374 : (1964) 1 L.L.J. 570.
2. Emperor *v.* Rais Rasulbaksh, A.I.R. 1944 Sindh 145 at p. 150.
3. *In re* R. Umanatham Rao, A.I.R. 1953 Mad. 228 at p. 228 : (1952) 2 M.L.J. 400 : 1953 M.W.N. 34 : 54 Cr. L.J. 442.
4. C.C. Mathew *v.* State of Kerala, A.I.R. 1968 Ker. 230 at p. 232 : 1968 Lab. I.C. 1055.
5. A.I.R. 1971 Mad. 468 at pp. 468, 469 : 84 M.L.W. 455 (2).
6. *Vide*, for instance, Ijjat Ali Talukdar *v.* Emperor, A.I.R. 1943 Cal. 539 : I.L.R. 1 Cal. 410.

Thus the conclusion is that reading Secs. 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Sec.123 or not.[1]

Whether Court can enquire into the possible injury on disclosure.

In the above-noted case, Subba Rao, J., laid down the following propositions:

"(1) Under Sec.162 of the Evidence Act the Court has the overriding power to disallow a claim of privilege raised by the State in respect of an unpublished document pertaining to matters of State; but in its discretion, the Court will exercise its power only in exceptional circumstances when public interest demands, that is, when the public interest served by the disclosure clearly outweights that served by the non-disclosure.

Supreme Court's view.

(2) The said claim shall be made by an affidavit filed by the Minister in-charge of the department concerned describing the nature of the document in general and broadly the category of public interest its non-disclosure purports to serve.

(3) Ordinarily the Court shall accept the affidavit of a Minister, but in exceptional circumstances, when it has reason to believe that there is more than what meets the eye, it can examine the Minister and take other evidence to decide the question of privilege.

(4) Under no circumstances can a Court inspect such a document, or permit giving of secondary evidence of its contents.

(5) Subject to the overriding power of the Court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for the Courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State;

(*a*) 'records relating to affairs of State' mean documents of State whose production would endanger the public interest; (*b*) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State; (*c*) unpublished documents relating to trading, commercial or contractual activities of the State are not ordinarily to be considered as documents relating to affairs of State; but in special circumstances they may partake of that character.[2]

24. Privilege, how determined and by whom.—It has been now settled by the decision of the Supreme Court reported in *State of Pubjab* v. *Sodhi Sukhdev Singh*,[3] that where an objection is raised regarding the document being a privileged one under Sec.123 of the Evidence Act, the Court has no jurisdiction to inspect the document first and then to determine the question as to whether the document is privileged one or not. It has been pointed out by their Lordship in that case that the proper course in such matters is to first hold an enquiry and then determine the character, class or the nature of the document

Whether the document is privileged or not.

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1. State of Punjab *v.* Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 at pp. 504-6.
2. State of Punjab *v.* Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 at p. 531-32.
3. A.I.R. 1961 S.C. 493.

concerned and if the Court finds that the document belongs to the "noxious" class it may stay its hands and refer the document to the head of department and leave it to its discretion to produce the document. If, however, the Court finds that the document is not privileged and does not relate to the affairs of the State, it can direct that document to be tendered in evidence and overrule the objection on that score.[1]

Public interest lies at the foundation of the claim for protection against disclosure enacted in Sec. 123 and it seeks to prevent production of a document where such production would cause public injury. The Court would allow the objection if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest in the adminstration of justice in the particular case before it overrides all other aspects of public interest, it will overrule the objection and order disclosure of the document. The final decision in regard to the validity of an objection against disclosure raised under Sec.123 would always be with the Court by reason of Sec.162. It is now well settled that the Court is not bound by the statement made by the minister or the head of the department in the affidavit and it retains the power to balance the injury to the State or the public service against the risk of injustice, before reaching its decision. *Vide* observations of Lord Scarman in *Burma Oil* v. *Bank of England*.[2]

25. Privilege relating to affairs of the State.—Professor H.W.R. Wade has observed in *Law Quaterly Review*, Vol 86, at page 171 under the caption "Crown Privilege Controlled at Last";

"It is now at last established that where a Minister claims that documents should not be used in evidence because their production would be injurious to the public interest, the Court has power to disallow the claim and order their production, after weighing the possible injury to the public interest against the injury to the interests of justice that their suppression would cause. For this purpose the Court may inspect the documents privately, i.e. without disclosure to the parties. Moreover, the House of Lords has itself ordered the production of five documents for its own inspection, with strong indications that it may then disallow the Home Secretary's claim of privilege for a last four of them. Both parties, in fact, wished the evidence to be produced. But the Home Secretary stepped in with the claim of privilege based on the 'class' principle so widely enunciated by Lord Simon in *Duncan* v. *Cammell Laird & Co. Ltd.*[3]

Court to inspect the documents privately.

"Their Lordships heaped withering criticism upon this 'class' principle, which is that complete classes of official reports and documents ought to be kept secret, at whatever cost to the interest of litigants, merely because otherwise there would not be freedom and candour of communication with and within the public service. The flimsiness (as Lord Reid called it) of this overworked argument has long been obvious and their Lordships have now shattered it without mercy.

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1. State *v.* M.A. Beg, A.I.R. 1963 J. & K. 20 at p. 22.
2. (1979) 3 All. E.R. 700 at p. 732 ; *see* also S.P. Gupta *v.* Union of India, A.I.R. 1982 S.C. 149 at pp. 235, 237 (S.C.).
3. (1942) A.C. 624.

"The House of Lords has contributed to Human Rights Year by bringing back into legal custody a dangerous executive power. It is a pity that it was ever allowed to escape."

Similarly, the decision of the House of Lords was hailed in the *Modern Law Review* in an article entitled, "The Last word on the Last Word", 32 *Modern Law Review*, 1969 (page 143).

Law in England.

After the said decision, the law in England is summarized as follows in Phipson on *Evidence*, 11th Ed, (1970) at page 240, para 562 :

In deciding whether a claim of Crown privilege should apply to a document, there are two kinds of public interest to be considered by the Court. There is (1) the public interest that harm shall not be done to the nation or the public service, and (2) the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are cases where the nature of the injury which might be done to the public service is of so grave a character that no other interest can be allowed to prevail. But there are other cases where the possible injury is much less and there the Court must balance the public interests involved in deciding whether to withhold the document or not. If a Judge decides that on balance the documents probably ought to be produced, it would generally be best that he should see them before ordering production."

In para 565 it is further stated at page 242:

".....In *Conway* v. *Rimmer*,[1] dicta of Lord Simmon, L.C., in *Duncan* v. *Cammell Laird & Co. Ltd.*[2] that a Judge must accept as final a Minister's decision to exclude evidence were overruled it being laid down that the Courts have power to order production and to overrule the Minister's decision to withhold if necessary on the principles enunciated in Sec. 562."

Affairs of State interpretation given by Supreme Court.

Ours is an open society which has a government of the people, which has to be run according to the Constitution and the laws. The expression "affairs of State" should therefore, receive a very narrow meaning. Any claim for interpreting it with a wider connotation may expose Sec.123 of the Evidence Act to be challenged as being unconstitutional.[3]

Court's power and jurisdiction—If different in India than in England.

In view of the provisions of Sec. 162 the position in India in regard to the Court's power and jurisdiction is different from the position under the English law as it obtained in England in 1872.[4]

When an order under rule 161 (C-1) of the Bombay Civil Service Rules, 1959, is challenged before the Bombay High Court in a petition under Art. 226 of the Constitution it is the duty of the State to satisfy the Court that it formed an opinion that it was not in the public interest to continue the petitioner in service on the basis of some material which can be considered to be relevant material.

Such a privilege of non-disclosure of material for which a possible view could be taken that it was not in the public interest to continue the Government servant concerned can be claimed by the State under Sec. 123 of the Evidence Act, when opposing a petition under Art. 226 of the Consititution without even placing before the Court sufficient materials to uphold the plea of their privilege.[5]

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1. (1968) A.C. 910.
2. (1942) A.C. 624.
3. S.P. Gupta *v.* Union of India, A.I.R. 1982 S.C. 149 at p. 642.
4. State of Punjab *v.* Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 at p. 506.
5. Dattaram Sadashiv Rane *v.* State of Maharashtra, (1971) 74 Bom. L.R. 550 at pp. 554-58.

Character Rolls and confidential reports privilege.

The character rolls and confidential reports are documents evidence derived from which cannot be given in view of the provisions of Sec.123 of the Indian Evidence Act. Character rolls and confidential reports are maintained for the purpose of providing an appraisal of the merit of State servants by their superiors from time to time. They are in the nature of confidential communications from one official to another and are meant to serve as part of the material designed to maintain the efficiency of the public service.[1]

Bombay High Court's view.

26. Question of privilege when arises.—The question of privilege arises only when it is claimed and not when it is not claimed. Moreover, it is necessary to bear in mind the following remarks of Chagla, C.J., in the judgment in *Dinbai* v. *Dominion of India*[2] :

> "It is necessary to state that a privilege of this nature should be rarely claimed and should only be claimed after the responsible Minister or the head of the department has fully satisfied himself that the document whose disclosure is being resisted is really a document relating to the affairs of State and whose disclosure will result in injury to public interests."

There is nothing in the decision of the Supreme Court in *State of Punjab* v. *S.S. Singh*,[3] to compel the government to disclose all the confidential sources which it has not chosen to disclose in the affidavit in reply. It is well established that it is not a sufficient ground that documents are "State documents" or "official" or are marked "confidential" for a privilege to be claimed by the Government. The Minister ought not to take the responsibility of withholding production except in a case where the public interest would otherwise be damnified, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.[4]

27. Secondary evidence of the document.—Unlike the rule in cases of private privilege, the exclusion when allowed, is here absolute, so that in the case of documents no secondary evidence is admissible.[5] If the original of the document is privileged, surely that privilege cannot be got over by litigants getting hold of copies surreptitiously of the document from the Secretariat and asking the Court to look at the secondary evidence of the document.[6]

28. Objection to admissibility after admission.—When once without objection copies of official reports have been allowed to go into the record, the objection that the documents are privileged on the ground of official confidence cannot thereafter be allowed to be taken.[7]

29. Order XI, rule 19, C.P.C., cannot override provision of the section.—Order XI, rule 19 of the Civil Procedure Code cannot override the provisions of Sec. 123 of the Indian Evidence Act which is a special provision of law.

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1. State of Punjab *v.* Surajit Singh, A.I.R. 1975 Punj. 11 at pp. 12, 13.
2. A.I.R. 1951 Bom. 72 : 55 Bom. L.R. 229.
3. A.I.R. 1961 S.C. 493.
4. *See* Viscount Simon, L.C., in Duncan *v.* Cammell Laird & Co. Ltd., (1942) 1 All. E.R. 587, approved in Conwey *v.* Rimmer, (1968) 1 All E.R. 874 ; Jagannath Dwarkanath Raje *v.* State of Maharashtra, 1971 Bom. L.R. 320 at p. 332.
5. Hughes *v.* Vargas, (1893) 9 T.L.R. 92, 551 ; Chatterton *v.* Secretary of State, (1895) 2 Q.B. 189 ; Phipson's *Evidence*, 10th Ed., para 566 p. 244.
6. Lady Dinbai Dinshaw Petit *v.* Dominion of India, A.I.R. 1951 Bom. 72 at pp. 84-85 : 53 Bom. L.R. 229.
7. Rathanamasari *v.* Secretary of State, 44 M.L.J. 132 : 72 I.C. 214.

The legal position, therefore, is as follows : The head of the department must in the first place examine the document and consider whether privilege should or should not be claimed in respect of the document. He may then appear in person before the Court to raise the objection. The Court may require him to give an affidavit or make a statement on oath and may put any further questions to him for satisfying itself that the privilege has been validity claimed. But it is important to say that the Court is not entitled to inspect the document, nor put such questions to the head of the department or any other witness, either directly or indirectly to reveal its contents. The scope of the inquiry that the Court can hold is, therefore, limited.[1]

Scope of the enquiry by Court is limited.

This view is in accordance with the majority view of the Full Bench decision in *Governor General-in-Council* v. *H.Peer Mohd. Khuda Bux.*[2] The same view has been enunciated by Lord Simmon in *Duncan* v. *Cammell Laird & Co. Ltd.*,[3] as follows:

> "The esstential matter is that the decision to object should be taken by the Minister who is the political head of the department and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of the public interest they ought not to be produced, either because of their actual contents or because of the class of documents, e.g. departmental minutes to which they belong... If the question arises before trial, the objection would ordinarily be taken by affidavits... If the question arises on *sub poena* at the hearing it is not uncommon in modern practice for the Minister's objection to be conveyed to the Court, at any rate in the first instance, by an official of the department who produces a certificate which the Minister has signed stating what is necessary. I see no harm in that procedure, provided it is understood that this is only for convenience and that if the Court is not satisfied by this method, it can request the Minister's personal attendance."

Privy Council's view.

A similar view has been expressed by the Bombay High Court in *In re Mantubhai Mehta,*[4] and Wadia, J., observed in that case as follows:

> "The question... whether that objection is well founded is one for the Court to decide. But for this purpose the Court is not entitled to inspect the document if it refers to matters of State. It must decide the question without such inspection by examining the officer producing it or otherwise.[5]

Bombay High Court's view.

The provisions of Order XI, rule 19 (2) of the Code of Civil Procedure, must be read subject to Sec.162 of the Evidence Act. He should, therefore, have determined whether upon the material before him the documents were in fact, of the class which could be said to relate to the affairs of the State.[6]

124. Official communications.—No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure.

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1. Lakhuram Hariram *v.* Union of India, A.I.R. 1960 Pat. 192 at p. 193.
2. A.I.R. 1950 E.P. 228.
3. (1942) A.C. 624.
4. A.I.R. 1945 Bom. 122.
5. Lakhuram Hariram *v.* Union of India, A.I.R. 1960 Pat. 192 at pp. 193-94.
6. Durga Prasad *v.* Mst. Praveen, A.I.R. 1976 M.P. 196 at p. 202.

SYNOPSIS

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1. Privilege—General.—Most claims for privilege tend to fall into one of two groups. The first are claims based on the actual contents of the documents, it being said by the Crown's representative that the document discloses facts which, if made public, will be injurious to the public interest. The second group of cases are those where it is said that the character of the document is such that if privilege is not afforded in respect of it, the production of documents of a similar character or class in future may be inhibited to the prejudice of the public service. The present case does not come into the first group, it is not suggested that the actual information disclosed in the letters in question would be damaging to the public interest if the public bore that knowlege. What is said in this case is that the matter falls into the second group in that the type of report which was made by the police in this case is a type of report which the future functioning of the Gaming Board will require to be produced from time to time, and it is said that if privilege is not granted in respect of these letters the result in future will be to dry up a vital source of supply of information to the Gaming Board.

Privilege—Kinds of.

So far as this particular case and these particular documents are concerned, the Secretary of State has certified that in his opinion it would be injurious to the public interest to produce these documents, and it is necessary to withhold them from production for the proper functioning of the public service. Although the Court is not bound to accept the same view, his opinion carried great weight. The effect of denying the Crown's privilege in this case might be in the Minister's view to dry up that source of information and this is a perfectly proper approach to the question, it is one with which the Court agrees, and accordingly, the claim of privilege is valid.[1]

Weight attached to the opinion of Secretary of State.

What is said to make them privileged in this case is the fact that the Commissioners happened to expect that there would be an arbitration and called in the solicitor to "hold their hands" in the early stages. But even so, in this case just as must as in cases in which no arbitration was in fact anticipated the commissioners had to form their own opinion as to value on the evidence available to them, including these documents, before any arbitration could take place. This feature of the case appears to make it analogous to *Jones* v. *Great Central Railways Co.*[2] There a member of a trade union who thought that he had been unjustly dismissed by his employers furnished the union authorities (as required by the rules) with information in writing as to the facts of the case as he saw them in order to satisfy them that it was proper for them to sanction the employment of a solicitor to conduct the case and also for use by the solicitor in the conduct of the

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1. R. *v.* Lewes Justices, *ex parte* the Gaming Board of Great Britain, (1971) 2 All. E.R. Q.B.D. 1126 at p. 1133.
2. (1910) A.C. 4.

action if the employment of a solicitor was sanctioned. This House held that the letters in question were not the subject of legal professional privilege because the union authorities had themselves to consider them and act on them before the solicitor was employed to conduct the case. So here the commissioners had to form their own opinion as to value before the solicitor would use the documents for the purpose of defending their opinion in the anticipated arbitration. As to Crown privilege or rather privilege on the ground of public interest the commissioners think that it is contrary to the public interest for them to disclose such documents or any other documents which contain references to the contents of documents obtained under Sec. 24 (6), Purchase Tax Act because such documents were obtained in confidence from the third parties concerned on the understanding that commissioners would not disclose them to anyone else. Such dislcosure, it is said, would be unfair to the third parties and would be harmful to the proper working of the department.

What the Court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other. Plainly there is much to be said in favour of dislcosure.

On the other hand, there is much to be said against disclosure. One can well see that the third parties who have supplied this information to the commissioners because of the existence of their statutory powers would very much resent its disclosure by the commissioners to the appellants and that it is not at all fanciful to say that the knowlege that the commissioners cannot keep such information secret may be harmful to the efficient working of the Act. In a case where the considerations for and against disclosure appear to be fairly evenly balanced the Courts should uphold a claim to privilege on the ground of public interest and trust to the head of the department concerned to do whatever he can to mitigate the ill-effects of non- disclosure.[1]

Disclosure of complaints about existence of restrictive trade practices.

Coming to the item objected to by the Registrar, his objection is that the disclosure of the document would deter persons from confidentially communicating to the Registrar complaints about the existence of the restrictive trade practices and will inhibit collection of necessary information leading to initiation of proceedings under Sec.10. It is true that this information was received by the Registrar prior to his initiating the present proceedings under Sec.10 (*a*) (*iii*) of the Monopolies and Restrictive Trade Practices Act. There is no provision of the Evidence Act which would protect the disclosure of this document. Even Sec.125 of the Evidence Act protects only the source of information as to the commission of an offence with regard to certain matters but not the information itself. This provision would not protect the Registrar from disclosing even the source of his information. But the Registrar has not relied upon Sec. 125 of the Evidence Act. Mr. Sanghi on his behalf has invited Court's attention to the case of *Rogers* v. *Gaming Board for Great Britain.*[2] In that case, Rogers made an application to the Gaming Board of Great Britain for certificates of consent in relation to five gaming clubs. In answer to request from the Board for information the Assistant Chief Constable of the County wrote a letter to the Gaming Board

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1. Alfred Crompton Amusement Machines Ltd. *v.* Commissioner of Customs and Excise, (1973) 2 All. E.R. 1169 at pp. 1178, 1183, 1184 (H.L.).
2. (1973) A.C. 388 (HL), decided by the House of Lords in June, 1972.

setting out the facts showing that Rogers was not a fit person to get such consent. The application for consent was refused. Rogers commenced proceedings for criminal libel in respect of the letter against the Assistant Chief Constable. A witness summons was issued to the Gaming Board for production of the letter. The Home Secretary applied for an order of *certiorari* to set aside the two witnesses, one directed to the Assistant Chief Constable and the other to the Secretary of the Gaming Board to produce certain document including the letter from the Board of the Assitant Chief Constable requesting for information and the reply to the Assistant Chief Constable. The Board made a similar application in relation to the summons directed to their Secretary. On the Home Secretary's application the Divisional Court ordered that the two witness summonses should be set aside, and made no order on the Board's application. Rogers appealed to the House of Lords where it was held that public interest required that the letters should not be produced since if the information given to the Board was liable to be disclosed, it might be withheld and they would thereby be hampered in the discharge of the duty imposed on them by a statute to identify and exclude persons of dubious character and reputation from the privilege of obtaining a licence to conduct a gaming club. The result was that even on the Board's application, the witness summons against its secretary was set aside. In Court's, 'opinion' this case applies to the present situation. The Registrar is a public officer appointed under Sec. 34 of the Monopolies and Restrictive Trade Practices Act for maintaining a register of agreement and for performing the other functions imposed on him by the Act. One of the functions imposed on him by Sec. 10 of the Act is to make applications to the Commission about the restrictive trade practices. The Registrar has, therefore, to perform certain statutory functions. If the information given to him with regard to restrictive trade practices was liable to be disclosed, it might be withheld and the Registrar would thereby be hampered in the discharge of the duty imposed on him by the statute to make applications to the Commission in respect of restrictive trade practices. There are acute shortages of consumer goods and raw materials in the country and any person furnishing information to the Registrar is liable to be victimised by the producers and suppliers by refusing or withholding supplies from him. In Court's opinion, public interest requires that the complaints made by such informants should not be produced for inspection if the Registrar does not rely upon such communications as evidence at the hearing. If he produces the complaint in evidence the respondents will certainly be entitled to inspection of it.[1]

Discretion of disclosing communication made in official confidence.

2. Principle.—This section gives the discretion of disclosing communication made in official confidence to the public officer to whom the communication was made, whethe he is or is not the head of the department, whereas under Sec. 123, no evidence derived from unpublished official records is admissible without the permission from the head of the department. Under Sec.124 the public officer to whom communication has been made may waive the privilege without reference to the head of the department. Section 124 is based on the same principle as Sec. 123, the object being to prevent disclosure to the detriment of the public interest and test to be applied under Sec. 124, is that the communication was made to such public officer in official confidence and, therefore, the privilege cannot be claimed in respect of communications merely on the ground that its disclosure would cause a scandal

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1. Registrar of Restrictive Trade Agreements *v.* Baroda Rayon Corporation Ltd., (1976) 46 Com. Cases 192 at pp. 197-98.

in the office. The basis of this rule was given by Lord Lyndhurst, L.C. in *Smith* v. *East India Co.*,[1] where he said at page 330.

Basis of rule

'Now it is quite obvious that public policy requires, and looking to the Act of Parliament, it is quite clear that the Legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations. I think, therefore, that these communications come within that class of official communications which are privileged inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests.'

"That disclosure of communications made in official confidence are privileged has been the law in England since a very long time. Eyre, C.J., said in one case:

English law.

'There is a rule.....for the detection of crimes that those persons who are the channel by means of which that detection is made should not be unnecessarily disclosed.'

and much to the same effect was the statement made by Abbott, J., and this law was confirmed by Lord Ellenborough at the trial of *James Watson*.[2]

"In the case that I have referred to above, *Home* v. *Lord F.C. Bentick*,[3] where an inquiry had been directed to be made by the Commander- in-chief with a view to investigate the conduct of an individual in the course of which a number of persons had been called before the Inquiring Court to give information as witnesses who might not choose to have their names disclosed, the minutes of enquiry were not allowed to be given in evidence by Dallas, C.J.

Basis of objection for disclosing etc.

"As Viscount Simon put in *Duncan's* case,[4] the objection is sometimes based upon the views that the public interest requires a particular class of communication with, or within, a public department to be protected from production on the ground that the condour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather upon the contents of the particular document itself.

"He relied on *Smith* v. *East India Co.*[5] and *Wadeer East India Co.*[6] and quoted the passage of Lord Lyndhurst, L.C., which I have referred to above.

"In *HMS Bellerphon*,[7] it was held that in England a practice has grown up that reports made by a police officer to his superior as to a street accident are protected from production though asked for by a party to a subsequent litigation for fixing liability between private individuals.

3. Applicability.—"The above mentioned authorities will show that—

Applicability of this section.

(1) Section 124 (1) applies to communications made in official confidence to a public officer and he need not be a head of the department who cannot be compelled to give evidence but is at liberty to waive the objection.

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1. (1841) 65 R.R. 327 : 11 L.J. Ch. 71.
2. (1817) 32 State Trial at p. 101.
3. (1820) 22 R.R. 748 : 4 More 563.
4. (1942) 1 All. E.R. 587 : (1942) A.C. 624.
5. (1841) 65 R.R. 327 : 11 L.J. Ch. 71.
6. (1856) 8 De. G.M. & G. 182 : 25 L.J. Ch. 345.
7. (1874) 44 L.J. Adm. 5 : 31 L.T. 756.

(2) The basis of prohibition is that it would restain the freedom of communications made to public officers or by one public officer to another and would thereby injure public interest.

(3) If such communications were compelled there will be a danger that the usual channels of detection of crime or of evasion of taxes would get blocked up.

(4) If is for the Court to decide as to whether such communication was in official confidence or not"[1].

For the application of this section the first question which has to be decided is whether the communication which is to be disclosed was one made to the officer in public confidence. If it is such a communication, then it will be for the officer concerned to decide whether public interest would suffer on account of its disclosure or not, and if he thinks that it will suffer, he cannot be compelled to disclose that communication.[2]

It is not possible to infer from the words "official confidence" that Sec. 124 is intended to protect only communications by one official to another. There may be cases in which a private person may make a communication to a public officer in official confidence and it could not be said that the public officer cannot claim privilege in respect of the same. Thus is *In re Suryanarayana Naidu*,[3] the privilege claimed was in respect of statements made by the defendant in the suit to the Taluk Supply Officer and the privilege claimed was upheld.

How the privilege should be claimed in respect of each document.

In *State of Punjab* v. *Sukhdev Singh*,[4] Gajendragadkar, J., has pointed out that the affidavit claiming privilege should show that each document in question had been carefully read and considered and the person making the affidavit was satisfied that its disclosure would lead to the public injury, and that the affidavit should also indicate, briefly, within permissible limits, the reason why it was apprehended that their disclosure would lead to injury to public interest.[5]

4. Object of section.—Section 124 is designed to prevent the knowledge of official papers, that is to say papers in official custody beyond that circle which would obtain knowlege of them in confidence whether the confidence was express or implied. The object is to prevent the disclosure of things not known outside that circle which is in confidence and this section has no application when once there has been disclosure to a member of the public to whom the contents of such papers have not been made known in confidence. The word "disclosure" means the first disclosure of communications made in official confidence and does not apply to disclosure in a Court of law of what has already been disclosed outside it.[6]

When there has been a disclosure ; section is inapplicable.

"Disclose"—Meaning of.

5. Scope.—Section 124 of the Evidence Act refers to official communications made in confidence. When witnesses made a statement before the police officer

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1. Governor General-in-Council *v.* H. Peer Mohd. Khuda Bux, A.I.R. 1950 E.P. 228 at p. 241-43.
2. Tilka *v.* State, A.I.R. 1959 All. 543 at p. 544 : 1958 A.W.R. 689 : 1958 A.L.J. 588.
3. (1954) 66 L.W. 927.
4. (1961) M.L.J. (Cr.) 731 at p. 740 : (1961) 2 S.C.J. 691 : (1961) 2 M.L.J. (S.C.) 203 : (1961) 2 Andh. W.R. (S.C.) 203.
5. S.S.M. Subramaniam Chettiar, *In re*, (1966) 2 M.L.J. 529 at pp. 531-32.
6. Chandra Dhar Tewari *v.* Deputy Commissioner, Lucknow, A.I.R. 1939 Oudh 65 at p. 66.

openly, and not in confidence and also when the police officer inspects the locality and prepares site-plan, it cannot be said that by admitting such evidence communications made in official confidence are being disclosed. In other words. Secs. 123 and 124 of the Evidence Act place no restriction on the admission of statements of witnesses examined during police investigation of the site-plan etc. prepared by the police officer, even though they are contained in the case dairy.[1]

Site-plan or statements by witnesses during police investigation.

The defence is not entitled to make a fishing inquiry into the papers or records of the prosecuting agency.[2]

Though a communication may be made to a particular public officer, if that officer forwards it to another officer for further action, the communication should be held to have been addressed to the latter officer for the purpose of Sec. 124 of the Evidence Act, and an affidavit from the officer to the effect that public interest would suffer by its disclosure should be taken as sufficient to support a claim of privilege.[3]

Section 124 of the Evidence Act confers right on the public officers to claim privilege from disclosure of confidential communications. But before exercising that right, the officer concerned must come to the conclusion that the disclosure of such document would be detrimental to the public interest. He is the sole judge to decide that fact but his decision should not be arbitrary or capricious. He should not claim privilege merely because such disclosure would either advance the case of the adversary or damage his case. Section 124 of the Evidence Act should in no event be resorted to as a cloak to shield the truth from the Court.[4]

Disclosure of documents under Sec. 124 must be detrimental to the public interest.

6. Sections 123 and 124, difference between.—There is a great deal of difference between Sec. 123 and Sec. 124 though they resemble each other in a number of points. There may be cases in which the two sections overlap. Communications may have been made to a public officer which may relate to affairs of State in which case it would be Sec. 123 which would apply and not Sec. 124, but there may be cases in which the communication made in official confidence is not made in a case where affairs of State are involved, but where public interests would otherwise suffer by the disclosure. That might be a case for example, relating to some departmental letter. It may relate to commission of an offence. In such a case unless it is covered by Sec. 123, the Court may inspect the document or take other evidence to enable it to determine on its admissibility but otherwise the duties of the Court are the same. The Court cannot substitute its opinion for the opinion of the head of the department in case of Sec. 123 or the opinion of the public officer in case of Sec. 124.[5]

Section 124 is more or less supplementary to Sec. 123. These two sections cannot be understood as mutually exclusive and operating in two different and clearly demarcated fields. They do overlap.

Section 124, Evidence Act.

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1. Mahabirji Birajman Mandir *v.* Prem Narain Shukla, A.I.R. 1965 All. 494 at p. 496 : 1964 A.L.J. 950.
2. Lakshmandas Chaganlal Bhatia *v.* State, A.I.R. 1968 Bom. 400 at p. 424 : 69 Bom. L.R. 898.
3. Union of India *v.* Sudhir Kumar Roy, A.I.R. 1963 Orissa 111 at p. 115 : 29 Cut. L.T. 179 : I.L.R. (1963) Cut. 213.
4. Excelsior Firm Exchange *v.* Union of India, A.I.R. 1968 Bom. 322 at pp. 322-23 : 69 Bom. L.R. 878.
5. Governor General-in-Council *v.* H. Peer Modh. Khuda Bux, A.I.R. 1950 E.P. 228 at p. 245 ; *See* also Swadeshi Cotton Mills Ltd. *v.* Swadeshi Polytex, (1982) 52 Com. Cases 483.

The difference between the two is that while Sec. 123 applies only to evidence derived from unpublished official records relating to any affair of the State,[1] Sec. 124 applies to all communications made in official confidence, whether such communications are in writing or not and whether they relate to any affair of State or not.[2]

As to Court's power to inspect a document.

There is distinction between the provisions of Sec. 123 and Sec. 124 of the Evidence Act. If the document comes within Sec. 123 the Court cannot inspect it, though it can take other evidence to determine the character attributed to the document. The procedure which is to be followed in a case under Sec. 123 of the Evidence Act has been laid down by a Division Bench of the Patna High Court in *Lakhuram Hariram* v. *Union of India*.[3] If a document falls within the ambit of Sec. 124 of the Evidence Act, the Court can inspect the document to detemine the claim of privilege.[4]

"Public officer" meaning of.

7. Public officer.—Under Sec.124, no public officer can be compelled to disclose communication made to him in official confidence, when by that disclosure public interest is likely to suffer.[5] It is incorrect to say that the term 'public officer' in Sec. 124, Evidence Act, shall be given the same meaning as has been asisgned to this term in Sec. 2, C.P.C. For the purposes of interpreting the term "public officer" as used in Sec. 124, Evidence Act, Court must resort to the definition given in the General Clauses Act. If no definition of this term can be found in the General Clauses Act, the term will have to be given its ordinary meaning. If a person was discharging duties which were assigned to him by means of a statute and rules and regulations made thereunder and if those duties were of a public character, the person discharging such duties must be held to be a "public officer".

"Vice Chancellor of a University; whether a public officer".

The duties of the Vice Chancellor are undoutedly of a public character as they concern the regulation of educational activities in the State. Hence, the Vice Chancellor when performing these public duties is acting as a public officer. Reference may be made in this connection to the case in *In re, A. Natesan*,[6] where it was held that Syndicate of the Madras University, was a statutory body of a person holding "public office" within the meaning of Sec. 45 (old), Specific Relief Act. Though no emoluments were attached to that office, where a statute appointed a body of persons to carry out functions of public interest the persons constituting such a body *so facto* became holders of a public office.

Syndicate of a University whether a "public body".

Case-law.

Reference may also be made in this connection to the case in *Chandradhar Tewari* v. *Deputy Commissioner, Lucknow*.[7] The question for consideration in that case was whether the Court of Wards can be regarded as a public officer within the purview of Sec. 124, Evidence Act. It was held that the Court of Wards, for the purposes of Sec. 124, should be taken to be a government officer.[8]

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1. Khawaja Nazir Ahmad *v.* Emperor, A.I.R. 1944 Lah. 434 at p. 436.
2. Firm Ghulam Mohi-ud-Din *v.* State of Jammu and Kashmir, A.I.R. 1961 J. & K. 20 at p. 23.
3. A.I.R. 1960 Pat. 192 : J.L.R. 39 Pat. 255 : 1959 Pat. L.R. 227.
4. Ganga Ram Union of India, A.I.R. 1964 Pat. 444 at pp. 444-45; *see* also Swadeshi Cotton Mills Ltd. *v.* Swadeshi Polytex, (1982) 52 Com. Cases 483.
5. Raj Narain *v.* Smt. Indira Nehru Gandhi, A.I.R. 1974 All. 324 at p. 327.
6. I.L.R. 40 Mad. 125 at p. 160 : A.I.R. 1918 Mad. 763 : 38 I.C 847.
7. A.I.R. 1939 Oudh 65 : I.L.R. 14 Luck. 351 : 178 I.C. 982.
8. University of Punjab, Lahore *v.* Jaswan Rai, A.I.R. 1946 Lah. 220 at pp. 220-22.

Patwari.

Daljit v. *Pratap Narain*[1] is a case where it was decided that Khasras prepared by a *patwari*, who was not appointed by government but by the *talukdar*, were public documents. It was also held that such a *patwari* was a public officer. In *Shahebzadee Shahunshah Begum* v. *Fergusson*,[2] the Official Trustee was held to be a public officer and in *Bhanudas Narayanboa* v. *Krishnabai*,[3] a school master in a Native State was held to be public officer. In *Vishnomal* v. *Court of Wards*,[4] it was held that the Court of Wards was a public officer. In *Queen-Empress* v. *Mathura Prasad*,[5] the Manager of the Court of Wards was held to be a public servant. At that time in fact that Board of Revenue was the Court of Wards and at the same time the Board of Renenue was of course a department of the government. On the other hand, in *Nanda Lal Bose* v. *Ashutosh Ghose*,[6] a learned Judge of the Calcutta High Court held that the Manager, of the Court of Wards is not a public servant within the meaning of Sec. 2 Cl. 17, C.P.C. In *Vasudeva Rao* v. *Municipal Council Anantapur*,[7] the municipality was held not to be a public officer for purposes of the Code of Civil Procedure. In

Municipality.

Emperor v. *Bhagwati Prasad*,[8] the question whether a Station Master in a State Railway was a public officer within the meaning of Sec. 124, Evidence Act, was left undecided. There is, therefore, a divergence of opinion as to whether the Court of Wards and officers of the Courts of Wards and similar bodies are or are not public officers with regard to the definition of "public officer" elsewhere than under Sec. 124, Evidence Act.

A public officer need not be a head of the department.[9]

8. Communications made in official confidence.—Whether a statement is made in official confidence or not is a question of fact. Before arriving at its decision the Court would undoubtedly examine the statements in question and the surrounding circumstances. It may be further, noted that ordinarily a communication is said to be made in official confidence, when one official communicates with another official in confidence.[10]

Nature of the statement and enquiry.

Communications between officer empowered to impose penalty in assessment procedures and higher authorities.

It has not been disputed that assessment proceedings as well as proceedings for the imposition of penalty are judicial in nature. It is well-settled that an officer or authority upon whom jurisdiction has been conferred to make an order judicially has to act independently. He has to apply his own mind to the evidence on the record. He cannot act on the advice given by an outsider even though that stranger may be an authority higher in rank to him in the official hierarchy. The communications between the officer empowered to impose penalty and the higher authorities in regard to assessment

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1. (1900) 3 O.C. 205.
2. I.L.R. 7 Cal. 499.
3. A.I.R. 1927 Bom. 11 at p. 12 : 99 I.C. 307 : I.L.R. 50 Bom. 716 : 28 Bom. L.R. 1225.
4. A.I.R. 1928 Sind 76 at p. 79 : 105 I.C. 729 : 22 S.L.R. 63.
5. I.L.R. 21 All. 127 : 1898 A.W.N. 205.
6. A.I.R. 1920 Cal. 167 at p. 168 : 55 I.C. 515.
7. A.I.R. 1930 Mad. 844 at p. 854 : 59 M.L.J. 690 ; *see* also V. Mohana Krishnan *v.* Shanmughavadivu, (1984) M.L.J. (Cr.) 127.
8. A.I.R. 1929 Oudh 543 at p. 544 : 1929 Cr. C. 677 : 123 I.C. 222 : 31 Cr. L.J. 479 : I.L.R. 5 Luck. 297 : 6 O.W.N. 937.
9. Governor General-in-Council *v.* H. Peer Mohd. Khuda Bux, A.I.R. 1950 E.P. 228 at p. 242.
10. B.R. Srinivasan *v.* Bramhatantra Parakalaswamy Mutt, Mysore, 1960 Mys. 186 at p. 187 : 1960 Mys. L.J. 127.

or penalty proceedings could not be held to be communications made in official confidence because in law these authorities were not entitled to exchange opinions or give advice in regard to judicial proceedings. Such communications are not privileged under Sec.124 of the Evidence Act.[1]

"Communications made in official confidence", meaning of.

The words "communications in official confidence" in this section include generally all matters communicated by one officer to another in the performance of duties. These words have the same meaning as "professional confidence" used in Sec. 126, *post*. The public officer in charge of the record is the sole judge of the detrimental character of the document, and his assertion as to its character is final and binds the Court.[2] Statements made to the Collector by proprietors who apply for the taking over of their estates by the Court of Wards are communications made in official confidence, and their disclosure cannot be compelled.[3] It is open to the government, by resolution or otherwise to censure or reprimand an officer. The resolution complained of by the plaintiff, being an official communication, is absolutely privileged. No action therefore can be based on any libel, however malicious, contained in the resolution.[4] Where a public officer to whom a defamatory communication had been made in official confidence, claimed privilege on the ground that the publication of the communication might cause a scandal in the office ; *held* that the case did not come within this section.[5]

"Public" and "private" documents and privilege claim.

Section 123 protects the discovery of documents referring to matters of State. That is based on the general rule that no person can be compelled to give evidence of matters which are State secrets including communications between public officers in the discharge of their public duties.[6] The section makes no difference between a private witness called upon to produce private documents and a public officer summoned to produce public record. In that respect Sec. 124, Evidence Act, is more particular and lays down the rule of public policy, and the limits within which the production can be withheld, that is the character and quality of the privilege.

English law on privilege attached to documents.

It has been well recognized in England that the privilege is a narrow one and most sparingly to be exercised.[7] According to Taylor[8], the principle of the rule is public safety. That is not the test under the Indian Law. The question that arises under Sec. 124, is whether the communication in question was made to the public officer in official confidence. That is the condition precedent to the claim, and the question is primarily to be decided by the Court before whom the privilege is claimed.[9] As to when and how the privilege should be claimed, it should be claimed at the earliest opportunity by the public officer

When and how privilege be claimed.

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1. Union of India *v.* Sheo Shanker Sitaram, (1974) 95 I.T.R. 523 at p. 526 (All.); *see* also Raghunath Raj Kumar *v.* B.N. Khanna, (1984) 55 Comp. Cas. 518.
2. Nagaraja Pillai *v.* Secretary of State, I.L.R. 39 Mad. 304, distinguishing Venkatachalla Chetti *v.* Sampathu Chettiar, I.L.R. 32 Mad. 62.
3. Collector of Jaunpur *v.* Jamna Prasad, I.L.R. 44 All. 360.
4. Jehangir *v.* Secretary of State, I.L.R. 27 Bom. 189.
5. Bidhu Bhusan *v.* Hari Nath, 7 C.W.N. 246.
6. Halsbury's *Laws of England*, Vol. 13 para. 597, p. 427.
7. *See* Robinson *v.* State of South Australia (No. 2), (1931) A.C. 704 : 100 L.J.P.C. 183 : 145 L.T. 408 : 75 S.J. 458 : 47 T.L.R. 454.
8. *Law of Evidence*, 12th Ed., Vol. 1.
9. *See* Collector of Jaunpur *v.* Jamna Prasad, A.I.R. 1922 All. 37 : 66 I.C. 171 : I.L.R. 44 All. 360: 20 A.L.J. 140.

concerned when in reply to the summons he produces the document in his control or charge. There is no rule of law requiring in terms that the public officer should state the exclusionary facts in an affidavit. The Court may call for an affidavit or a statement on oath in Court in a case where the public officer or the Government whom he represents is a party and they are called upon to make a general discovery of the documents in their possession.

The authorities in England establish that the Court has wide powers to determine the validity of the claim.[1] In India those powers exist but within the limitation stated in Sec. 124, Evidence Act. Under that section, it is essential, for the Court to inquire into the nature of the document and ascertain whether the first requirement of the section is satisfied. In the matter of discovery, where government is a party, English Courts have insisted upon proof of some collateral evil to society or to the public to justify the rejection of documents on grounds of public policy. See *Attorney General* v. *Newcastle-upon-Tyne Corporation.*[2]

Essentials for the Court to look into.

The rule of exclusion of secrets of State or State papers is well illustrated by *Chatterton* v. *Secretary of State.*[3] The rule that the channel of communication of information reaching government cannot be disclosed is exemplified by *Marks* v. *Beyfus,*[4] Whilst in England the Court has to decide the expediency of the application of the exclusionary rule in India the only circumstance which the govenment or public officer need prove is the confidential character of the communication. He is the sole judge to decide on the question of public policy. Therein lies the difference between English law and Indian law as regards the limits within which privilege can be recognized. A communication in official confidence requiring protection under Sec. 124, Evidence Act, must be such as to necessarily involve the wilful confiding of secrets with a view to avoid publicity by reason of the official position of the person in whom trust is reposed, under an express or implied promise of secrecy. The test must be whether the disclosure would result in betrayal of the person confiding by the publication of the communication having regard to the nature thereof.[5]

Confidential character of the communication.

Test

Courts have adopted a basic principle for deciding whether a particular document is a communication made in official confidence to a public officer or not, viz. whether the document produced or the statement made was under the process of law of not. If the former is the case, it would be difficult to say that the document produced or statement made is a communication made in official confidence. If, on the other hand, the document is produced or the statement is made in a confidential departmental enquiry not under process of law it would be a case of communication made in official confidence.[6]

Principle for deciding the character of a communication.

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1. *See* Asiatic Petroleum Co. Ltd. *v.* Anglo-Persian Oil Co. Ltd., (1916) 1 K.B. 822 : 85 L.J.K.B. 1075 : 114 L.T. 645 : 60 S.L. 417 : 82 T.L.R. 367 and Smith *v.* East India Company, (1841) 1 Ph. 50 : 11 L.J. Ch. 71 : 65 R.R. 327.
2. (1897) 2 Q.B. 384 : 66 L.J.Q.B. 593 : 77 L.T. 203.
3. (1895) 2 Q.B. 189 : 64 L.J.Q.B. 676 : 72 L.T. 858 : 59 J.P. 596.
4. (1890) 25 Q.B.D. 494 : 59 L.J.Q.B. 479.
5. Bhalchandra Dattatraya Bubane *v.* Chanbasappa Mallappa Warad, A.I.R. 1939 Bom. 237 at pp. 246-47 : 41 Bom. L.R. 391 : 183 I.C. 225.
6. *In re* Killi Surayanarayana Naidu, A.I.R. 1954 Mad. 278 at p. 279 : 66 L.W. 927.

A report from the Deputy Tahsildar to the Collector is undoubtedly confidential document and therefore can be regarded as privileged.[1] In *Nagaraja Pillai* v. *Secretary of State*,[2] an easier and more probable explanation of the phrase "official confidence", is afforded by comparison with the reference to "professional confidence", in connection with the privilege of legal advisers as for instance, Taylor on *Evidence*, 10th Ed. p. 650, and in *Goodall* v. *Little*[3] and *Ex parte Compbell, In re Cathcart*,[4] quoted in *Framji Bhicaji* v. *Mohansingh Dhansing*.[5] "A demi-official" letter addressed by one officer by name to another officer by name must be held, to have been written in official confidence.[6]

Tahsildar's report to Collector.

"Demi-official" letter.

There is a consensus of judicial opinion that the point as to whether a communication was made in official confidence is a matter subject solely to judicial decision and if once the Court comes to the conclusion that the communication has been made not in official confidence then the officer to whom the communication has been made has no other alternative but to produce the documents. If, however, the Court comes to the conclusion that the communication was made in official confidence, then it is for the officer alone to whom the communication has been made to decide as to whether the document should be produced or not. If he elects not to produce it, the Court cannot compel him to produce. Reference may in this connextion be made to *In re Mantubhai Mehta*,[7] *In re Makky Moithu*[8] and *Ijjatali Talukdar* v. *Emperor*,[9] etc.[10]

Case-law.

In *Nagaraja Pillai* v. *Secretary of State*,[11] it has been held that, "the words 'communication in official confidence' used in Sec. 124, Evidence Act, import no special degree of secrecy but include generally all matters communicated by one officer to another in the performance of duties."

"Professional confidence", meaning of.

"Where therefore the document that was sought to be put in evidence was a report made by one officer to another after inspection of a spot in person, and where that was objected to on the ground that its production would be detrimental to public interest, that is a sufficient cause for a Court to refuse to compel its production. In *Vythilinga Pandarasannidhi* v. *Secretary of State*,[12] if has been held that if once a Court holds that the communication made is in public confidence, then it is the officer alone who can claim privilege in which the Court cannot interfere.

As to who can claim privilege.

In *Jehangir M. Cursetji* v. *Secretary of State*,[13] a resolution passed by the government was held to be privileged.

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1. *In re* Makky Moithu, A.I.R. 1943 Mad. 278 at p. 279 : (1943) 2 M.L.J. 154 : 56 L.W. 74 : 1943 M.W.N. 62 : 206 I.C. 25.
2. A.I.R. 1943 Mad. 1113 at p. 1117 : I.L.R. 39 Mad. 304.
3. (1851) 20 L.J. Ch. 132 : 1 Sim (n.s.) 155 : 61 E.R. 60 : 89 R.R. 56.
4. (1870) 5 Ch. 703 : 23 L.T. 289 : 18 W.R. 1056.
5. I.L.R. 18 Bom. 263.
6. Chandra Dhar Tewari *v.* Deputy Commissioner, A.I.R. 1939 Oudh 65 at p. 66.
7. A.I.R. 1945 Bom. 122.
8. A.I.R. 1943 Mad. 278 : (1943) 2 M.L.J. 154 : 56 L.W. 74 : 1943 M.W.N. 62 : 206 I.C. 25.
9. A.I.R. 1943 Cal. 539.
10. L. Tirath Ram *v.* His Highness' Government, Jammu and Kashmir, A.I.R. 1954 J. & K. 11 at p. 12.
11. A.I.R. 1943 Mad. 1113 : I.L.R. 39 Mad. 304.
12. A.I.R. 1935 Mad. 342 (1) : 1935 M.W.N. 273 : 41 M.L.W. 472 : 68 M.L.J. 396 : 159 I.C. 577.
13. I.L.R. 27 Bom. 189.

The long and short of all these rulings is that if once a Court comes to the conclusion that a communication is made in official confidence, then it is for the officer concerned to claim privilege and the Court cannot interfere in it. This is quite good law so far as it goes, but the question is : can communications made by one officer to another in matters which arise out of commercial relations which subsist between the State on the one side and a private citizen on the other be treated as communications made in official confidence? From *Bhanya Saheb Dajibabhau* v. *Pandit Ramnath Rampartap.*[1]

Distinction.

It becomes obvious that a distinction has to drawn between two cases: first in which two citizens engage in civil litigation and want official communication to be disclosed at the time of the trial, and the cases, in which the State has entered into a commercial transaction with a private citizen in the course of which the State has made certain communication pertaining to the case in which it is interested as a defendant or a plaintiff. In the former case the State not being interested either way, a government officer is expected to keep before himself only the interests of the public before a privilege is claimed. But in a case in which the State itself is a party, the Court must be satisfied that the mind of a responsible officer of the government has been applied to the question as to whether the safety of the public interests warrants giving or withholding of the infomation.

In *Robinson* v. *State of South Australia*,[2] a case from South Australia, it has been held that—

> "Where the documents have come into existence with reference to the commercial activities of the State and they are the documents of a department of State which has been disbanded the exercise of the power of the Judge to inspect the documents is specially appropriate; more so, when reference is made to them in documents disclosed."

In *Governor General-in-Council* v. *H.Peer Mohd. Khuda Bux*,[3] in a Full Bench judgment Kapur, J., has laid down the law, as to in what cases privilege is to be claimed in the following words:

In what cases privilege is to be claimed.

> "Ordinarily the privilege is attached to State papers which are of a political or administrative character but there can be documents relating to trade or commercial or contractual activities of a State with regard to which privilege may be claimed. This privilege is a necessary one and must most sparingly be exercised, the sole object of this privilege is that the disclosure would be injurious to national defence or to good diplomatic relations or for the proper functioning of the public service and it is necessary to keep that document or that class of documents secret."

The learned Judge (Kapur J.,) has in his judgment referred to a judgment of Rigby, L.J., in which the Lord justice has laid down—

> "I know that there has always been the utmost care to give a defendant that discovery which the Crown would have been compelled to give it in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded."

Particularly must it be remembered in this connexion that the fact that production of the documents might in the particular litigation prejudice the

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1. A.I.R. 1938 Nag. 358 : I.L.R. (1940) Nag. 280 : 179 I.C. 865.
2. A.I.R. 1931 P.C. 254 (1) : 34 M.L.W. 575 : 35 C.W.N. 1121 : 61 M.L.J. 943 : 135 I.C. 625.
3. A.I.R. 1950 E.P. 228.

Crown's own case or assist that of the other side is no such plain overriding principle of public interests as to justify any claim of privilege.

In truth, the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself compelling reason for their production one only to be overborne by the gravest considerations of State policy or security.

State and its commercial transaction with subject.

When once the State has entered into a commercial transaction with a subject, that very moment the State has to be presumed to have given up to a very large extent its privileged position, "Communication made in official confidence" presupposes that the communication is of such a nature which will affect the interests of the State as such and not of a department which has estabilised contractual relations with a subject. The bare fact that the production of the documents might adversely tell upon the fortunes of the litigation would not be sufficient for holding that the documents were made in official confidence and that their disclosure would affect adversely the interests of the State.[1] Statements

Enquiry regarding theft by railway authorities.

recorded by a station master in the course of enquiry made by him and transmitted to the Divisional Superintendent cannot be regarded as privileged.[2] The subject-matter of police diaries would ordinarily be privileged under the provisions of Sec. 124, Evidence Act.[3] In the instant case, the Sub Inspector stated that there was a confidential record relating to Teja Singh and his family but he was under the impression that he was free to claim privilege for it.

Held that this notion was entirely wrong and that it could not be very well understood how the record could be regarded as privileged under Secs. 123 and 124, Evidence Act.[4]

Communication between subordinate and superior officers.

Speaking in a general way, communications made in official confidence by a subordinate officer to his superior officer in the discharge of his official duties must be taken as belonging to the class of documents which the public interest would require to be regarded as privileged. This is especially so when the officer to whom the communications are addressed who is the head of the department concerned has sworn to an affidavit that the disclosure of these communications would impair the public interest. It may be that a particular public officer has in his confidential communications expressed himself without any manner of reserve for or against the merits of the claim made by a subject. An outsider must not be permitted to probe into such confidential communications : otherwise it would result in gradually undermining the candour and courage which ought to characterize confidential views communicated by public officers to the Government. A party to an action who had made a communication to the Government or to a head of the department of the government is entitled to ask for its production. The government or the head of the department has no right to claim any privilege in respect of such a document.[5]

It is difficult to say that cable addresses and cables relating to those address are communications to a public officer in official confidence. Privilege cannot be claimed under Sec. 124 in respect of their disclosure.[6]

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1. L. Tirath Ram *v.* His Highness' Government, Jammu *v.* Kashmir, A.I.R. 1954 J. & K. 11 at pp. 12, 13, 14.
2. Emperor *v.* Bhagwati Prasad, A.I.R. 1929 Oudh 543 at p. 544.
3. Emperor *v.* Dharam Vir, A.I.R. 1933 Lah. 498 at p. 500.
4. Teja Singh *v.* Emperor, A.I.R. 1945 Lah. 293 at p. 297 : 222 I.C. 234.
5. Firm Ghulam Mohi-ud-Din *v.* State of Jammu and Kashmir, A.I.R. 1961 J. & K. 20 at p. 24.
6. Mohd. Hussain Umar Kochra *v.* K.S. Dalipsinghji, A.I.R. 1970 S.C. 45 at p. 52 : 72 Bom. L.R. 774.

9. Condition necessary for making communication privileged.—The requirements of this section are (1) that a communication should have been made to a public officer in official confidence; and (2) the officer in question must consider that public interests would suffer by the disclosure of the communication in question. If these two conditions are satisfied then the public officer to whom the communication was made cannot be compelled to disclose the same.

He cannot claim the protection of Sec. 124 on any other ground. It is also necessary that the privilege in question should be claimed by the official concerned. In *B.R. Srinivasan* v. *Branhatantra Parakalaswamy Mutt, Mysore,*[1] the official concerned had not directly claimed any protection under Sec. 124 nor was the Court informed that the disclosure of the documents called for would affect public interest. *Held* that no foundation was laid for claiming the privilege in question.

The question whether a communication is privileged or not is determined by the occasion on which and the circumstances in which it was made.[2]

Case-law.

The observations of the High Court would be a privileged document and therefore no complaint can be made of non-disclosure of that document.[3] In *State of Punjab* v. *Sodhi Sukhdev Singh,*[4] it was held by the Supreme Court that the report of the Public Service Commission was a privileged document to the disclosure of which a public servant was not entitled. In *Har Prasad Gupta* v. *State of U.P.,*[5] a question arose whether the correspondence between the High Court and the government relating to the confirmation of a judicial officer was a privileged communication, it was held that the correspondence was a privileged document. The State Government can claim privilege with regard to correspondence relating to confirmation or non-confirmation of a government servant though it must give material facts in the affidavit and make the documents available for the inspection of the Court, so that only the confidential part of the correspondence is not brought on the record and the remaining material is utilized for the decision of the case.

Nature of the privilege.

The privilege attaching to an official publication, *e.g.* a government resolution is subject to the condition that it is without malice actual, express and in fact.[6]

Government officer—Privilege—Refusing to give name of informant.

The accused was convicted of criminal breach of trust in respect of three gold bangles. The evidence went to show that the accused insured a parcel in the post office as containing gold bangles, but shortly after delivery to the addressee, the parcel was found to contain only a piece of steel. One of the witnesses deposed that he sold the steel to the accused. Accused's counsel asked of the Superintendent of Post Offices, the name of the person who had informed him about the sale of steel to the accused. *Held* that neither this section nor Sec. 125 had any application to the case, and that the question should have been allowed.[7]

The fact that information has been communicated by one person to another in confidence, however, is not of itself a sufficient ground for protecting from

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1. A.I.R. 1960 Mys. 186 : 1960 Mys. L.J. 127.
2. 6 Bom. L.R. 131.
3. Mohammad Ilyas Alvi *v.* State of Maharashtra, A.I.R. 1965 Bom. 156 at p. 168 : 67 Bom. L.R. 170 : (1965) 2 L.L.J 487.
4. A.I.R. 1961 S.C. 493.
5. A.I.R. 1963 All. 415 at p. 419.
6. 6 Bom. L.R. 131.
7. 2 Bom. L.R. 329.

disclosure in a Court of law the nature of the information or the identity of the informant if either of these matters would assist the Court to ascertain facts which are relevant to an issue on which it is adjudicating.[1] The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant, a more important public interest is served by protecting the information or the identity of the informant from disclosure in a Court of law. The public interest which the National Society for Prevention of Cruelty to Children relies on as obliging it to withhold from the respondent and from the Court itself material that could disclose the identity of the Society's informant is analogous to the public interest that is protected by the well-established rule of law that the identity of police informers may not be disclosed in a civil action, whether by the process of discovery or by oral evidence at the trial.[2]

Non-disclosure of identity of informant.

The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a Court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relavant to an issue on which it is required to adjudicate should be withheld from that Tribunal. By the uniform practice of the judges which by the time of *Marks* v. *Beyfus*[3] had already hardened into a rule of law, the balance has fallen on the side of non-disclosure except whereon the trial of a defendant for a criminal offence, disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls on the side of disclosure. There is no reason and no authority for confining public interest as a ground for non-disclosure of documents or information to the effective functioning of departments or organs of Central Government. In *Conway* v. *Rimmer*[4] the public interest to be protected was the effecitve functioning of a county police force; in *Re D* (*infants*)[5] the interest to be protected was the effective functioning of a local authority in relation to the welfare of boarded out children. In the instant case, the public interest to be protected is the effective functioning of an organization authorized under an Act of Parliament to bring legal proceedings for the welfare of children. This is public interest which the Court is entitled to take into consideration in deciding whether the indentity of the NSPCC's informants ought to be disclosed. The balance of public interest also falls on the side of non-disclosure.[6]

Discovery to find the identify of wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession. But the respondents are in an intermediate

Discovery to find out identity of a wrongdoer.

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1. Alfred Crompton Amusement Machines Ltd. *v.* Customs and Excise Commissioners (No. 2), (1973) 2 All. E.R. 1169 at pp. 1184, 1185 : (1974) A.C. 405 at pp. 433, 434.
2. Marks *v.* Beyfus, (1890) 25 Q.B.D. 494.
3. (1890) 25 Q.B.D. 494.
4. (1968) 1 All. E.R. 874 : (1968) A.C. 910.
5. (1970) 1 All. E.R. 1088 : (1970) W.L.R. 599.
6. D. *v.* National Society for the Prevention of Cruelty to Children, (1977) 1 All. E.R. 589 at pp. 594-95, 597.

position. Their conduct was entirely innocent; it was in execution of their statutory duty. But without certain action on their part the infringements could never have been committed. Does this involvement in the matter make a difference? The views expressed by Lord Romilly, M.R. in *Upmana* v. *Elkan*[1] and Lord Matherta L.C.[2] in *Upmanan* v. *Elkan*,[3] seem to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. The House does not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

It is therefore held that the respondents must disclose the information now sought.[4]

Official communication—Privilege—Libel.

The question whether an official communication is privileged from production in evidence is distinct from the question whether it would, if produced, be privileged in respect of liability for libel. The first point is governed by Secs. 123 and 124 of this Act.[5]

10. Privilege, who can claim.—It is not open to private parties to claim privilege. The privilege can be claimed only by the public servant concerned.[6]

11. Who is to decide whether the communication was made to a public officer in official confidence.—The law relating to the claim of privilege under Secs.123 and 124 of the Evidence Act has been discussed in a number of decisions of different High Courts. In *Vythilinga Pandarasannidhi* v. *Secretary of State*,[7] dealing with Sec. 124, Venkata Subba Rao J., said :

Madras High Court view.

"There are two matters involved in this section *first*.... whether the document is a communication made to a public officer in official confidence.

On a proper construction of the section, it is for the Court to decide that question. *Secondly*, should the Court, decide that the document is of the nature contemplated by the section, then the public officer himself is the sole judge as to whether by its disclosure public interests would suffer.

"....This distinction between the two matters involved in the section is pointed out and recognized in *Venkatachala Chetti* v. *Sampathu Chettiar*,[8] which case has been treated as having settled the law of the Presidency in the later decision in *Nagaraja Pillai* v. *Secretary of State*.[9]

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1. (1871) L.R. 12 E.Q. 140 at p. 145.
2. (1871) 7 Ch. App. 130 at p. 133.
3. (1871) L.R. 12 Eq. 140 at pp. 145.
4. Norwich Pharmacal Co. *v.* Commissoners of Customs and Excise, (1973) 2 All. E.R. 943 at pp. 947, 948-49 (H.L.).
5. 6 Bom. L.R. 131.
6. VR. SR. M. Ramaswami Chettiar *v.* K.J. Mahadevan, (1968) 2 M.L.J. 393 at p. 394 ; *see* also Sewakram Sobhani *v.* R.K. Karanjia, 1981 S.C.C. (Cri.) 698 ; V. Mohana Krishnan *v.* Shanmughavadivu, 1984 L.W. (Cr.) 55.
7. A.I.R. 1935 Mad. 342 (1) : 1935 M.W.N. 273 : 41 M.L.W. 472 : 68 M.L.J. 396 : 159 I.C. 577.
8. I.L.R. 32 Mad. 62 : 19 M.L.J. 263.
9. A.I.R. 1915 Mad. 1113 : I.L.R. 39 Mad. 304.

In *Henry Greer Robinson* v. *State of South Australia*,[1] the Judicial Committee explained that the foundation for the privilege is that the information cannot be disclosed without injury to the public interest. This was also the view taken in a subsequent decision of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.*[2] where Viscount Simmon, L. C., said:

"The principle to be applied in every case is that a document otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld.

The principle which is to be applied.

The principle enunciated in *Duncan* v. *Cammell Laird & Co. Ltd*,[3] was quoted with approval and applied in construing Secs. 123, 124 and 162 of the Indian Evidence Act in *Governor-General-in-Council* v. *H. Peer Mohd. Khuda Bux*[4] and *Din Bai* v. *Dominion of India*.[5]

In the light of the aforesaid decisions the position under the Indian law may, therefore, be stated thus: It is obligatory for a person who has been summoned to produce a document in his possession or control, to bring it into Court, even if there is any objection to its production, or to its being admitted in evidence as under Sec. 123 or Sec. 124 of the Evidence Act. The Court will decide on the validity of the objection and he is not entitled to withhold the evidence if the objection is overruled.

Position under the Indian law.

If the objection is a claim of privilege under Sec.123, the Court has no power to inspect the document, but may only take other evidence for the purpose of deciding on the objection. If it is a claim of privilege under Sec.124, the Court may inspect the document in its discretion. If the Court comes to the conclusion that the evidence proposed to be given will be derived from an unpublished record relating to the affairs of the State it will have to uphold the privilege under Sec. 123. Then it will be left to the head of the department concerned to give or withhold permission for the giving of the evidence.

Court's power to inspect the document.

Similarly, if the Court comes to the conclusion that the communication in question was made to a public officer in official confidence, it will have to uphold the privilege claimed under Sec. 124 and leave the public officer concerned to decide whether or not to disclose the communication. The criterion for the head of the department and the public officer is whether or not the disclosure would cause injury to public interest. But they are the sole judges of that matter and the Court cannot interfere with their discretion, once it upholds their claim of privilege either under Sec. 123 or Sec. 124 of the Evidence Act.[6]

A Court has inherent powers for refusing disclosure of matters which in the public interest should be kept secret, but that a witness should be allowed to put in a portion of a letter and say which portions of it are to go in and which portions are to be concealed from his opponent is quite unheard of; nor there is any warrant for a letter, which once had been made an exhibit, being handed back to a party.[7]

Court's inherent powers.

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1. A.I.R. 1931 P.C. 254 : 34 M.L.W. 575 : 35 C.W.N. 1121 : 61 M.L.J. 943 : 135 I.C. 625.
2. (1942) A.C. 624 at pp. 636, 642 : 111 L.J.K.B. 406.
3. (1942) A.C. 624 : 111 L.J.K.B. 406.
4. A.I.R. 1950 E.P. 228 : 52 Punj. L.R. 153 (F.B.).
5. A.I.R. 1951 Bom. 72 (1) : 53 Bom. L.R. 229.
6. Public Prosecutor *v.* Damera Venkata Narasayya, A.I.R. 1957 A.P. 486 at pp. 487-89 : I.L.R. (1957) A.P. 174 : (1957) Andh. W.R. 106.
7. E.A. Morley *v.* Emperor, A.I.R. 1936 Rang. 299 at p. 302 ; Bishnu Ram Barah *v.* Parag Saikia, 1984 Tax L.R. 570 : A.I.R. 1984 S.C. 898 ; P. Sudhir Kumar *v.* Government of India, 1982 Lab. I.C. 1911.

Government secretary should state reasons for apprehended injury to public interest.

Public Interest.—It is not in dispute in the present case that the suit relates to a commercial transaction between the State and the legal representatives of the deceased contractor, who had constructed the right flank of the Earthen Dam of Parbati Irrigation Project. The plaintiffs claimed in the suit that certain deductions were wrongfully made by the defendant from the amount payable to the contractor for the work done. While, according to the State of Rajasthan, the deductions were rightly made. The letters written by the Executive Engineer or the Assistant Engineer to his superior officers are in respect of the work done by the contractor in relation to the contract, which was subject-matter of the suit. In such circumstances, it was absolutely necessary for the Irrigation Secretary to the Government of Rajasthan, not only to express a view that the disclosure of the documents in question would adversely affect public interest, but he should have also stated the reasons, within permissible limits, as to why an injury to public interest was apprehended from the disclosure of the documents. A mere mechanical repetition of the words that the production and disclosure of the documents would injure public interest or would be prejudicial to the public interest would not be sufficient. The Court should be satisfied that there was a real danger of some injury being caused to the larger public or national interest by the production or disclosure of the documents in question.[1] The law is not that a confidential document is immune from discovery unless the public interest requires its disclosure, but that all relevant documents, whether or not, confidential, are subject to disclosure unless on some recognized ground, including the public interest, they are withdrawn from disclosure.[2]

Privilege in regard to departmental notings contained in official files.

Where the High Court would not have rejected the State's claim of privilege in regard to departmental notings contained in official files, except for the fact that the affidavits filed on behalf of the Government did not adequately bring out the involvement of public interest consequent upon the disclosure of the notings. The Supreme Court held that judgment of the High Court has to be confined to the particular facts of the case and cannot be used as a precedent in other cases for calling upon the Government to produce confidential notings in official files, if the disclosure thereof is calculated to impair public interest.[3]

12. Procedure.—The final decision of both the departmental held as well as the Presiding Judge will be governed by only one consideration, *viz.*, whether the disclosure would result in an injury being caused to the public interest as the section gives effect to the principle that public interest must be paramount and private interest must give way when there is a conflict between public and private interests.[4]

Object of Sec. 124, Evidence Act.

In *Nagaraja Pillai* v. *Secretary of State*,[5] a Bench of the Madras High Court held that the object of Sec. 124, Evidence Act, is to prevent the disclosure to the detriment of public interests and the

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1. State of Rajasthan *v.* Smt. Kailashwati, A.I.R. 1979 Raj. 221 at p. 223.
2. D. *v.* National Society for the Prevention of Cruelty to Children, (1976) 2 All. E.R. 993 at p. 1009.
3. State of Orissa *v.* Jagannath Jona, A.I.R. 1977 S.C. 2201 at p. 2201.
4. *Vide* Dinbai *v.* Dominion of India, A.I.R. 1951 Bom. 72, decided by, Chagla, C.J. and Bhagavati, J. ; P.S. Narayanaswamy *v.* State of Madras, A.I.R. 1953 Mad. 228 at pp. 228, 229 : (1952) 2 M.L.J. 375 ; *In re* Killi Suryanarayana Naidu, A.I.R. 1954 Mad. 278 : 66 L.W. 927.
5. I.L.R. 39 Mad. 304.

decision as to such detriment rests with the officer to whom the communication is made and does not depend upon the special use of the word "confidential". The decision in *Venkatachala Chettiar* v. *Sampathu Chettiar*[1] was followed. In *Secretary of State* v. *Saminatha*,[2] Jackson, J., held that under Sec. 124, it rested exclusively with the public officer concerned to withhold or give permission as he is the sole judge as to whether public interest will or will not suffer by the disclosure though such discretion must naturally be exercised on well established principles and not arbitrarily.

Public officer is the sole judge to decide privilege he claims.

In *Makky Moithu, In re*,[3] Horwill, J., held that a report made by the Deputy Tahsildar of a Government Forest to the Collector was privileged.

Report of Deputy Tahsildar.

In *Weston* v. *Peary*,[4] it was laid down that protection under this section is not dependent upon a claim privilege being put forward. It is the duty of the Judge himself to exclude the evidence. In *Governor-General-in-Council* v. *Peer Mohammad*,[5] a Full Bench of the Punjab High Court held that where the privilege claimed is attached to State papers which are of an administrative character the Court can hold an enquiry into the validity of an objection. But it is nevertheless true that once the Court comes to the conclusion that the document relates to an affair of the State, the decision of the head of the department to give or withhold permission to its production must be accepted as final. Similarly, in *I.M. Lall* v. *Secretary of State*,[6] it was held that the principle or foundation on which Sec. 123 rests is concern for the public interest. The use of the word "concerned" in relation to the head of the department shows that the affidavit must contain a sworn statement by the head of the department in whose custody the documents happen to be at the time when discovery and production is claimed.

Principle embodied in the section rests on public interests.

These decisions are based upon a long line of English decisions of which the most important is the decision of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.*[7] Their Lordships have clearly laid down the principles which are embodied in Secs. 123 and 124, Evidence Act.[8]

It is difficult to see how in cases where non appointment of an additional Judge for a further term or transfer of a High Court Judge is challenged, the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of High Court, the State Government and the Chief Justice of India and the relevant notings made by them, could at all be said to be injurious to public interest.[9]

Where the privileged communication is withheld no secondary evidence of it should be receivable.[10]

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1. I.L.R. 32 Mad. 62.
2. A.I.R. 1930 Mad. 342 (2).
3. (1943) 1 M.L.J. 154.
4. I.L.R. 40 Cal. 898.
5. A.I.R. 1950 E.P. 228 : 52 Punj. L.R. 153 (F.B.).
6. A.I.R. 1944 Lah. 209 : 216 I.C. 89
7. (1942) A.C. 624 : 111 L.J.K.B. 406.
8. *Cf.* P. S. Narayanaswamy *v.* State of Madras, A.I.R. 1953 Mad. 228 at pp. 229-30.
9. S.P. Gupta, V.M. Tarkunde, J.L. Kalra *v.* President of India, A.I.R. 1982 S.C. 149 at p. 249.
10. Whitley Stokes, Vol. II p. 919.

[1][**125. Information as to commission of offences.**—No Magistrate or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation—"Revenue Officer" in this section means any officer employed in or about the business of any branch of the public revenue.]

SYNOPSIS

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2. Meaning of the section ... 4649
3. Whence he got information as to commission of offence ... 4650
4. Spy witness ... 4651

1. English rule.—"It is perfectly right", said Eyre, C.J., in *Hardy's* case,[2] "that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule that those persons who are the channel by means of which the detection is made should not be necessarily disclosed."

The channel by which crime detection is made should not be disclosed.

2. Meaning of the section.—Under Sec. 125, no Magistrate or police officer can be compelled to tell the source of his information about the commission of an offence.[3]

This section merely enacts that no Magistrate or police officer shall be compelled to say, but it does not prohibit him, if he be willing, to say whence he got his information. The protection afforded by the section does not depend upon a claim of privilege being made but it the duty of the Court, apart from objection taken, to exclude such evidence.[4]

"Compelled" and "willing" to say.

Witnesses for the Crown in criminal prosecutions undertaken by Government are privileged from disclosing the channel through which they have received or communicated information. But a detective cannot refuse to answer a question as to where he was secreted.[5] The defence is not entitled to elicit from individual prosecution witnesses whether he was a spy or an informer, or to discover from police officials the names of persons from whom they have received information.[6]

Privilege from disclosing the channel of information to prosecution witnesses.

The section rests upon public policy. It has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings.[7]

Section is based on public policy.

In this country, the Magistrate, police officers and revenue officers, may, if they like, say whence they got their information.[8]

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1. Subs. by Act 3 of 1887, Sec. 1, for the original Sec. 125.
2. 24 Howell's State Trials, 808.
3. Raj Narain *v.* Smt. Indira Nehru Gandhi, A.I.R. 1974 All. 324 at p. 327.
4. Donald Weston *v.* Pearey Mohan Das, I.L.R. 40 Cal. 898 : 18 C.W.N. 185.
5. Amritlal Hazra *v.* King-Emperor, I.L.R. 42 Cal. 957 : 21 C.L.J. 331 : 19 C.W.N. 676.
6. *Ibid.*
7. Liladhar Umersi *v.* Emperor, 29 I.C. 79 (Sind).
8. Whitley Stokes, Vol. II, p. 919.

3. Whence he got information as to commission of offence.—When a Magistrate or a police officer gets any information as to the commission of any offence, whence he got such an information is prevented from being given.

Informant; position if some incriminating document is seized from her.

In certain cases, it may be that the person from whom the account-books are seized may be the informant. But what the section contemplates is only the prohibition of the source from whom the Magistrate or the police officer got information as to the commission of the offence and not as to the custody of any documents or other material objects, that might have been seized and that might be tendered in evidence in support of the commission of the offence.[1]

The law relating to privilege, has to be read in Sec. 121 *et seq* of the Evidence Act. The Court does not read an F.I.R. to be legally clothed in those provisions with the status of a privileged document in any manner. The material section indeed is Sec. 125, but scope thereof is clear and narrow. It secures privilege for a Magistrate or police officer to refuse to say whence he got any information as to the commission of any offence.[2]

Compelling a police officer to give source of information.

Under Sec. 125, Evidence Act, a police officer cannot be compelled to say whence he got any information as to the commission of any offence. A Magistrate should not make an exception in favour of the statement made by the informant.[3] There is no reason why an investigating police officer should not indicate the source of the information upon which he takes action.[4] Questions mentioned in Secs. 121, 124 and 125 are in no way barred, and a Magistrate may warn the witness who is ignorant of his privilege but he cannot disallow such questions.[5] The subject-matter of police diaries would ordinarily appear to be privileged under the provisions of Sec. 124, Evidence Act. As regards particular matters they may also be privileged under the provisions of Sec. 125 and also in the circumstances of a particular case under Sec. 123, Evidence Act.[6]

Status of Prohibition Officer.

A prohibition officer under the Madras Prohibition Act, 1957 (10 of 1957) shall be deemed to be a police officer only for the purpose of Sec. 125 of the Indian Evidence Act, 1872.[7] In *Venkatareddy* v. *Emperor*,[8] Justice Rajamannar decided that a prohibition officer was not a police officer within the meaning of Sec. 25 of the Evidence Act. To the same effect is the judgment of Mr. Somasundaram in *Srinivasa Narasimha Bayanker* v. *State*.[9]

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1. Public Prosecutor *v.* M.N. Govindraja Mudaliar, A.I.R. 1954 Mad. 1023 at p. 1024 : (1954) 2 M.L.J 239 : 67 L.W. 861 : 1954 M.W.N. 561 : 55 Cr. L.J. 1624 ; Emperor *v.* Ramdhan, 2 Bom. L.R. 328, followed in Harbans *v.* Emperor, 16 C.W.N. 431.
2. Munna Singh Tomar *v.* State of M.P., 1989 Cr. L.J. 580 at p. 586 (M.P.).
3. Emperor *v.* Bilal Mahomed, A.I.R. 1940 Bom. 361 at p. 362.
4. Shyam Kumar Singh *v.* Emperor, A.I.R. 1941 Oudh 130 at p. 134.
5. Mohammad Ally *v.* R., 10 I.C. 917.
6. Emperor *v.* Dharam Vir, A.I.R. 1933 Lah. 498 at p. 500 : 34 Punj. L.R. 541.
7. Public Prosecutor *v.* Shaik Dawood, A.I.R. 1957 A.P. 977 at p. 978.
8. A.I.R. 1918 Mad. 116 : I.L.R. (1948) Mad. 574.
9. (1954) M.W.N. 659.

4. Spy witness.—The examination of the spy is neither necessary nor desirable.[1]

126. Professional communications.—No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any [2][illlegal] purpose;

(2) any fact observed by any barrister, pleader, attorney or vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [3][pleader,] attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations

(*a*) *A*, a client, says to *B*, an attorney—"I have committed forgery and I wish you to defend me".

As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.

(*b*) *A*, a client, says to *B*, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

The communication, being made in the furtherance of a criminal purpose, is not protected from disclosure.

(*c*) *A*, being charged with embezzlement retains *B*, an attorney, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A's* account-book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

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1. State *v.* Dhanpat Chamara, A.I.R. 1960 Pat. 582 at p. 585 : 1960 B.L.J.R. 511 : 61 Cr. L.J. 1650.
2. Subs. by the Indian Evidence (Amendment) Act, 1872 (18 of 1872), Sec. 10, for "criminal".
3. Ins. by Sec. 10, *ibid.*

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22. If a document is once privileged, it is always privileged ... 4671
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1. Reasons and object of the rule.—Under Sec. 126, no barrister, attorney, pleader or vakil, can be compelled to disclose any communication made to him in the course of his employment, unless the client consents for that disclosure.[1]

Principle.

When a barrister, attorney, pleader or vakil is the party interrogated as a witness, he is not only privileged and protected from disclosing, but even if willing, he is not permitted to disclose, unless with his client's express consent. The principle on which communications to a solicitor, etc, are privileged is that, otherwise, a man would be deterred from fully disclosing his case, so as to obtain proper professional aid to be thrown into litigation.[2]

Section 126 is designed to abort the attempt to intrude into privacy of the close preserve of the fund of information conveyed by the client closetted in confidence. In the instant case, summons was issued initially in due course at the instance of the plaintiff and an advocate pursuant to the summons appeared and claimed privilege on the ground that he is appearing for defendants 3 to 8 in the suit and he will be obligated to divulge privileged communication if he is called upon to adduce evidence. After hearing both sides it was held that the advocate should not be called upon to give evidence in view of Sec. 126. The review petition is filed. There is absolutely no infirmity in the order much less apparent error.[3]

2. Scope of the section.—Section 126 of the Evidence Act prohibits a pleader from disclosing any communication made to him in the course of and for the purpose of his employment as such pleader. Disclosure implies that which was not already made known to others. If what is communicated by the client to the advocate is what is put in the notice, then there is already a disclosure, and Sec. 126, therefore, does not stand in the way of summoning the advocate for giving evidence.[4]

What the word "disclosure" implies.

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1. Raj Narain *v.* Smt. Indira Nehru Gandhi, A.I.R. 1974 All. 324 at p. 327.
2. *Ex parte* Campbell, cited in Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263 at p. 272.
3. Gangavarapu Kameswara Rao Sri *v.* Gangavarapu Satyanarayana, (1984) 1 Andh. L.T. 280 at p. 283.
4. Pratti Rajamma *v.* Pratti Chintaiah, (1972) 2 Andh. W.R. 253 at p. 254.

In *Palaniappa Chettiar* v. *Emperor*[1], it was held that Sec. 126 is not infringed if an advocate, who asks a defamatory question on the information of his clients, deposes to that effect when his client is sued for defamation or when his reply notice to the effect is allowed to be produced in Court.

This section protects from publicity not merely the details of the business but also its general purport, unless it be known *aliunde* that such business falls within proviso I or II to the Section.[2]

Rule of law.

"The rule of law", as pointed out by Lord Sankey, "is the condition of liberty. Amid the cross-currents and shifting sands of public life, the law is like great rock upon which a man may set his feet and be safe.

Rule of law in criminal cases.

This rule of law in so far as the administration of criminal justice is concerned is ensured by the fundamental concept, *viz.* that (1) the accused who can be tried only in accordance with law and (2) who can be convicted only in accordance with law must be able to protect his own interests by all legitimate means against the accusations made against him. This can be done by the only weapon which he possesses, *viz.* the right to cross-examine his accusers.[3]

But unfortunately most of the accused persons are either illitrate or people unskilled in unraveling the motives, the psychological imperfections and the faulty and incoherent deductions of the witnesses. Hence, a man unpractised in speech, unskilled in law should have the aid of one possessing skill and power of speech but professing no personal knowledge or belief of the matters in question, and he should be able by his counsel to say all that he could say himself. On this it follows that there should be absolute confidence between the client and his legal adviser that this confidence should be protected.

Foundation of the rule under Sec. 126, Evidence Act.

The foundation of this rule embodied in Sec. 126, Evidence Act, is not difficult to discover. It is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of Courts. It the privilege did not exist at all a man would not venture to consult any skilled person, or would only dare to tell his counsel half his case.[4]

It is absolutely necessary that a man in order to prosecute his rights or to defend himself from an improper claim to have recourse to the assistance of professional lawyers and it is equally necessary that he should be able to make a clean breast of it to the gentleman whom he consults and that the communication he so makes to him should be kept secret unless with his consent (for it is his privilege and not the privilege of the confidential agent) that he should be enabled properly to conduct his litigation. That is the meaning of the rule embodied in Sec. 126, Evidence Act.[5] The rigid enforcement of this rule no doubt occasionally operates to the exclusion of truth. But as pointed by Knight Bruce, L.J., *Pears* v. *Pears* :[6]

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1. (1935) M.W.N. 460.
2. Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263.
3. Section 146, Evidence Act.
4. *Per* Brougham, L.C., in Greenough *v.* Gaskell, (1883) 1 Myl. & K. 98 at p. 103 : 36 P.R. 258.
5. *Per* Jessel, M.R., in Anderson *v.* Bank, (1876) 2 Ch.D. 614 at p. 619, *per* Brougham, L.C., in Bolton *v.* Corporation of Liverpool, (1831-33) 1 Myl. & K. 88.
6. (1846) 16 L.J. Ch. 153.

"Truth like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal advisor, are too great a price to pay for truth itself."[1]

English law.

Thus, one arrives at the position that an accused or a party to a proceeding to protect his own interest is able to test the evidence of a witness appearing against him by cross-examination as to credit, etc. through an advocate and that the intercourse between him and that advocate is protected unless expressly waived by the client.

This position has not always been the case and it would be interesting at this stage to trace the history of advocacy in our country *albeit* briefly owing to the limitation of space.

The best exposition of advocacy in Hindu India is to be found in Radha Kumud Mookerjee Endowment Lectures, 1945, on the Hindu Judicial System delivered by Sir S. Varadachariar Kt. Judge, Federal Court, and published by the M.L.J. Office for the Lucknow University :

"It is not possible to say anything definite as to the existence of a legal profession in ancient India.[2] Mr. Jayswal thinks that professional lawyers ought to have existed from the days of Manu or to least from the first century A.D.[3] I find it difficult to interpret the reference to 'Vipra' in Manu 8,619, as a reference to a 'Lawyer Brahmin'. The commentaries on this verse lend no support to such a reading. The passages in Narada (122) and Katyayana (90 to 95) seem rather to refer to agents than to advocates or pleaders as we know them.[4]

On advocacy in India; Hindu law.

It may, however, be added that Mr. Kane reads these passage of Katyayana as referring to recognized agents and pleaders.[5]

The passage in the *Sukraniti* is perhaps more significant, because it fixes the remuneration payable to the "representative" and declares him liable to punishment for receiving anything more; but it is noteworthy that it provides for the appointment of a "representative" not only on the ground of the party's ignorance of *vyavahara* but also on the ground of his being otherwise busy.[6] The *Arthasastra* makes no reference to a legal profession. Mr. Nilakanta Sastriar in his book on the *Cholas*[7] states that there appears no trace of the employment of advocates in the days of Chola administration. In the laws of the Ancient Persians (translated by Mr. Bulsara) it is stated that in ancient Babylonia the institution of lawyers did not exist, but that by the time of the book which Mr. Bulsara was translating, i.e. about the 6th or 7th century A.D. lawyers were in existence.[8] In the Athens of Pericles, there was no Bench of trained Judges or Bar of trained lawyers. A party was not allowed to have his case presented by an

Advocacy in India according to ancient text.

Roman law.

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1. Taylor on *Evidence*, Secs. 911 to 918; Best on *Evidence*, Sec. 581; Roscoe on *Criminal Evidence*, 133 to 135; Stephen's *Digest*, Art. 115 and Art. 116; Phipson's *Law of Evidence*, p. 182 (Book 2); Wigmore on *Evidence*, Sec. 2292 and Sirkar on *Evidence*, p. 1206 (7th Ed.)
2. *See* discussion in 19 M.L.J., pp. 153 *st seq* (Journal).
3. M. & Y., pp. 288-92.
4. *Cf.* the Cognitores and the Procurators of the Roman law; Buckland, p. 404.
5. *See* his Introduction to Katyayana, p. xv.
6. Anya Karya Kulena.
7. Volume II, p. 260.
8. *See* pp. 34 and 612.

advocate.[1] In Rome, there no doubt existed a class of persons (Jurisprudents) who made law their speciality: but they were not professional lawyers in our sense.[2] In England there was no definite legal profession till more than a century after the Norman conquest.[3]

Similarly, regarding lawyers in Muslim India there is no detailed and reliable account and the utmost learning and sympathetic consideration of the "Administration of Justice in Medieval India" could evolve nothing more than the following sketch by Mr. M.B. Ahmad, I.C.S :

Advocacy in India's Muslim law.

"Their duties are mentioned in the two Muslim Indian Codes, Fiqh-e-Firoz Shahi and Fatawa-e-Alamgiri. They were known as vakils, a term which still applies to them. Marvardi speaks of the profession and considers expert knowledge of the law necessary both for the practice of law and for the acting as Qazi.[4] Moreland thinks that the profession did not exist but contemporary authorities have referred to vakils. Ibn Batuta who was himself a Judge in the time of Muhammad Tughlaq (1315-1351) speaks of them.[5] Badaoni refers to Rae Arzani, a Hindu Vakil of Khan Zaman.[6] Sir Thomas Rae refers to his 'Solicitor' who perused his plaint.[7] The petition of the East India Company was presented by lawyers on the original side of the Emperor's Court....

"Vakils had a right of audience in Courts and were attached to the staff of every King and his sons. One vakil was given the title of 'Vakalat Khan' in the time of Bahadur Shah (1701-1712) for his successful advocacy.[8]

"A client could withdraw the power of his vakil. During the reigns of Shahjahan and Aurangzeb, lawyers were appointed to defend civil suits against the State and to assist poor litigants with free legal advice. They were, as I have mentioned in the previous chapter, known a Vakil-e-Sharai.[9] The vakils had to file their powers of attorney (*vakalatnamah*) in all cases,[10] and even today the form in which the power filed in Court is more or less the same.

"There were no Bar Associations...

"As recorded elsewhere, vakils could be appointed Qazis in the districts where they were practising. A perusal of judgments in *Baqiat* shows that Qasi Quim Ali was a local lawyer and officiated as Qazi for some time (page 22). After he left the Bench he again appeared as a lawyer in *Dunia Murai* v. *Mir Shahamat*,[11] for the defendant.

"It should, however, be borne in mind that the word 'vakil' was also a general term applied in those days to agent.[12] Shahjahan's 'diplomatic' representative at the Court of Aurangzeb was referred to as Vakil-e-An Hazrat', 'Waqua' at-e-Alamgir MS. 1940.[13] At another place Sujan Rae in his

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1. *See Trial of Socrates* by Coleman Phillipson.
2. Jol., pp. 91 to 94.
3. P. & M. Intro. p. xxvii.
4. J.R.A.S. 1910, p. 764.
5. Page 194, *Travels*—Lee.
6. Page 97, Vol. II; p. 76, Vol. II..
7. Roe's *Embassy*, Foster, p. 760.
8. *Vide* Bahadur Shah Mamah MS, K.C.C.
9. Khafi Khan 2, p. 249.
10. *See* Br. Mus. Or. 2011.
11. *Ali Baqiat*, p. 25.
12. I.O.L.M.S. 370.
13. Br. Mus, f. 39.

Khulasat-ut-Tawarikh has used the word Vakil as Saltanant or Vakil-e-Mutalaq for the Prime Minister."

Historical background and growth of advocacy in India.

Similarly, regarding advocacy there is very little tangible information both in the Vijayanagar empire and in the Maratha administration.[1]

Oldest Bar in India : Madras.

Coming to the British times, the Madras Bar is the oldest in India. First, the merchant came and built his factory in 1639. The soldier then came to guard and protect it. With him the doctor came to attend to the sick and wounded and the Chaplain to remind them of their religion. But the lawyer came at a later stage and that too not from reputable or skilled sources owing to the fact that in the beginning there were grave doubts and uncertainties about the Company's right to maintain Courts and administer justice over non-English inhabitants.

The first Agent who appears to have had some taste for law was Sir William Laughorne. When he was near his embarking, the Minutes of Consultation dated 19th September, 1677, take stock of all his law-books. This Court constituted by the Agent and Council started encouraging legal practitioners and in consultation dated 18th March, 1678, a regular table of fees was drawn up. This is the first reference to the Bar in the Company's records of Fort St. Georage and some more years passed before the practitioners appeared to act and plead.

By Charter dated 9th August, 1683, the Governor and Council were empowered to establish Admiralty Courts. This Admiratly Court gave no scope or legal talents. In 1726 came the Letters Patent establishing regular Civil and Criminal Courts of Madras.

In addition there were Caste Panchayats to dispose of all caste disputes and other disputes submitted to by the parties and Military Courts with reference to military offences. It was in this atmosphere that a group of attorneys plied their trade.

It was only in course of time when attorneys came to be replaced by men of learning and responsibility educated in law colleges possessing prescribed qualifications subject to elaborate rules of professional conduct and having Bar Associations of their own.

Effect of Regulation 27 of 1814 and Regulation 2 of 1833.

In regard to Regulations, the most important are Regulation 27 of 1814 and Regulation 2 of 1833. It is interesting to note that Regulation 27 of 1814 compelled every vakil to take an oath regarding his duties before he commenced his practice. The fees of pleaders had to be deposited in Court and security given for payment of the adversary's pleaders before the trial started and vakils were required to be careful in accepting *vakalatnamas* and to examine and sign pleading before filing them and pleaders were made liable for damages which the clients might sustain by breach of law on the part of the pleaders and the client could withdraw the *vakalat* at any stage of the case in case of his pleader's misconduct by application made to the Court and if the pleaders were unable to attend Court, they had to notify the same to the Court in writing and otherwise they were made liable to pay a fine and

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1. *See* Saletore's *Social and Political Life in Vijayanagar Empire;* N. Venkatramanayya's *Studies in the History of the Third Dynasty of Vijyanagar;* Maha Lingam's *Administration and Social Life under Vijayanagar;* C.K. Srinivasan's *Maratha Rule in the Carnatic* and other well-known works on Maharatta Administration by Grant Duff, Kincaid, etc.

Vakils were prohibited from becoming law-agents or *mukhtars* and a pleader was liable to be dismissed for giving an illegal or dishonest opinion and for incompetency.

Legal Practitioners Act and Bar Council Act and their effect.

Then there are a series of Acts culminating in the Legal Practitioners Act (28 of 1879), amended by the Indian Bar Councils Act (38 of 1926). Now the Advocates Act, 1961, has done away with the above regulations and has evolved a unified Code for the legal practitioners in India.

Thus one arrives at the present position set out by an eminent lawyer, the late Sir P.S. Sivaswami Iyer, in his foreword to Justice Sundara Iyer's *Professional Ethics* :

> .....The theory underlying the English system is that the best means of finding out the truth between two contending parties is to hear the best that can be said for each side by a skilful advocate and entrust the decision to an impartial Judge capable of weighing the arguments on both sides. Necessarily the system invloves a division of functions between the Judge and the advocate.
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> "It is the business and the duty of the advocate to make the best of his client's case and it is the province of the Court to weigh the contentions in the balance and determine on which side the right lies. .....While it is the duty of the advocate to make the best of his client's case, it is his duty to conform to the rules of the game, which have been laid down by the traditions of the English Bar, traditions inspired by an eminent love of fair play and by a deep sense of the duty of the profession to assist in the administration of justice."

Advocate's liability on a defamation charge.

The liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of Sec. 499, I.P.C. ; the Court will presume good faith unless there is cogent proof to the contrary [1] The privilege is not absolute but qualified, but the burden in cast upon the prosecution to prove absence of good faith.[2] So far as the English law is concerned, it is settled that advocates have absolute and unqualified privilege in respect of questions asked in cross-examination.[3]

No privilege to lawyers on a prosecution for defamation.

But advocates in India, including in the term vakils and pleaders have no absolute privilege on the prosecution for defamation.[4] This section is meant to be universal in its application. Consequently, for purposes of fixing criminal liability the English law of absolute privilege does not apply in this country to statements of advocates in judicial proceedings. The contrary view taken in the following cases is no longer tenable.[5] It is the duty of the Court to presume that the statement was made on instruction and in good faith and for the protection of his client's interest, and unless circumstances clearly show that the statement complained of as defamatory

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1. Nirsu Narayan *v.* Emperor, A.I.R. 1926 Pat. 499 ; M. Banerjee *v.* Anukul Chandra, A.I.R. 1927 Cal. 823 and Anwaruddin *v.* Fatim Bai, A.I.R. 1927 Mad. 379 : 52 M.L.J. 269 : 25 M.L.W. 295 : 1927 M.W.N. 164 : I.L.R. 50 Mad. 667.
2. *In re* Nagarji Trikamji, I.L.R. 19 Bom. 340 ; Nikunji *v.* Harendra Chand, A.I.R. 1914 Cal. 255 (1) and Upendra Nath *v.* F.A. Savi, 9 C.L.J. 259.
3. Sullivan *v.* Norton, I.L.R. 10 Mad. 28 (F.B.) ; *In re* Venkatareddy, I.L.R. 36 Mad. 216 ; Upendra Nath *v.* F.A. Savi, I.L.R. 36 Cal. 375 and Nikunji *v.* Harendra Chand, A.I.R. 1914 Cal. 255 (1).
4. M. Banerjee *v.* Anukul Chandra, A.I.R. 1927 Cal. 828.
5. Sullivan *v.* Norton, I.L.R. 10 Mad, 28 (F.B.); *In re* Venkatareddi, I.L.R. 36 Mad. 216 and Jagat Mohan *v.* Kalipado, A.I.R. 1922 Pat. 104.

was made wantonly or from malicious or private motive, the complaint for defamation should not be entertained.[1]

"Good faith"—Presumption of.

When a laywer is acting in the course of his professional duties good faith is to be presumed and bad faith is not to be presumed merely because the statement is *prima facie* defamatory. Even the presence of malice will not override the presumption of good faith when the statement was obviously necessary in the interests of the client and where the lawyer could not omit to make it without gravely imperilling the interests of his client, and would in fact not be discharging his duty to his client unless he made it.

A word of caution for lawyers in India.

At the same time while Advocates ought not to abuse their privilege, a pleader must use a certain amount of commonsense and caution in asking defamatory questions to witness. If he puts defamatory questions to a witness with utter recklessness and without seeing whether there is any truth in them with a view to injure the reputation of the witness publicly rather than for the proper conduct of his case, he acts in bad faith and is not entitled to claim privilege.[2]

Cross-examination of witness should not be scandalous.

It is unfortunate, however, that in this country cross-examination is allowed to be carried on to the extent which can only be described as scandalous with the result that Courts are avoided by respectable people and the administration of justice suffers thereby and the Bar gets into greater and greater disrepute.[3] It is the duty of the Court to see that not only such questions should not be answered but that they should not be asked.

Aggrieved defamed witness; steps against advocate etc.

The steps which an aggrieved witness cruelly defamed has got to take are firstly, to find out whether the questions put to him by the advocate were on instructions by the accused client or were put by the advocate without instructions and on his own volition.

In cases where the client-accused alone is proceeded against on account of the reply notice given by the lawyer intimating that what he did was on instructions that notice will have to be filed.

Reply notice of lawyers.

In this connection a strange misconception seems to prevail that the reply notice of the lawyer or his stating that what he did was in accordance with the instructions or not in excess of his instructions, is a breach of the provisions of Sec. 126, Evidence Act. Section 126 has been enacted for the protection of the client and not of the lawyer. The privilege is the privilege of the client and not of the legal adviser. The latter is therefore bound to claim the privilege unless it is waived by his client expressly under Sec. 126 or impliedly under Sec. 128, e.g. by examining the legal adviser as to the privileged communication. The privilege applies to all communications, oral or

Privilege is of client.

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1. Modennell *v.* Emperor, A.I.R. 1925 Rang. 345 ; Anwaruddin *v.* Fatim Bai, A.I.R. 1927 Mad. 379; I.L.R. 50 Mad. 667 : 52 M.L.J. 269 : 25 M.L.W. 295 : 1927 M.W.N. 164 and M. Banerjee *v.* Anukul Chandra, A.I.R. 1927 Cal. 823.
2. Fakir Prasad Ghose *v.* Kripa Sindhu Pal Bhutti, A.I.R. 1927 Cal. 303 : I.L.R. 54 Cal. 137 : 101 I.C. 600.
3. *See* the opinions of eminent Indian lawyers Mahatmaji, Pandit Motilal Nehru, President Rajendra Prasad collected in *Magisterial and Police Guide*, Vol. I, by Ramaswami, Judge, Madras High Court.

documentary, in the course of and for the purpose of the employment as legal adviser and the privilege continues throughout and does not get terminated by the termination of the litigation or the death of the parties.

Rule under Sec. 126, Evidence Act ; scope.

This rule, however, covers only the private and confidential communications between the client and the lawyer. It does not however, preclude the lawyer from replying to the opposite-party who wants to proceed against him from stating that what all he did was in pursuance of the instructions given to him and not on his own volition. The rule under Sec. 126, Evidence Act cannot cover the case of a lawyer acknowledging a notice given to him and replying that what he did was only a pursuance of his instructions and nothing more.

In this connection three decisions have been relied upon by the Courts below for drawing the inference that the lawyer Mr. Sundaresa Ayyar in this case could not be allowed to state that the questions put by him were under instructions, viz. *Palaniappa Chettiar* v. *Emperor*,[1] *Saukhi Gope* v. *Uchit Rai*[2] and *K. Appaya* v. *Rama Subbayya*.[3]

In *Palaniappa Chettiar* v. *Emperor*,[4] Revision to the High Court was disposed of by Burn, J., with more than his customary brevity as follows :

> "The learned Magistrate ought not to have allowed the accused's vakil to depose to the instructions given to him for the purpose of the accused's case; Sec. 126, Evidence Act, is an absolute bar."

This observation of Burn , J., can hardly be described with the greatest respect, as well reasoned.

In this connection it must be borne in mind that the responsibility of a lawyer for putting defamatory questions is different from the responsibility of the client-accused for putting the questions. This has been made clear by Bardswell, J., in *Bashyam Ayyangar* v. *Andal Ammal*.[5]

> "Where.....there is no allegation, and much less proof, that the pleader in putting the questions was actuated by any motive of private malice and was not acting in the interests of his client, the pleader is entitled to the benefit of Exception 9 of Sec. 499, I.P.C., and the charge which imputes no ill-faith but merely refers to the questions as having been put unnecessarily cannot stand...."

Scope of lawyers privilege.

The scope of a lawyer's privilege as stated by Wallace, J., in *Anwaruddin* v. *Fatim Bai*[6] was applied. Similarly, Newsam, J., in *Seshagiri Rao* v. *Sadulla*,[7] held that in regard to a question put by an advocate in the course of re-cross-examination to the complainant...the presumtion is that it was asked under instruction and good faith and the advocate is privileged. Pearson and M.C. Ghose, JJ., held in *Narayan Chandra* v. *Harish Chandra*,[8] that a pleader asking the questions in cross-examination under instructions from his client is protected from a charge under Sec. 500, I.P.C. Similarly. Banker and Broomfleld, JJ., in *Tulsidas* v. *Billimoria*,[9] held

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1. 1935 M.W.N. (Cr.) 76.
2. A.I.R. 1948 Pat. 56.
3. A.I.R. 1950 Mad. 537.
4. 1935 M.W.N. (Cr.) 76.
5. 1934 M.W.N. (Cr.) 81.
6. A.I.R. 1927 Mad. 379 : 52 M.L.J. 269 : I.L.R. 50 Mad. 667 : 25 M.L.W. 295 : 1927 M.W.N. 164.
7. 1937 M.W.N. (Cr.) 243 (1).
8. A.I.R. 1933 Cal. 185 : 144 I.C. 935.
9. A.I.R. 1932 Bom. 490 : 34 Bom. L.R. 910 : 139 I.C. 274.

that in practice the Courts ought to presume that the advocate who made the defamatory statement acted in good faith and upon instructions and ought to require the other party to prove express malice.

Quite different would be the case in the case of a party accused who claimed the benefit of Exception 9 to Sec. 499, I.P.C., and he has to prove that he made the imputation in good faith for the protection of his interest (per Rajamanner, J.) in *Anthoni Udayar* v. *Velusami Thevar*[1], and the truth of the imputation need not be proved by an accused person claiming the privilege of the Exception.[2]

The immunity from disclosure which can be claimed by a client in respect of a communication made to his lawyer is not absolute but limited in its scope and Sec. 126, Evidence Act, prescribes these limits.[3]

3. Illustrations.—The Illustrations should be read in connection with the proviso. As to Illustration (*c*) see *Brown* v. *Forster*[4]. The substitution of "illegal purpose" for "criminal purpose" in the first portion of the proviso by the amending Act (XVIII of 1872) carries the principle somewhat further than what can be said to be established law in England but is in conformity with the expressed opinion of several able Judges. In *Russell* v. *Jackson*[5], Turner, V.C., said : "I am very much disposed to think that the existence of an illegal purpose would prevent any privilege attaching to the communications. Where a solicitor is a party to a fraud, no privilege attaches to the communications with him upon the subject; because the contriving of a fraud is no part of his duty as solicitor... In *Follet* v. *Jefferys*,[6] Rolfe, V.C. observed... no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor".[7]

Can the barrister, attorney, etc. be asked whether the communication was or was not made in furtherance of an illegal purpose? "It seems," says Mr. Taylor, "that the legal adviser cannot be aksed whether the conference between him and his client was for a lawful or an unlawful purpose; though if from independent evidence it should clearly appear that the communication was made by the client for a criminal purpose... it is submitted that on the broad principles of penal justice, the attorney would be bound to disclose such guilty project."[8] Having regard to Sec. 132 *post* and to the general tenor of the whole Act, it may be doubtful whether an answer to the question would not be compelled in India.

4. Privilege under the section is only a qualified one.—The privilege stated in Sec. 126 of the Evidence Act is only a qualified one. The proposition receives support from the illustration to Sec. 126 itself.

The illustrations make it clear that it is not all professional communications that are privileged and are protected from disclosure. The communication which is made to a lawyer must be in course, and for the purpose, of employment as such. A question put to a witness in cross-examination which might injure his character though permissible under Sec. 146 (3) of the Indian Evidence Act with a view to shake his credibility, nonetheless, there must be a reasonable ground for

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1. A.I.R. 1948 Mad. 469 : (1948) 1 M.L.J. 420 : 1948 M.W.N. 413 (2) : 49 Cr.L.J. 724.
2. Karpuppana Goundan *v.* Kuppuswami Mudaliar, 1935 M.W.N. Cr. 69 (Pandurang Row, J.) ; Ayesha Bai *v.* Peerkhan Sahib, A.I.R. 1954 Mad. 741 at pp. 745, 753.
3. K.C. Sonrexa *v.* State of Uttar Pradesh, A.I.R. 1963 All. 33 at p. 36.
4. 1 Hurlstone and Normans Rep. 736.
5. 9 Hare's Chancery Rep. 392.
6. 1 Simon's Chancery Rep. N.S. 17.
7. *See* also Kelly *v.* Jackson, 13 Ir. Eq. Rep. 129 and Queen *v.* Cox and Railton, L.R. 14 Q.B.D. 153, where the question was discussed and the same principle affirmed.
8. Section 833; Sec. 912, 8th Ed.

putting a question which is defamatory in character and if there is no basis for putting such questions, then it is difficult to state that such a communication is a professional communication and its disclosure is protected under Sec. 126 of the Indian Evidence Act without the express consent of his client.[1]

5. Professional communication—Pleader and client—English and Indian law.—It is clear from Sec. 126 of the Indian Evidence Act that the privilege in respect of professional communications is intended only to protect the interests of a client in respect of any action or prosecution for any prior act or offence. The privilege is not intended for committing any offence.[2]

The law relating to professional communications between a solicitor and client is the same both in England and India.[3] Hence, in interpreting this section, the Court may rightly refer to English cases.[4]

When a barrister, solicitor or attorney is professionally employed by a client, all communications which pass between them, in the course and for the purpose of the employment, are so far privileged that the legal adviser cannot be permitted to disclose them.[5] From the similarity between the words above italicised and corresponding words in this section it appers that the law on this point is the same in India as in England.[6] Such a statement volunteered by a pleader is inadmissible in evidence, even if offered on oath.[7]

6. Who are within the rule.—The above section only mentions barristers, attorneys, pleaders and vakils. At one time there was a question how far the privilege will extend to so-called legal practitioners in this country, who do not fall within the above enumeration. That *mukhtears* are not wihin the rule was decided by the Calcutta High Court.[8]

In *Abbas Peada* v. *Queen-Empress*,[9] it was decided that this section applies to *mukhtears* also. The protection is in England extended to interpreters, intermediate, agents, attorneys, town or local agent or clerk, foreign counsel, and even to a gentleman sent out to India to act as a solicitor's agent in collecting evidence respecting a pending suit. There is no protection afforded by the Evidence Act to a doctor as such. When a doctor is called to give evidence it is his duty to disclose to the Court all the information in his possession relevant to the matter in issue.[10]

No protection afforded to a doctor

In the instant case, the will came in the hands of the pleaders in the course of their professional employment in connexion with the succession certificate.

Will.

Held that Sec. 126, Evidence Act, applied and that the evidence as to the contents of the will to be given by the two pleaders concerned was properly excluded.[11]

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1. Deepchand *v.* Sampathraj, A.I.R. 1970 Mys. 34 at pp. 36-37 : (1969) 1 Mys. L.J. 606.
2. S. Antony *v.* G.S. Naidu, A.I.R. 1967 Mad. 395 at pp. 395-96 : (1966) 2 M.L.J. 443.
3. Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263.
4. *See* the judgment of Westropp, C.J. and Sargent, J., in Memon Hajee Haroon Mohammad *v.* Molvi Abdul Karim, I.L.R. 3 Bom. 91, cited in Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263 at p. 271.
5. Taylor's *Evidence*, Sec. 832 (Ed. 1864), cited in Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263 at p. 279; *Ex parte* Campbell, *In re*, Cathcart, L.R. 5 Ch. 703 ; Parkhurst *v.* Lawton, 2 Siv. 194.
6. *Per* Fulton, J., in Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263 at p. 279.
7. P.J.L.B. 358.
8. Queen *v.* Chandrakant Chakravarti, 1 B.L.R.A. Cr. 8 and *see* 9 W.R. (Cri.) Letters 10.
9. I.L.R. 25 Cal. 736.
10. Mrs. Edna May Oliva Hardless *v.* Mr. Harold Richard Hardless, A.I.R. 1933 All. 56 at p. 57 : 1932 A.L.J. 385 : I.L.R. 54 All. 553.
11. Bai Kanta *v.* Bhailal Ghelabhai Amin, A.I.R. 1929 Bom. 414 at pp. 414-16 : 31 Bom. L.R. 1046.

Public communication between a public prosecutor and lawyer is no privilege.

In the matter of the petition of Belleleo's[1], the contention that communications between a prosecutor in a Crown case and his attorney were not privileged, and this contention was accepted by the Court. Generally speaking, this proposition is correct. It is hardly conceivable that a prosecutor can make any communication to a pleader appearing for him which is confidential, and which is at the same time made for the purpose, and in the course of the employment of the pleader as such. If a prosecutor applies to his legal adviser for advice intended to avoid a fair trial and to guide him how to give false evidence or to commit any other crime or fraud leading to the conviction of the accused, the communication made by the prosecutor for that purpose is in no sense privileged. It comes within the principle affirmed in the leading case of *R.* v. *Cox.*[2]

Foundation of proviso 2 of Sec. 126, Evidence Act—Principle.

"That communications made in furtherance of any criminal or fraudulent purpose are not privileged."

It is this principle which forms the foundation of proviso 2, Sec. 126.[3]

7. Privilege of salaried legal advisers.—The law relating to discovery was developed by the Chancery Courts in the first half of the 19th century. At that time nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times, it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the Court. They must respect the same confidence. They and their clients have the same privileges. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege.[4]

In the recent past a practice of employing legal advisers who are well qualifed in law has grown up. Instead of going to the professional lawyers every now and then a practice has come into operation to retain the lawyers in full time employment of the Corporation. Their nature of duty is to advise their employers on the questions which are of a legal character. They advise their employers on all matters pertaining to law and litigation. Their nature of duties is the same as that of barrister, pleader, vakil, or attorney except that they do not appear in Courts. If it is so, then one does not see any reason why they should not get same protection of law as the other legal advisers who appear in Courts of law. In Court's opinion, therefore, a paid or salaried employee who advises his employer, on all questions of law and relating to litigation, must get the same protection of law and therefore any such communication made in confidence by his employer

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1. (1873) 12 Beng. H.C.R. 249.
2. (1855) 14 Q.B.D. 153 : 54 L.J.M.C. 41 : 52 L.T. 25 : 33 W.R. 396 : 15 Cox. C.C. 611 : 49 J.P. 374.
3. Bhagwani Choithram *v.* Deooram, A.I.R. 1933 Sind 47 at p. 49.
4. Alfred Crompton Amusement Machines Ltd. *v.* Commissioners of Customs and Excise (No. 2), 1972—2 All. E.R. 353 at p. 376 (C.A.).

to him for the purpose of seeking legal advice or *vice versa* should get protection of Secs.126 and 129 of the Evidence Act. It is, therefore held that a salaried employee who advises his employer on all legal questions and also other legal matters would get the same protection as others under Secs. 126 and 129 of the Evidence Act and even otherwise these communications are properly covered by these sections.[1]

8. Admissibility of evidence though unlawfully obtained.—The mere fact of papers and other subjects of evidence having been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, constitutes no valid objection tc their admissibility, provided they be pertinent to the issue.[2]

9. Same attorney by two parties.—Where the same attorney is employed by two parties, the test is—"Was the communication made by the party to the witness in the character of his own exclusive attorney?" If it was, the bond of secrecy is imposed on the attorney called as a witness; if it was not, the communication will not be privileged. If an attorney, acting for both parties, has an offer made to him by the one for communication to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party. But if an attorney, acting for one party by the direction of his client, makes a proposal to the opposite party, though he may be compelled to disclose what he stated to that party, he cannot divulge what his own client communicated to him. Thus, in *Memon Hajee Haroon Mohammad* v. *Molvi Adbul Karim*[3], in which the defendants, at an interview at which the plaintiff was present, had admitted their partnership to their attorney who was then also acting as attorney for the plaintiff, it was held that the attorney was not precluded from giving evidence of this admission to him.[4]

10. To what communications does the privilege extend.—The privilege extends only to communications made to an attorney confidentially and with a view to obaining professional advice.[5]

Communication made before creation of clients-advocate relationship.

There is no privilege to communications made before the creation of relationship of pleader and client. Further, where two persons have a dispute about a claim made by one of them upon the other, and both seek the help of a pleader, the statement to the pleader by one of the parties is certainly admissible.[6] The question arises, was the communication or admission made by the plaintiff to the witness in the character of his own exclusive pleader or legal adviser? If it was so, the bond of secrecy is upon the witness; and if it was not, the communication was not privileged.[7] It may be mentioned further that to be privileged under Sec. 126, Evidence Act, a communication by a party to his pleader must be of a confidential nature.[8]

What communications are privileged.

It is well settled that the privilege protects only such communications as are made to the legal adviser in confidence, in the course and for the purpose of his employment. It is true that the section does

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1. Municipal Corporation of Greater Bombay *v.* Vijay Metal Works, A.I.R. 1982 Bom. 6 at p. 9.
2. *See* Bakaullah *v.* Debiruddi, 16 C.W.N. 741.
3. I.L.R. 3 Bom. 91.
4. *See In re* Attorney, 26 Bom. L.R. 837 (F.B.) : 84 I.C. 353 (Bom.)
5. Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263.
6. *See* Shore *v.* Bedford, (1843) 5 Man. & G. 271 : 12 L.J.C.P. 138.
7. *See* Perry *v.* Smith, (1842) 9 M. & W. 681 : 11 L.J. Ex. 269.
8. *See* Memon Hajee Haroon Mohammad *v.* Molvi Abdul Karim, I.L.R. 3 Bom. 91 ; *see* also Kalikumar Pal *v.* Rajkumar Pal, A.I.R. 1932 Cal. 148 at p. 149 : I.L.R. 58 Cal. 1379 : 136 I.C. 476.

not say in express words that the communication should be made in confidence. But as pointed out in *Memon Hajee Haroon Mohammad* v. *Molvi Adbul Karim*,[1] the word "disclose" shows that the privileged communication must be confidential or private. That is no doubt the law in England and has been stated in *Wheeler* v. *Le Merchants*[2] thus :

> "What is protected is the communication necessary to obtain legal advice. It must be communication made to the solicitor in that character and for that purpose".

Extent of protection.

There is equally little doubt that the law in India is the same as is said in *Framji Bhicaji* v. *Mohansing Dhansing*.[3]

A communication to an attorney to be privileged must be of a confidential or private nature. Communications to an attorney made in the presence and hearing of the opposite-party, or made to the attorney not exclusively in his character as attorney of the party making it, but addressed to him also as attorney of the opposite-party, is not privileged.[4]

Communication to be of a confidential nature.

The application was for issue of summons to the lawyer for accused 6 to produce certain letters written by accused 1 to accused 6, alleged to be in his possession. *Held* that *prima facie* those letters are not privileged communications by accused 6 to his lawyer under Sec. 126, Evidence Act.[5]

The fact of the communication having been made in the presence of others does not destroy the privilege when the persons present are friends of the person making the communication although it may be evidence of the communication not having been made in confidence.[6]

Where the accused is charged under Sec. 500, I.P.C., for publishing certain imputation concerning the complainant to his pleader who put it in Court in the presence of his client no possible question under Sec.126, Evidence Act, can arise.[7]

Section 126 has no application where the statement made by a client to his solicitor is made, not as confidential but for the purposes of communication.[8] Documents in the nature of notes for the briefs and proofs for counsel should ordinarily be considered privileged. If the documents fall short of this, they should, as a general rule, be disclosed.[9] An attorney may be compelled to divulge the character in which his client employed him.[10] Although the pleader is bound to disclose the fact of professional employment, the nature of the business cannot be revealed.[11]

Liberty to disclose character of employment.

In *K.C. Sonrexa* v. *State of U.P.*,[12] it was held that the right given to a client under Sec.126 of the Evidence Act is restricted in its operation to the purpose of

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1. I.L.R. 3 Bom. 91.
2. (1881) 17 Ch.D. 675 : 50 L.J. Ch. 793 : 44 L.T. 632 : 45 J.P. 728.
3. I.L.R. 18 Bom. 263 at p. 279.
4. Memon Hajee Haroon Mohommad *v.* Molvi Abdul Karim, I.L.R. 3 Bom. 91.
5. Public Prosecutor *v.* M.S. Menoki, A.I.R. 1939 Mad. 914 at p. 914.
6. Bhagwani Choithram *v.* Deooram, A.I.R. 1933 Sind 47 at p. 48.
7. Miss Rebecca Mondal *v.* Emperor, A.I.R. 1947 Cal. 278 at p. 279 : 50 C.W.N. 545.
8. 5 Bom. I.R. 122.
9. Story *v.* Lord John George, 1 My. & C. 525 ; Kerr. *v.* Gellespie, 7 Beav. 572; English *v.* Tottie, 1 Q.B.D. 141, cited in 7 Bom. L.R. 709 at p. 710.
10. *See* Beekwith *v.* Benner, 6 C. & P. 688, cited in Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263 at p. 280, but see Chirac *v.* Reinicker, 11 Wheat 890.
11. Chirac *v.* Reinicker, 11 Wheat 890, cited in I.L.R. 18 Bom. 263 at p. 280.
12. A.I.R. 1963 All. 33 at p. 37.

defending him or presenting his case and the protection extends no further. It was held in that decision that the defematory imputation in the instructions to the advocate would not be a privileged communication as the case would fall under proviso (*i*) to Sec. 126 of the Evidence Act.

It is clear that the privilege of a party to make a defamatory statement in proceedings in Court or to make defamatory suggestions to witness is not an absolute one under the Indian Penal Code. The accused, who made the false accusations without any good faith, cannot claim the privilege under Sec. 126 of the Evidence Act.[1]

11. In the course of and for the purpose of professional employment.—It is not every communication made by a client to any attorney that is privileged from disclosure. The privilege extends only to communication made to him confidentially, and with a view to obtaining professional advice.[2] Where a solicitor claims privilege under this section, he is bound to disclose the name of his client, on whose behalf he claims the privilege. The mere fact the client's name had been communicated to him, by another client affords no excuse, unless it was communicated to him confidentially, on the express understanding that it was not to be disclosed.[3]

The very section would show that, the communication should have been made in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil on behalf of the client. The communication should have been while the relationship of attorney and client subsisted. Here, all that PW-14 said is, he is residing about half a kilometer away from the burial ground and that at about 11 p.m. on 13th Feb. 1989 the accused came to his house. The witness was not cross-examined. *Held* the said piece of evidence will not fall under Sec. 126 of the Evidence Act.[4]

Nature of professional employment.

But a solicitor is not at liberty, without his client's express consent, to disclose the nature of his professional employment.[5]

Solicitor's privilege and order for disclosure.

If there are documents in the possession of control of a solicitor which, on production, help to further the defence of an accused man, then no privilege attaches. One cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown. However, this principle must be restricted to particular facts in a criminal trial.[6]

At an interview between a solicitor and a client, the solicitor took down a certain statement made by a person named *AB*, who was in his client's company and whose name was communicated to him in the course and for the purpose of his professional employment. *AB* was afterwards tried for defamation. At the trial the solicitor was called as a witness for the prosecution. *Held* that (*a*) the solicitor was bound to disclose the name of the client, (*b*) he was bound to disclose the name of the person who accompanied the client and made a statement to him, and (*c*) he was not bound to disclose the matter in which the client employed him.[7]

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1. S. Antony *v.* G.S. Naidu, A.I.R. 1967 Mad. 395 at p. 396 : (1966) 2 M.L.J. 443.
2. Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263.
3. Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263.
4. V. Ravi *v.* State of Kerala, 1994 Cr.L.J. 162 at p. 169 (Ker.) (D.B.).
5. Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263.
6. R. *v.* Barton, (1972) 2 All. E.R. 1192 at p. 1194 (C.C.)
7. Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263.

A communication to pleader or attorney is not privileged unless made in the course of and for the purposes of his employment.[1]

Extent of privilege instruction to lawyers of client.

Instructions to counsel are only privileged in the sense of being protected from disclosure to the opponent; there is no privilege against the Court; the latter for the purposes of trial, would have to treat them as confidential, but they could be called for then and there and be used after the trial for determining whether disciplinary action should be taken against the counsel. The Court is entitled to ask the counsel, who during the conduct of a case makes charges for misconduct, whether he makes the charges on instructions, and if so on whose.[2]

Advocate learning the manufacture process in his employment as a lawyers, etc.

In the course of his employment to defend certain manufacture of a substance called *banslochan* against a charge of creating a nuisance in the process of manufacture, the process in question was shown to the vakil engaged by the manufacturers. *Held* that such a vakil could not afterwards, being *subponeaed* as a witness for the applicant in an application for revocation of patent against the same manufacturers, be compelled to disclose what he had learned of the process in the course of his former employment.[3]

Plaintiff sought to prove that defendant was his *benamidar* in respect of certain property and for that purpose examined defendant's pleader in a previous suit to depose that the dependent had informed him that he was plaintiff's *benamidar*. *Held* that the statement of the pleader, having been made without his client's consent, was inadmissible in evidence under this section.[4]

Disclosure by an attorney.

The obligation to keep undisclosed matters which ought not to be disclosed, continues after the employment of the attorney has ceased and has nothing to do with the question whether at the time when the communications were made there was any pending litigation or any prospect of it. When an attorney is engaged by two persons, he cannot disclose anything without the consent of both the clients.[5]

Exceptions to the rule.

The protection does not cease with the termination of the suit or business in which the communication was made, nor yet with the death of the client. Where, however, the client who made the communication is dead, and the litigating parties both claim under him, either of them can call the attorney as a witness. Other exceptions, which have been recognized by English law are—where the knowledge was not acquired by the attorney solely by his being employed professionally, but was in some measure obtained by his acting as a party, more especially, if the transaction were fraudulent;—where the communication was made before the attorney was employed as such, or after his employment had ceased;— where it had no reference to professional employment;—and all cases in which the attorney was acting not as such, but in some other character, as, for instance, in that of a subscribing witness. There is also no privilege where unnecessay communications have been made by the client. An attorney or other legal advisor may also be called to prove his client's handwriting, or to identify him as the person who verified a plaint or executed a *mukhtarnama or vakalatnama;* but he cannot be asked whether a document entrusted to him was duly stamped or had an erasure upon it.

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1. Emperor *v.* Bala Darona, 4 Bom. L.R. 460 ; Emperor *v.* Rodrigues, 5 Bom. L.R. 122.
2. Donald Weston *v.* Peary Mohan Dass, I.L.R. 40 Cal. 898.
3. Gopi Lal *v.* Lakhpat Rai, I.L.R. 41 All. 125.
4. Bakaulla Mollah *v.* Debiruddi Mollah, 16 C.W.N. 741.
5. *In re* an Attorney, 26 Bom. L.R. 887 (F.B.)

12. The privilege embodied in Sec. 126 is not liable to melt down on the principle of waiver or acquiescence.—The privilege embodied in Sec. 126 of the Evidence Act is not liable to melt down on the principle of waiver or acquiescence. This can be more understood from Sec. 128 of the Act which says that by giving evidence, a party shall not be deemed to have consented to such disclosure as is mentioned in Sec. 126. It is only when the party calls such advocates as witness that the party shall be deemed to have consented to such disclosure, that too only if he questions the witness about it. Section 126 uses strong language in imposing the prohibition. No advocate "shall at any time be permitted" to disclose such communication "unless with his client's express consent". A failure on the part of the client to claim privilege cannot be stretched to the extent of amounting to "express consent" envisaged in the provision.[1]

The privilege is that of the client : he may expressly waive it, or he may do so by calling the barrister, pleader, attorney or vakil as a witness, and questioning him on matters which, but for such question, he would not be at liberty to disclose. But he does not lose the privilege by giving evidence in the suit at his own instance, or if he be compelled to give evidence at the instance of another party (Sec. 128). The fact that portions of privileged letters had been read to the defendant's solicitor, was no waiver of the privilege as regards the parts which were not read.[2]

A failure on the part of a client to claim privilege when he is under cross examination does not amount to "express consent", given by him to his legal adviser to disclose a privileged communication.[3]

Mr. Taylor remarks that "the rule of protection was for many years laid down in less broad terms, where the client himself was the party interogated. It was, indeed, long since established that, in that event all communications between the solicitor and client, whether pending and with reference to litigation, or made before litigation and with reference thereto, or made after the dispute between the parties followed by litigations, though not in contemplation of, or with reference to, that litigation, were protected; as also were communications made respecting the subject matter in question pending or in contemplation of litigation the same subject with other persons with the view of asserting the same right"[4]....Mr. Taylor goes on to add that this doctrine was propounded in the case of *Radcliffe* v. *Fursman*[5], but although that decision was afterwards disapproved of by almost every Judge under whose notice it was brought, it was still reluctantly followed till the year 1873, when Lord Chancellor Selborne had the hardihood to set it at nought in the important case of *Minet* v. *Morgan*.[6]

In *Munchershaw Bezonji* v. *New Dhurumsey Spinning and Weaving Company*,[7] the defendants relying on *Radcliffe* v. *Fursman*,[8] endeavoured to make plaintiff produce a case laid by him before counsel as to one of the matters in question in the suit before the litigation had begun. But West, J., following *Minet* v. *Morgan*[9] declined to order the production of the paper.

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1. Mandesan *v.* State of Kerala, 1995 Cr.L.J. 61 at pp. 62-63 (Ker.) (D.B.).
2. Kay *v.* Poorunchand, I.L.R. 4 Bom. 681.
3. Bhagwani Choithram *v.* Deooram, A.I.R. 1933 Sind 47 at p. 48.
4. Sections 845, 924, 8th Edition.
5. 2 Brown's Parliamentary cases, 514.
6. L.R. 8 Ch. App. 361 ; Sec. 846 ; Sec. 925, 8th Ed.
7. 4 Bom. 576.
8. 2 Brown's Parliamentary cases, 514.
9. L.R. 8 Ch. App. 361.

See, in connection with this section, the explanation to Sec. 23, *ante*.

13. Privilege to successors.—It is clearly established that legal professional privilege of a predecessor-in-title does enure for the benefit of his successor. This is so stated in 12 Halsbury's *Laws of England*, (3rd Ed). pp. 41, 49 and correctly so. Of course where the documents change hands before the ultimate recipient acquires title the privilege may on the particular facts be lost. It is also well established that where a communication which would otherwise be within the protection of legal professional privilege is made in preparation for or in furtherance of a crime or fraud privilege does not attach.[1]

14. Solicitor if bound to disclose place of residence of client.—A solicitor refused to disclose the place of residence of his client, because he said it came to his knowledge in consequence of the professional employment in which he was engaged on his behalf. *Held* that it was not sufficient to protect the solicitor from answering.[2] The client's place of residence, in the above case, was a mere collateral fact. But if the client's residence has been concealed, if he was in hiding and the solicitor knew the residence because he had communicated it to him confidentially, as his solicitor then the client's residence would be a matter of professional confidence.[3] The attorney's knowing that his client is at one place and not at another, at a certain time, is a fact of which any other man would have known if he and the client were equally conversant.[4]

15. What documents are privileged.—A document, in order to be privileged, must have come into existence, for the purpose of being communicated to the solicitor with the object of obtaining his advice.[5] Any document expressly collected for purposes of litigation is privileged.[6]

Under the Evidence Act, in regard to certain documents, when they are absolutely privileged, the Court has no power whatever to order production.[7]

16. Privilege relating to instructions of the client for making compromise.—The Motor Accidents Claims Tribunal is not justified in sending for the file relating to compromise, becuase the communication between the counsel for the Insurance company and the Insurance Company is privileged and nobody can be compelled to disclose the communication.[8]

17. Register containing instructions given by lawyer's client.—In the instant case, the State filed an application under Sec. 14 of the Official Secrets Act praying that apart from excluding the public from the hearings of the proceeding, the accused should not be allowed to have access to, or be given copies of, the statements of the witnesses recorded by the Magistrate or those recorded earlier during police investigation. The Magistrate permitted the defence lawyer to take copious notes of the statements of witnesses in order to be in a position to cross-

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1. Crescent Farm, (Sidcup) Sports Ltd. *v.* Sterling Offices Ltd., (1971) 3 All. E.R. 1192 at p. 1198-1199 (Ch.D.).
2. *Ex parte* Campbell, *In re* Cathcart, L.R. 5 Ch. 703, cited in Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 263 at p. 272.
3. *Ibid*.
4. Greenough *v.* Gaskell, 1 Myl. & K. 96, cited in Framji Bhicaji *v.* Mohansing Dhansing, I.L.R. 18 Bom. 269 at p. 276.
5. Southwark and Vauxhall Water Co. *v.* Quick, L.R. 3 Q.B.D. 315 at p. 323 ; Friend *v.* London, Chatham and Dover Ry. Co., 2 Ex.D. 437, cited in Bipro Doss Dey *v.* Secretary of State for India in Council, I.L.R. 11 Cal. 655 at p. 657.
6. 7 Bom. L.R. 709 at p. 710.
7. 7 Bom. L.R. 709.
8. R. Ramalingam *v.* P.R. Thakur, A.I.R. 1982 Delhi 486 at p. 487.

examine the witnesses. Subsequently, the Magistrate directed the lawyer to produce his notebook so that the Magistrate may examine if only a summary of the evidence had been taken by the lawyer or the statements had been taken *in extenso* in which case it would amount to publication and, therefore, would be barred by Sec. 14 of the Act. The lawyer of the defence appearing before the Magistrate first agreed to show his notebook but later claimed privilege under Sec. 126 of the Evidence Act on the ground that the register in which he had taken down the notes of the evidence also contained certain instructions given to him which amounted to a privileged communication and could not be looked into by the Court. In this view of the matter the Magistrate with the inquiry found himself helpless and proceeded with the inquiry. The High Court came to a finding that the Magistrate should have taken legal action against the lawyer for flouting the orders of the Court by not producing the notebook on the plea of privilege which did not hold any water. The Supreme Court held:

> "That there was absolutely no impropriety on the part of the Magistrate in not taking action against the defence lawyer for his refusal to show his register because the lawyer had rightly claimed privilege under Sec. 126 of the Evidence Act as the register contained instructions given by the client which being privileged could not be disclosed to the Court. On a parity of reasoning we find no impropriety on the conduct of the lawyer in refusing to show the statement of witnesses recorded by the Court *in extenso* in order to prepare himself for an effective cross-examination of the witnesses. Hence the strictures passed by the High Court on the Magistrate as also on the lawyer of the defence were in our opinion, totally unwarranted."[1]

18. Privilege in relation to internal memoranda passing between accounts department and other departments.—In *Alfred Crompton Amusement Machines Ltd.* v. *Commissioners of Customs and Excise*,[2] it was held as under :

> "I ask myself, : can the commissioners properly claim legal professional privilege for these internal documents? I think they can. It is true that the documents were not obtained solely or merely or principally for the solicitors. They were obtained primarily in order to enable the commissioners to form their own opinion of the justice of the company's claim to deductions. But, at the same time, they were obtained as material to place before the solicitor if it came to a right, as the commissioners anticipated that it might. That is, I think, sufficient within such authorities as *Southwark Water Co.* v. *Quick*[3] ; *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North Western Railway Co.*[4] and *Seabrook* v. *British Tranport Commission.*[5] The case seems to me very like a case where the head office of a company is concerned with the way a branch manager is handling its moneys, and instructs its accounts department to look into it, realising that, if the investigation should disclose irregularities, the matter will have to be placed in the hands of their solicitor. In such a case the internal memoranda passing between the accounts department and the other departments in the course of the investigations would be privileged, just as the minutes of the sub-committee in *Bristol Corpn* v. *Co.*[6] which were also

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1. Superintendent and Remembrancer of Legal Affairs West Bengal *v.* Satyen Bhowmick, 1981 Cr.L.J. 341 at p. 342 (S.C.).
2. (1972) 2 All. E.R. 353 (QBD).
3. (1878) 3 Q.B.D. 315.
4. (1913) 3 K.B. 850.
5. (1959) 2 All. E.R. 15 : (1959) 1 W.L.R. 509.
6. (1884) 26 Ch.D. 678.

internal memoranda made in prospect of litigation. But the actual invoices and accounts which came into existence before the investigation would not be privileged; even though the accounts department asked for them, *see* the observations of Mellish, L. J., in *Anderson* v. *Bank of British Columbia*.[1]

19 . Privilege in relation to proceeding before industrial tribunal.—General guidance as to privilege is contained in the note in the County Court Practice or order XIV of the County Court Rules, 1936.

Counsel for the respondent has drawn the attention of the Court to a particular paragraph in the note to CCR Order XIV rule 5.[2] It appears under the main heading, "Communications with agents with a view to litigation" and continues : "Communications not only with legal advisers, but with other agents, with an actual view to litigation in hand, and the mode of conduct of it also are privileged.[3]"

Before industrial tribunals, it is the rule, rather than the exception, for parties to be represented by persons other than lawyers. Indeed, it is the policy of Parliament to encourage such representation. If the law to be applied to industrial tribunals were not as stated in the note. In the County Court Rules, the position would arise that, for example, a personnel officer, when examining as a witness a works foreman, could, at the end of the works foremen's ecidence, be called on to hand over the proof of evidence from which he had been examining the witness. Obviously, that would be a wholly untenable situation. Accordingly, it is ruled that if and insofar as the general law applicable to all Courts does not give the privilege set out in the note in the County Court practice, then, in the interests of the administration of justice privilege exists in relation to proceedings before an industrial tribunal. The Court would, however, draw attention to the fact that it is a limited privilege. It exists only in relation to communications with an actual view to the litigaion in hand and the mode of conduct of it. It does not exist in relation to the situation at the time when the matters complained of were arising.[4]

20. Privilege attaching to medical reports made on the advice of legal advisers.—The case of *Worrol* v. *Reich*[5] appears to be clear authority that medical reports made on behalf of either party on the advice of their legal advisers and for the purpose of preparing their case at the trial are privilege documents. Such documents are by well recognised principles privileged. However, desirable it may be that there should be agreements between the parties for the disclosure and exchange of such documents, in the absence of an agreement or waiver of the privilege which would otherwise attach to them they remain privileged. In the present case the plaintiff's solicitors sought "agreement" of their medical experts' reports. To this end they produced the reports without attaching any conditions. They might have but did not attach such conditions. The defendants solicitors then saw the plaintiff's report. But that cannot without more oblige the defendants to produce their reports or amount to an agreement to produce them or to a waiver of the privilege. Therefore, it is not open to the Court to order production of privileged documents against the wish of the party claiming privilege.[6]

21. Privilege in relation to documents given to arbitrators.—Privilege has been claimed for the documents enumerated in Part 2 of the schedule, which was in the following terms :

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1. (1876) 2 Ch.D. 644 at p. 660 : (1874-80) All. E.R. Rep. 396 at p. 400 ; Alfred Crompton Amusement Machines Ltd. *v.* Commissioners of Customs and Excise (No. 2), (1972) 2 All. E.R. 353 (Q.B.D.) at pp. 378-79.
2. *See* County Court Practice, (1973) Part I, p. 422.
3. Pearce *v.* Foster, (1885) 15 Q.B.D. 114.
4. M. & W. Grazebrook Ltd. *v.* Wallens, (1973) 2 All. E.R. 868 (NIRC) at pp. 870, 871.
5. (1955) 1 All. E.R. 363 : (1955) 1 Q.B. 296.
6. Vauston *v.* Mann, Egerton (Johnsons) Ltd., (1974) 1 All. E.R. 453 at pp. 458, 459, 460.

"(*a*) Communications between the (commissioners) and their solicitor in his professional capacity and instructions to and opinions of and documents settled by counsel for the purpose of obtaining or giving legal advice or assistance ; and

(*b*) (*i*) Communications passing between the (commissioners) their officers, servants and agents and (commissioners) solicitor when arbitration between the (appellants) and the (commissioners) was contemplated or pending, the same having been prepared, sent or received confidentially for the purpose of obtaining for or furnishing to the said solicitor information or evidence to be used in such arbitration, or information as to the advice which could be obtained, or otherwise for the use of the said solicitor, to enable him to conduct, and/or advise the (commissioners) their officers, servants or agents in relation to, the said arbitraton."

The Court of Appeal[1] held that Forbes, J., was wrong in holding that there was any distinction for the purpose of a claim to legal professional privilege between solicitors in private practice and salaried legal advisers and the appellants did not challenge that view in their appeal to this House. They did, however, submit that the commissioners ought not to have "anticipated litigation" within the meaning of the rules as to legal professional privilege as early as 31st July 1967. There was not any need for the appellants to have requested a reference to arbitration at that stage. It may well be that the request was made *ex abundanti cautela* and that the appellants were hoping that they might obtain a reduction in the tax payable by a process of negotiation. But whatever may have been in their minds it does not lie in their mouth to complain that the commissioners on receipt of the letter formed the view that any value which they fixed would almost certainly be challenged and there was nothing in the subsequent correspondence to cause them to think otherwise. So even if the existence of privielge in respect of the 2 (*b*) (*i*) documents depends on the reference to arbitration having been anticipated when they were written, the Court of Appeal[2] was right in holding that the claim was made out with regard to them to as well as with regard to the 2 (*a*) documents.[3]

22. If a document is once privileged, it is always privileged.—A legal adviser is also not permitted to state the contents and conditions of documents with which he has become familiar or acqainted in the course and for the purpose of his professional employment. It is very clear from the aforesaid provision that the protection of Sec. 126 shall not extend to any communications made in furtherance of any illegal purpose or to any fact showing that a crime or a fraud is committed since the commencement of the employment, as contemplated under the proviso to Sec. 126 of the Evidence Act. However, under the Explanation to the said section, if a document is once privileged, it is always privileged. The fact that it is being inquired about in another action will not destroy the privilege. The advocate or the legal adviser cannot give evidence of a communication made to him without the express consent of his client. An advocate engaged by two parties cannot make disclosures in a proceeding between a third party and one of the

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1. Alfred Crompton Amusement Machines Ltd. *v.* Commissioner of Customs and Excise, (1972) 2 All. E.R. 353 : (1972) 2 Q.B. 102 (Q.B.D.).
2. Alfred Crompton Amusement Machines Ltd. *v.* Commissioners of Customs and Excise, (1972) 2 All. E.R. 353 : (1972) 2 Q.B. 102 (Q.B.D.).
3. Alfred Crompton Amusement Machines Ltd. *v.* Commissioners of Customs and Excise, (1973) 2 All. E.R. 1169 at pp. 1178, 1182 (H.L.).

clients without the express consent of other client though as between them, there can be no secrecy.[1]

23. **Disclosure of any fact which was already known or disclosed—Proper.**—There is abundant authority for stating that the Sec. 126 of the Act is not meant to forbid the disclosure of any fact which was already known or disclosed. A precisely same question came before Andhra High Court in, *P. Rajamma* v. *P. Chintaiah.*[2] It was held by High Court that summoning of advocate cannot be challenged on the ground that it contravenes Sec. 126 of the Act. Again in, Rev *FR Bernad Thattil* v. *Ramachandran Pillai,*[3] the same question arose and it was pointed out that whatever was written or was stated in the notice was evidently the substance which was meant for being disclosed to others and more particularly to the other side. There was nothing confidential in the contents of the notice which in fact has been communicated to the other side. The contents were no more confidential so as to claim privilege under Sec. 126 of the Act. Of course summoning of the advocate for pupose of proof of sending of the notice will not justify asking of questions which would fall within the mischief of Sec. 126 of the Act. If questions, the answers of which would enable the advocate to claim privilege under Sec. 126 of the Act, are put, it would be open to claim such privilege for such question.[4]

127. Section 126 to apply to interpreters, etc.—The provisions of Sec. 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakil.

SYNOPSIS

1. Interpreters ... 4672
2. Communication to pleader's clerks ... 4672
3. Officers of a corporation ... 4672

1. Interpreters.—This word probably means interpreters between barristers, etc. and their clients. They are in England within the privilege.[5]

2. Communication to pleader's clerk.—Although a communication contained in a letter is not addressed to a pleader direct, but to his clerk, Sec.127 extends to such a communication the same confidential character that attaches to a communication to a pleader direct under Sec. 126.[6]

3. Officers of a corporation.—Officers of a corporation through whom the Corporation makes statements are not privileged as such.[7]

128. Privilege not waived by volunteering evidence.—If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in Sec. 126; and, if any party to a suit or proceeding calls any such barrister, [8][pleader,] attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

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1. Gurunanak Provisons Stores *v.* Dulhonumal Savarmal, A.I.R. 1994 Guj. 31 at p. 34.
2. 1997 (2) And. W.R. 253.
3. 1987 Cr.L.J. 739 (Ker.).
4. P.G. Anantasayanam *v.* Miriyala Sathiraju, A.I.R. 1998 A.P. 335 at p. 336 : 1998 (2) A.L.T. 675 : 1998 (3) A.L.D. 13.
5. *See* Taylor's Evidence, Sec. 920.
6. 2 C.W.N. 649.
7. Mayor of Swansea *v.* Quirk, 5 C.P.D. 106 ; Whitley Stokes, Vol. II, p. 921.
8. Ins. by Act 18 of 1872, Sec. 10.

Comment

Waiving privilege.—The client does not "waive his privilege", says Mr. Taylor, "by calling the solicitor as a witness, unless he also examines him in chief to the matter privileged ; and even in that case, it has been held in Ireland that the cross-examination must be confined to the point upon which the witness has been examined-in-chief".[1]

With reference to the words "if any party to a suit or proceeding calls any such barrister etc," it may be observed that there was not, under the old law, and is not under the new Act, anything to prevent an attorney or other professional person who is acting as advocate for either of the parties to a suit and pleading the case in Court from being examined as a witness in the same case.[2] Such a course is, however, regarded with disfavour.

The mere fact that the plaintiffs may have waived the professional privilege which exists between client and *solicitor* does not also result in the waiver of the further privilege which protects documents brought into existence for the purpose of litigation.[3]

129. Confidential communications with legal advisers.—No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

SYNOPSIS

1. Object of the section ... 4673
2. Construction of section ... 4673
3. Scope of section ... 4673
4. Application ot section ... 4674
5. Confidential communication between client and his legal adviser ... 4674
6. Discovery and inspection of document ... 4674
7. English cases ... 4675
8. Indian cases ... 4680
9. Shall be compelled ... 4682

1. Object of the section.—It is highly desirable that "communication with professional advisers should be unembarrassed by any such fears as a contrary decision would give rise to... Advice would have to be given on maimed and distorted statements, and useless litigation would thus be promoted in numberless cases. Lastly, a compulsory disclosure of confidential communications is so opposed to the popular conscience on that point, that it would lead to frequent falsehoods as to what had really taken place."[4]

2. Construction of section.—The rule of protection contained in this section is one which should be construed in a sense most favourable in bringing professional knowledge to bear effectively on the facts, out of which legal rights and obligations arise.[5]

3. Scope of section.—Disclosures made under this section, should not be enforced in any cases, except where they are plainly necessary.[6]

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1. On this point, *see* Sec. 138 *post* and the note thereto Sec. 849; Sec. 927, 8th (Ed.).
2. Ramal Shaw *v.* Biswanath Mandal, 5 B.L.R. App. 28 and *see* Cobbett *v.* Hudson, 1 Ellis and Blackburn's Rep. Q.B. 11 there referred to.
3. George Doland Ltd. *v.* Blackburn Robson Coates & Co., (1972) 3 All. E.R. 959 at p. 962 (Q.B.D.).
4. *Per* West, J., in Munchershaw Bezonji *v.* New Dhurumsey Spinning and Weaving Company, I.L.R. 4 Bom. 576 at p. 582.
5. Munchershaw Bezonji *v.* New Dhurumsey Spinning and Weaving Company, I.L.R. 4 Bom. 576 at pp. 582-83.
6. *Ibid.* at p. 583.

The Union Government representing the Cabinet can claim no privilege or protection against the disclosure of such 'otherwise information' in its possession and which was made the basis of proclamation. As has been held, the Presidential proclamation issued under Art. 356 is open to judicial review on the settled principles and limits within which any other administrative action of the government is so reviewable. This is the effect of the lifting of the bar on judicial review by deletion of Cl. (5) of Art. 356 by the 44th Amendment Act which was introduced by 38th Amendment Act to the Constitution.[1]

4. Application of section.—This section applies where the client is interrogated, and whether he be a party to the suit or not. It adopts the principle contended for in Taylor on *Evidence*,[2] but with this qualification that if a party becomes a witness of his own accord, he shall, if the Court requires it, be made to disclose everything necessary to the true comprehension of his testimony,[3] where it was held that a case laid by the plaintiff before counsel was privileged not only as against the Court, but as against the opposite-party.[4] As to such communications in England, see *Mint* v. *Morgan*.[5]

5. Confidential communication between client and his legal adviser.—It is necessary to see whether the letter in question is confidential one which is protected by Secs. 126 and 129, Evidence Act. In Court's opinion, this document is not in the nature of a confidential communication between the client and his legal adviser. On the contrary, it discloses certain shocking facts that would destroy the privilege, if any. This shows that the enquiries were started against the occupants on a false ground and pretext that they were required to be evicted because of the reconstruction of Mahalaxmi Bridge. However, since they were not under the Mahalaxmi Bridge the enquiries were dropped and the Corporation was preparing another false ground to evict the occupants as if it was in the public interest. Certain facts were sought to be suppressed from the Government for which the orders of the Municipal Commissioner were required. The text of the entire letter is such that it shocks the conscience of common man about the manner in which the public bodies like Corporation is behaving. In Court's opinion, such a document can never get any protection of law either under Sec. 126 or 129 of the Evidence Act.[6]

The receipt of the reply by the advocate is, in effect, receipt by the client himself. It is one of recognised modes of communicating to the client. The confidential communications between client and advocate have protection from complusory disclosure as envisaged in Sec. 129 of the Evidence Act. Neither the advocate nor the client is under any obligation to spell it to a third person. The interdict is provided in Secs. 126 and 127 and the protection of communication embodied to keep the communication confidential as between the advocate and client.[7]

6. Discovery and inspection of document.—The provisions of the Indian Evidence Act upon the subject to privileged communication have been rendered

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1. Sunderlal Patwa *v.* Union of India, A.I.R. 1993 M.P. 214 at pp. 233, 234 (F.B.).
2. 6th Ed., Secs. 846, 847.
3. *See* Munchershaw Bezonji *v.* New Dhurumsey Spinning and Weaving Company, I.L.R. 4 Bom. 576 at p. 581.
4. Whitley Stokes, Vol. II, pp. 921.
5. L.R. 8 Ch. App. 361 ; Mayor of Bristol *v.* Cox. 26 Ch. Div. 678.
6. Municipal Corporation of Greater Bombay *v.* Vijay Metal Works, A.I.R. 1982 Bom. 6 at p. 9.
7. P.R. Ramakrishnan *v.* Subbaramma Sastrigal, 1988 Cr. L.J. at p. 128 (Ker.) : A.I.R. 1988 Ker. 18.

more important in consequence of the introduction into the Civil Procedure Code of certain sections[1] providing for discovery.

It is now immaterial whether the communications which have passed between a person and his legal advisers have taken place during the pendency of a litigation or before such litigation had begun, as in either case they are protected. This was decided, in this country, in *Munchershaw, Bezonji* v. *New Dhurumsey Spinning and Weaving Company*,[2] West, J., made the following observations:

Enforceability of under Sec. 129, Evidence Act.

"The arguments that *albeit* the document may not be such that Court can properly order its production as evidence, yet the opposite party may demand a perusal of it, is, I think, opposed to all principle. If a communication is protected by its confidential character, it is protected in an especial degree as against an adversary in litigation. Here the document which the plaintiff is asked to produce is in its nature a confidential communication... I do not find it necessary to compel a disclosure of it, in order to explain the evidence given by the plaintiff and in the absence of such necessity it would be wrong to put pressure on the plaintiff. I decline, therefore, to order the production of the paper."

7. English cases.—It will be observed that, under the terms of this section, it is only communications which have passed between a person and his legal professional adviser that are privileged. It has been for a long time a moot point in England as to whether the production of communications which have passed between a person and others than counsel or solicitors on the subject of a future or pending litigation can be enforced. The rule in England is now the same as in this country, but it will be useful to refer to some of the English cases on this subject.

Goodall v. *Little*.

In *Goodall* v. *Little*[3], plaintiff's assignees of a bankrupt firm at Teneriffe, filed their bill against the defendants three brothers one of whom managed the business of the Teneriffe firm, or an account of certain remittance forwarded by the Manager of the Teneriffe firm to his brother as agent in London. The defendant, the London agent, set up as a defence certain proceedings in the Lord Mayor's Court. It was held that letters which had passed between the London agent and his solicitors with reference to the litigation in this suit were privileged; that letters which had passed between such solicitors and the attorney acting in the proceedings in the Lord Mayor's Court were also privileged; but that the letters from the defendant, the manager of the Teneriffe firm, to the co-defendant, the agent in London, for the purpose of being communicated to his solicitors with a view to the litigation in this suit, were not privileged. Lord Cranworth, V.C., said : "On the question whether the defendants are entitled to withhold production on the ground of the document being privileged, I shall act on the doctrine as laid down by Lord Lyndhurst in *Hughes* v. *Biddulph*. There in answer to a motion for production of documents, Lord Lyndhurst stated his opinion to be, that confidential communications between the defendant and her solicitors, or between the country solicitors and the town solicitor, made in their relation of client and solicitors, either during the cause or with reference to it though previous to its commencement, ought to be protected...."

Communication between client and solicitor.

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1. Now *see* Order XI, rules 12-23 of Civil Procedure Code 1908.
2. I.L.R. 4 Bom. 576.
3. 20 L.J. Chancery, 132.

Chartered Bank v. Rich.

In the *Chartered Bank of India, Australia and China* v. *Rich*[1], which was an action for alleged breaches of an agreement between a banking company carrying on business, amongst other places, at Bombay, and the defendant, who had been their agent there, an order was made under the Common Law Procedure Act, 1854, 17 & 18 Vict Cap. 125, Sec. 50, for discovery of documents relating to the matter in dispute. The secretary of the plaintiff's banking company made an affidavit stating that the letters specified in the Schedule attached to the defendant's affidavit consisted of communications between the head office of the plaintiff's bank in London and their offices at Bombay, not forming part of the *res gestae* and that the same could not be material to the defendant with a view to establishing his case. The defendant made an affidavit of his belief that his correspondence was material to his defence. It was decided that all this correspondence was confidential communication, and that the defendant was not entitled to inspect it. Cockburn, C.J., said : "The true doctrine on this subject is clearly and admirably stated by Pollock, Chief Baron, in his judgment in *Hunt* v. *Hewitt*.[2] 'The right of a plaintiff in equity is limited, first, to a discovery confined to the questions in the cause; secondly, of such mateial documents as relate to the proof of his the plaintiff's case on the trial[3] and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case'.....Blackburn, J., said ".....In the present case all the documents, after a particular date, fall within the principle of communication by an attorney, or matters, done by, and communications made through, an agent of the attorney..... But there are several documents, written previously to the date at which an attorney was consulted. .....As to these we have a discretion, and I think we ought not to grant Inspection. If I thought that the present case was like *Colman* v. *Freeman*[4] in which there was a question whether there had been fraud committed by the plaintiffs and their agents in India, I might be of a different opinion".

Action on personal injury.

The case of *Woolley* v. *North London Railway Company*[5] was an action for a personal injury sustained by a passenger on the railway. Inspection was allowed of certain reports. Byles, J., said : "Where reports of this kind are made in the course and as part of the duty of the officer, whether an action is pending or not, and whether it contains facts or opinions, they must be produced: but if they are made confidentially and for the purpose of litigation, and not in the ordinary course of the duty of the person making them, they are privileged." Brett, J., said : "It seems to me that the rule may be thus stated : Any report or communication by an agent of servant to his master or principal, which is made for the purpose of assisting him, to establish his claim or defence in an existing litigation[6] is privileged, and will not be ordered to be produced; but if the report of communication is made in the ordinary course of the duty of the agent or servant whether before or after the

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1. 4 B. & S. 73 : 32 L.J. Q.B. 300.
2. 7 Exch. 236 at p. 244.
3. *See* the principle discussed, and this proposition repeated in Lyell *v.* Kennedy, L.R. 8 App. Cas. 217 ; *see* also Bewike *v.* Graham, L.R. 77 Q.B.D. 400 ; Campagnie Financiere et Commerciale, due Pacifique *v.* Peruvian Guano Co., L.R. 11 Q.B.D. 55.
4. 3 H. & N. 871.
5. L.R. 4 C.P. 602.
6. Wheeler *v.* Le Merchant, L.R. 17 Ch. D. 675 ; Mason *v.* Cattley, L.R. 22 Ch.D. 609.

commencement of the litigation, it is not privileged, and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential nor whether is contains facts or opinions....."

What one privilege communication which is to be produced.

The case of *Fenner* v. *London and South-Eastern Railway Company*[1] was an action for late delivery and defective condition of cattle carried by the defendants upon their railway for plaintiff. The documents, of which inspection was sought, were letters and reports which had passed between the company's servants upon the subject of the litigation after the company's manager was aware that litigation was probable. It was however decided that these documents were not privileged. Blackburn, J., said: "There is no doubt that on grounds of public policy, the communications between a person and his solicitors and counsel, with a view to obtain legal assistance and advice, are privileged.[2] But when the communications are made with a person not in any way connected with the legal advisers of the defendant, the question is one of much difficulty. In the case of *Greenlaw* v. *King*,[3] Lord Langdale went so far as to order the inspection of the correspondence between the defendant and a gentleman called Leigh, who had been his late father's solicitor with respect to the matter in controversy, and who continued to act as the agent and adviser of the defendant, though not as his solicitor....This is certainly a strong authority for this proposition, that the Court has power to order such an inspection; and accordingly a Court of Common Law has, in cases where it was of opinion that justice required such an inspection, ordered it.[4] But it has been held that a Court of Common Law, at least, has not a mere ministerial duty to order an inspection of documents admitted to be relevant and not brought strictly within the privilege of professional advice[5] and this was acted upon in *Woolley* v. *North London Railway Company*.[6] It is obvious that whenever—to borrow the language of Willes, J., in *London Gas Company* v. *Chelsa*[7]—'the case comes very near the dividing line at which the province of discovery ceases' there is chance that different minds may come to opposite conclusions as to how the judicial discretion should be exercised. The principle, however, I think, to be derived from all the cases is, that where it appears that the documents are substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the Court should, as a general rule, be to refuse the inspection. Where the documents fall short of that, it should, as a general rule, be granted."

Action on late delivery.

In an action for not delivering goods according to contract, the defendant, before selling the goods to the plaintiff, had purchased them from a certain company. Shortly before the commencement of the action two letters from the plaintiff's solicitors relating to the claims made in the action had been sent by the defendant to this company's agent with a request that they would obtain information respecting these claims; and thereupon a number of letters passed between such defendant and such agents, some of them after the action was

Contract for the delivery of goods.

1. L.R. 7 Q.B. 76.
2. Steel *v.* Stewart, 1 Phil, 471.
3. 1 Beav. 137.
4. Colman *v.* Trueman, 3 H. & N. 871 ; 28 L.J. (Ex.) 5 ; Baker *v.* London and South-Western Railway Company, L.R. 3 Q.B. 91.
5. Chartered Bank of India *v.* Rich, 4 B. & S. 73 : 32 L.J. (Q.B.) 300.
6. L.R. 4 C.P. 602.
7. 6 C.B. (N.S.) 411 : 28 L.J. (C.P.) 257.

brought. As a result of this correspondence, the defendant received a large compensation from the company. It was held that this correspondence did not come within any of the exceptions, and that plaintiff was entitled to inspect it. Cockburn, C.J., said: "I think it just and reasonable that the plaintiff, as far as possible, should be put in possession of all the facts of the case and, if this information is in the breast of the defendant, it is right that it should be disclosed." Blackburn, J., concurred, remarking: "The general rule as to the discovery of documents is laid down in *Fenner* v. *London and South-Eastern Railway Company*,[1] that a litigant is entitled to a discovery of all the documents in his adversary's possession which are relevant to his case subject to the exceptions; *firstly*—which is an exception by right of communications between a person and his solicitors and counsel with a view to obtain legal assistance and advice; and *secondly*—an exception which is in the discretion of Court to allow of communications made with a person not himself as a solicitor, but which can be considered as made with him as deputy for a solicitor.....It is enough to say that the present case is not brought within any of the exceptions which have hitherto been allowed."[2]

Rule as to the discovery of document.

When the defendants, in order to ascertain whether or not they ought to yield to a claim by the plaintiffs for damages for personal injuries alleged to have been sustained in an accident on the defendants' line of railway, sent their medical officer, before litigation commenced or was formerly threatened, to report to them upon the nature of the plaintiffs' injuries, it was held that the reports of such medical officer were privileged, and that plaintiffs were not entitled to have inspection of them.[3] Bovill, C. J., said : "Complaint had been made to the company, and the investigation took place with the view of compensating the plaintiffs. I think the facts clearly bring the case within *Chartered Bank of India* v. *Rich*[4] and *Woolley* v. *North London Railway Company*,[5] which protects the party against the production of documents which are obtained with a view to impending litigation....." Montague Smith, J., said : "The question is whether the limitation to the right to have discovery and production of documents on the ground that they were obtained with a view to litigation or impending litigation applies to the reports in question; and I think the reports are within the limitation and that we ought not to order the production of them; the principle of the limitation will be found in the judgments of all the Judges of this Court who took part in the decision of *Woolley* v. *North London Railway Company*[6] and, to avoid a change of words, I refer to what I said in that case. I said that I understood the limitation to the right to be that if the documents are procured for the purpose of assisting the party in an impending litigation, and to obtain advice, they are not to be produced, and I then referred to *Reid* v. *Langlois*;[7] and *Steel* v. *Stewart*,[8] which show that, if the information is obtained not by, though for, the attorney of the party, it is privileged

Limitation to the right to discovery and production.

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1. L.R. 7 Q.B. 76.
2. English *v.* Tottie, L.R. 1 Q.B. 140.
3. Cossey *v.* London, Brighton and South Coast Railway, L.R. 5 C.P. 146, distinguished from Baker *v.* London and South-Western Railway Company, L.R. 3 Q.B. 91.
4. 4 B. & S. 73 : 32 L.J.Q.B. 800.
5. L.R. 4 C.P. 602.
6. *Ibid.*
7. 1 McN. & G. 627.
8. 1 Phil. 471.

from production. To these two cases in Chancery I may now add the recent case of *Ross* v. *Glibbs*.[1] In that case, Stuart, V.C., says : "The privilege which exempts a communication from production is the privilege of the client and not of the solicitor and communication relating to the subject matter of suit, and furnished with a view to litigation are as much protected upon principle when made by a lay agent to a litigant, as they are when made by a solicitor". The Vice Chancellor, in this passage, places the principle of the privilege on broad, intelligible, and, I apprehend, sound grounds; and I confess I think this limitation to the general right to require production ought in its application to be liberally construed in favour of the limitation. Now the documents in question seems to me clearly to fall within the limitation. I confess I can draw no other inference than that this report was obtained with a view to impending litigation, and for the purpose of assisting the defendants and their advisers in dealing with it: and, that being so, I think we ought not to order the production. We were pressed with the decision of the Court of Queen's Bench in *Baker* v. *London and South Western Railway Company*.[2] I should be sorry to decide in opposition the judgment of a co-ordinate Court, but the circumstances of that case differ from those of the present. It was not contended in that case, in opposition to the production of documents, that they were obtained with a view to impending litigation; but the case was argued on other grounds."

Privilege exempting a communication from production

In *Skinner* v. *Great Northern Railway Company*,[3] inspection was claimed of two reports made to the defendants by their medical officer upon examining plaintiff after a claim for compensation had been made and in consequence of that claim, but before any action had been commenced or any communication made by the plaintiff's attorney. It was contended that, under the rule laid down in *Fenner* v. *London and South-Eastern Railway Company*,[4] *viz* that a document is not privileged unless it is in the nature of instructions for a brief, inspection of these reports ought to be allowed. Bramwell B. said : "We have to choose between the decision of the Queen's Bench[5] and that of the common plea[6] and we follow the latter, which is in conformity with the practice of this Court." Pigott, Cleasby and Amphlett, BBB., concurred.

In *Malden* v. *Great Northern Railway Company*,[7] Blackburn, J., said : "We adhere to the principles we laid down in the case of *Fenner* v. *London and South Eastern Railway Company*[8] the difficulty is in application of those principles..... Now we are agreed upon this, that if a medical man is sent down to examine a patient and to report to a company, and if it is done under such circumstances that there is a contract actually made that the doctors are to come and see the man, and have a fair examination and report to the company, and that report is to be for their guidance, and is confidential—then, undoubtedly, we should not order them to produce it; and where the circumstances are such, from the plaintiff's attorney being concerned in it, that it may be implied, although not expressly said, that such an agreement was understood, I should say the same thing....."

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1. L.R. 8 Eq. 522 at p. 524 : 36 L.J. (Ch.) at p. 63.
2. L.R. 3 Q.B. 91.
3. L.R. 9 Ex. 298.
4. L.R. 7 Q.B. 76.
5. I.E. Fenner *v.* London and South-Eastern Railway Company, L.R. 7 Q.B. 76.
6. I.E. Cossey *v.* London, Brighton and South Coast Railway Company, L.R. 5 C.P. 146.
7. Before the Queen's Bench, though reported at L.R. 9 Ex. 300.
8. L.R. 7 Q.B. 76.

In *Anderson* v. *Bank of British Columbia*,[1] the manager of the London establishment, observing litigation imminent, telegraphed to the manager at Oregon, North America, to send by letter the fullest particulars of the whole transaction. In answer to this telegram the English manager received a letter for which the defendants claimed privilege, on the ground that it was a communication in reference to the subject-matter of the litigation, made by a third person to enable the defendants to prepare their defence to the litigation then in anticipation. The Master of the Rolls held that the letter was not a privileged communication and ordered it to be produced ; and this order was confirmed by the Court of Appeal.

In *Pacey and wife* v. *London Tramway Company*,[2] the plaintiffs sued for an injury to the wife caused by an accident on the tramway; they brought their action in the Exchequer Division and applied at Chambers for an order to inspect a report of a surgeon, who had seen the injured party. This was refused in accordance with the Exchequer decisions on the subject, and notwithstanding the opposite rule followed by the Queen's Bench and Common Pleas Division. The plaintiffs appealed against the order of refusal, which was, however, confirmed.[3]

The conflict of decision between the Divisions of the High Court of Justice terminated, however, with the case of *Bustros* v. *White*,[4] which finally decided that a Judge has no discretionary power to refuse discovery except on the ground of privilege, and which is also an important authority as to what documents are privileged. The plaintiff in the case was the consignee of a cargo of seed shipped at Alexandria and discharged at Newcastle. He complained that the seed had arrived in bad condition; and he sued the owner of the ship in which it was carried for causing the damage by neglect of proper care in packing. The ship owner alleged that such damage arose from the seed being shipped in a bad state. The plaintiff had some correspondence with his agent at Newcastle, and also with a house at Alexandria, on the subject of the cargo, and the defendant desired that this correspondence should be produced. A Judge at Chambers, looking at the letters and thinking that they did not so much contain facts as opinions, declined to make the order for production; and this was confirmed in the Queen's Bench Division. The defendant who desired the production of the letters, appealed and the question was argued before a full Court of eight Judges. The Master of the Rolls proceeded to deliver their unanimous judgment, that the correspondence must be produced.

8. Indian cases.—The case of *Bustros* v. *White*[5] is now regarded as the leading case upon the subject of discovery under the new practice in the Supreme Court of Judicature in England; and has been followed in this country in the case

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1. L.R. 2 Chan. Div. 644 : 35 L.T. Rep. N.S. 75.
2. L.R. 2 Ex. 440 n : 46 L.J. Ex. 698.
3. *See* also Friend *v.* London, Chatham and Dover Railway Company, 36 L.T. Rep. N.S. 729 decided after Bustros *v.* White, L.R. 1 Q.B. Div. 423 : 34 L.T. Rep. N.S. 835. Here the plaintiff commenced an action against a railway company to recover damages for injuries sustained whilst travelling on their line with the plaintiff's consent the company's doctor saw and examined the plaintiff, and made a written report to the company's solicitor. *Held* by the Court of Appeal affirming the decison of the Exchequer Division, Pollock and Huddleston, BB.) that the report was privileged, and the plaintiff not entitled to inspect it.
4. L.R. 1 Q.B. Div. 423 : 34 L.T. Rep. N.S. 835.
5. *Ibid.*

of *Wallace* v. *Jefferson*.[1] "In this case, Sargent J., observed : "In *Bustros* v. *White*,[2] it was decided by a Court of Appeal consisting of eight Judges that under Order XXXI, rule 11 of the English Judicature Act, a Judge has no discretion as to refusing to allow the production of documents in possession of a party to the suit relating to the matter in question, provided the documents are not privileged, Sec. 130 of the Civil Procedure Code would appear to have been copied from the above rule, and we think, therefore, it is advisable to adopt the English ruling as to its construction. As the defendant's affidavit admits that the documents in question relate to the matter in dispute, the only question to be determined is whether they are privileged. They consist of two or three telegrams and letters, all of which passed between the plaintiffs in London and Mr. Richardson who manages their business in Bombay. It was said that they were confidential communications between principals and their agents. But the mere circumstances that communications are confidential does not render them privileged as pointed out by the Master of the Rolls in *Anderson* v. *Bank of British Columbia*.[3] They must be, to use his words, confidential communications with the professional advisers, and this view of the law was confirmed by the Court of Appeal.... The documents, as shown by Mr. Richardson's affidavit, are of the same nature as those of which production was ordered in *Anderson* v. *Bank of British Columbia*.[4] Production must be ordered." Similarly, in *Bipro Doss Dey* v. *Secretary of State for India*,[5] which was a suit for moneys claimed in respect of certain commissariat contracts, it was held that letters written by the defendants, servants to each other in respect of the subject-matter of the suit, were not privileged. In this case was said : ".....It is for the party claiming the privilege to show that the documents were prepared for the use of his solicitor; that they came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him to prosecute or defend an action, as Cotton, L.J., at page 322, or as Brett, L.J., at page 320, in the case of the *Southwark* and *Vauxhall Water Co.* v. *Quick*,[6] says modifying the words of Mellish, L.J., in *Anderson* v. *Bank of British Columbia*,[7] 'merely for the purpose of being laid before the solicitor for his advice or consideration'.....Nor, would it, I think, be enough to protect these letters if they were written with a

Confidential communications with professional advisers.

Letter written by one servant to another.

1. 2 Bom. 453; *see* also following cases : Minet *v.* Morgan, 28 L.T. Rep. N.S. 573; Mostyn *v.* West Mostyn Coal and Iron Company, 34 L.T. Rep. N.S. 531 ; Johnson *v.* Smith, 35 L.T. Rep. N.S. 741 ; Friend *v.* London, Chatham and Dover Railway Company, L.B. 2 Exch. Eq. 437 : 36 L.T. Rep. N.S. 729 ; Martin *v.* Butchard, 36 L.T. Rep. N.S. 732 and Southwark and Vauxhall Water Company *v.* Quick, 38 L.T. Rep. N.S. 29. The last four of these cases were decided after Bustros *v.* White. In Southwark and Vauxhall Water Company *v.* Quick, which was affirmed by the Court of Appeal, the documents of which inspection was sought were : (1) Transcript of shorthand notes of a conversation between a chimney-sweep employed by the company and their engineer; (2) transcript of notes of conversation between the chairman and the engineer of the company and (3) statement of facts drawn up by the chairman. All these documents had been prepared with the object of laying them before the solicitor of the company. It was held that all these documents were privileged. Where an action by *A* against *B* gave rise to an action [over] by *B* against *C*, the correspondence between the solicitors *A* and *B* was held privileged from inspection by *C* (Bullock *v.* Corri 38 L.T. Rep. N.S. 102).
2. L.R. 1 Q.B. Div. 423 : 34 L.T. Rep. N.S. 835.
3. L.R. 2 Chan. Div. 644 : 35 L.T. Rep. N.S. 75.
4. *Ibid.*
5. I.L.R. 11 Cal. 655.
6. L.R. 3 Q.B.D. 315.
7. L.R. 2 Chan. Div. 644 : 35 L.T. Rep. N.S. 75.

view to possible future litigaton, and with the intention that in that case they should be laid before a solicitor."

Document referred is no more privilege.

Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit and then sets up those facts by way of answer to the plaintiff's claim, he cannot afterwards attempt to make the case that the documents are confidential and intended merely for his legal advisers or for the purpose only of evidence in the case.[1] Although a document may not be such as passed directly between the legal adviser and the client, yet, it is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then the Court will not compel the production of such a document.[2] For the purpose of the propounder's brief, a note had been obtained from a witness (subsequently examined at the trial) of the evidence that he could give; *held* that the note was privileged from production.[3]

The Court's power to order production and inspection of document are now governed by the provisions contained in Order XI, rules 12-23 of the Civil Procedure Code of 1908.

9. Shall be compelled.—The word "compelled" cannot mean "subpoenaed" and the section uses the words "compelled to disclose" with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness box.[4]

130. Production of title-deeds of witness not a party.—No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Comment

Applicability of the section.—In *Beattie* v. *Jetha Dungarsi*,[5] the defendant had a mortgage over certain premises, and had been given the title-deeds of these premises [as well as some other immovable property belonging to the mortgagor.] It was held that the defendant could not be compelled to produce his title-deeds before satisfaction of his claim.

Proceedings under Sec. 476, (Sec. 340 new) Cr.P.C., when to be justified.

Where a person who is not a party to a cause, being present in Court, was called upon to produce a document which was his own title-deed stated that the document was not in his possession then but offered to produce the same the next day, and the Court at once drew up proceedings under Sec. 476 (Sec. 340 new) of the Code of Criminal Procedure. *Held* that proceedings under Sec. 476 could not, upon these facts, be justified. Before any proceedings could be taken, it would be necessary to determine whether the requirements of Secs. 130 and 131 were fulfilled.[6] If a witness refuses to produce

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1. Umbica Churn Sen *v.* Bengal Spining and Weaving Co., I.L.R. 22 Cal. 105.
2. Vishnu Yeshawani *v.* New Life Insurance Co., 7 Bom. L.R. 709.
3. Dulhin Genda Kunwar *v.* Harnandan Singh, 20 C.W.N. 617 (P.C.).
4. Moher Sheikh *v.* Queen-Empress, I.L.R. 21 Cal. 392.
5. 5 Bom. H.C.O.C.J. 152.
6. Bhagabat Prasad Singh *v.* King Emperor, 14 C.L.J. 120 : 12 Cr.L.J. 450.

his title-deed the party calling for its production may give secondary evidence of its contents.[1]

In a case to which this section would apply, it would be entirely optional for the witness to produce his title-deeds, and to raise any objection whatever; and the section would apply if the witness objected to produce his title-deeds.[2]

[3][**131. Production of documents or electronic records which another person, having possession, could refuse to produce.**—No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession or control, unless such last mentioned person consents to their production.]

SYNOPSIS

1. Privilege belongs only to witnesses other than parties ... 4683
2. Can witness be compelled to give parol evidence of contents ? ... 4683
3. Agents not prohibited from producing ... 4684
4. Can witnesses being parties be compelled to produce their title-deeds ? ... 4684

1. **Privilege belongs only to witnesses other than parties.**—Sections 130 and 131 may be considered together, Sec. 131 extending to the agent the same protection which Sec. 130 provides for the principal, the privilege created by Sec. 130 extends only to *witnesses who are not parties to the suit in which they are called;* and all such persons are absolutely privileged from being compelled to produce their title-deeds etc. unless there be a written agreement for their production between them and the person seeking such production. The principle so enacted is in accordance with the rule of English Law. "Upon principles of reason and equity," says Mr. Taylor, "Judges will refuse to compel either a witness or a party to cause to produce either his title-deeds, or any document, the production of which may tend to criminate him, or any document which he holds as mortgagee or pledgee" (Sec. 428 ; Sec. 458, 8th Ed). The fact that the production of a document will expose the person producing it to a *civil action* affords no ground for protection in England,[4] and the same rule has evidently been adopted in the Indian Evidence Act.

Principle of protection in England as well as in India.

2. **Can witness be compelled to give parol evidence of contents?**—In England, the same rule which protects title-deeds from production protects also the party, justified in refusing to produce them from being compelled to disclose their contents. "It would be perfectly illusory", said, Mr. Baron Alderson in *Davies* v. *Waters*,[5] "for the law to say that a party is jusitified in not producing a deed, but that he is compellable to give parol evidence of its contents. The same rule will, no doubt, be followed in India. Where a barrister, pleader, attorney, or vakil is the

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1. Imrit Chamar *v.* Sridhari, 15 C.L.J. 7 : 17 C.W.N. 108.
2. Queen-Empress *v.* Moss, I.L.R. 16 All. 88 at pp. 100-1 (per Edge, C.J.) ; *see* notes under the next section.
3. Subs. by the Information Technology Act, 2000 (Act 21 of 2000), Sec. 92 and Sch. II, Cl. 16 (w.e.f. 17th October, 2000). The substituted Sec. 131 read as under : "*Production of documents which another person, having possession, could refuse to produce.*—No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.
4. Doe *v.* Date, 3 Adolphus and Ellis's Rep. 60 ; Doe *v.* Lord Egroment, 2 Moody and Robinson's Rep. 386.
5. 9 Messon and Welsby's Rep. 612; *see* also Few *v.* Guppy, 18 Beav. 454.

person in possession of the document, he is expressly prohibited by Sec. 126 from stating the contents. As to the owner of the document and other agents, the Act contains no express provision; but it may appear that neither the owner nor any one else can be called to give secondary evidence of a document which the person in possession of it is not legally bound to produce.[1]

3. **Agents not prohibited from producing.**—Section 131 extends not only to professional men, but to trustees, mortgagees and agents. Having regard to the word "compelled", it would appear that these persons will be allowed to produce documents which other persons would be entitled to refuse to produce if such were in their possession. This is in accordance with English law. It would seem to follow that, although a barrister, pleader, attorney, or vakil is forbidden[2] (by Sec. 126) to state the contents of any documents with which he has become acquainted in the course and for the purpose of his professional employment, he will be permitted to produce the document itself, if it happen to be in his possession and he choose to do so. See, in connection with this section, Sec. 162, and the second proviso to Sec. 165, *post*.

4. **Can witnesses being parties be compelled to produce title-deeds?**—With respect to witnesses *who are parties to the suit*, Sec. 22 of the repealed Act II of 1855 enacted that "a witness being a party to the suit shall not be bound to produce any document in his possession or power, *which is not relevant or material to the case of the party requiring its production*". This provision, though not expressly re-enacted is, however, in entire conformity with the requirements of the whole Evidence Act. If this principle be followed, a plaintiff, who must succeed on the strength of his own title, not on the weakness of the defendant's will be prevented from using the law to detect flaws in the title of the latter. Where the defendant is in possession of a document or title-deed material or relevant to the case of the plaintiff, there is ordinarily no protection and production will be compelled.

132. Witness not excused from answering on ground that answer will criminate.—A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture, of any kind :

Proviso.—Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

SYNOPSIS

1.	Rule of English law different from rule of Sec. 132	... 4685	6.	Answer given without compulsion, admissible evidence	... 4692
2.	Applicability	... 4685	7.	Privilege whether absolute	... 4694
3.	Witnesses continue to be governed by the section	... 4687	8.	Doctrine of absolute privilege	... 4695
			9.	Two exceptions to rule that the witnesses must answer	... 4698
4.	Question must be relevant	... 4688	10.	Scope	... 4698
5.	"Compelled", meaning of	... 4688	11.	Proviso	... 4698

1. If this be so, it is contrary to the rule of English law, which admits secondary evidence of a document in the hands of a stranger, who is not compellable by law to produce it, and who refuses to do so—Taylor, Sec. 427 ; Sec. 457, 8th Ed.
2. *See* Hibberd *v.* Knight, 2 Welsby, Hurlestone and Gordon's Rep. 11.

1 Rule of English law different from rule of Sec. 132.—The provisions of this section are not in accordance with English law, under which a witness is excused from replying to any question, the answer to which would have a tendency to expose such witness or the husband or wife of such witness to any kind of criminal charge or to a penalty or forfeiture of any nature whatsoever. Under the New York Civil Code, the protection has been restricted to those questions the answer to which would have a tendency to subject to the punishment of *felony*. In England, the Legislature has occasionally found it necessary to take away the privilege, or by an act of indemnity to leave no cause for its exercise. The Act relating to combinations by workmen,[1] the Larceny Act, 1861,[2] and the Acts fo enquiring into corrupt practices at elections, are examples.[3] But these statues differ from the Indian enactment in this, that, under their provisions having given evidence is a complete bar to subsequent prosecution; while the Indian Act does not forbid such a subsequent prosecution. Against this, however, may be put the fact that if a witness in England do answer such questions, his replies can be used against him, unless at the time, having claimed the protection of the Courts, he was illegally compelled to answer.

Whether a witness can be compelled to answer a question the reply to which would *subject him to civil action or pecuniary loss, or charge him with a debt*, is a question on which the above section is silent.[4] It was discussed in England in Lord *Melvil's case* and decided in the affirmative by a majority consisting of eight out of twelve Judges. To remove all doubts, however, a statute was subsequently passed (46 Geo. III, c. 37), which declared a witness bound to answer such questions if *relevant to the matter in issue*. The New York Civil Code contains a similar provision. In India there can be no reasonable doubt that the same principle should be followed.

American view.

The English law as to privilege of a witness from being compelled to answer certain questions was taken away by Sec. 32 of Act 2 of 1855 and the present Sec. 132, Evidence Act, is a reproduction of that section.[5]

English law regarding privilege of witness.

2. Applicability.—A person who is interrogated under Sec. 161 by a police officer making an investigation is not a witness.

The word "witness" used in Sec. 132, Evidence Act, does not refer to any interrogatee examined by a police officer under Sec. 161 ; it refers only to a person who enters the witness-box and is sworn as a witness.

In this case, it was contended that the statement made by the applicant during the investigation was a privileged statement and could not form the basis of a charge of defamation. *Held* that the applicant was not a witness when he made the defamatory statement against the sub-inspector and was not entitled to the privilege conferred by Sec. 132 Evidence Act. If he had made the defamatory statement while giving evidence against the sub-inspector as a witness he would have been exempt from prosecution for defamation.[6]

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1. 6 Geo. IV, c. 129, Sec. 6.
2. 24 & 25 Vict., c. 96, Secs. 75-84.
3. And *see* Sec. 37 of the Madras Police Act, VIII (M.C.) of 1867, which indemnifies witnesses on prosecutions for gaming.
4. The above section (132) is almost verbatim the same as Sec. 32 to the repealed Act II of 1855, which also was silent on this point.
5. Elavarthi Peddabba Reddi *v.* Iyyala Varada Reddi, A.I.R. 1929 Mad. 236 at p. 238 : I.L.R. 52 Mad. 432 : 29 M.L.W. 210 : 1929 M.W.N. 84 : 56 M.L.J. 570.
6. Haji Ahmad Husain *v.* State, A.I.R. 1960 All. 623 at pp. 624, 625 : 1960 A.W.R. 141.

Evidence cannot be used against a person whose statement when recorded was not an accused in the case. Evidence recorded at trial cannot be used against a person who was not an accused at the time of recording. That defect cannot be cured by reading the evidence or permitting cross-examination. Trial against him to commence and witnesses re-heard. Non-compliance will vitiate trial.[1]

Evidence cannot be used against a person whose statement when recorded was not an accused in the case.

There is a distincton between the Eighth Exception to Sec. 499 and the proviso to Sec. 132, Evidence Act. The former excludes a statement from the definition of defamation altogether, whereas the latter excludes prosecution for defamation and bars proof of the accusation in a trial for defamation.

Distinction between Eighth Exception to Sec. 499, I.P.C. and Sec. 132, Evidence Act.

The proviso assumes that the accusation contained in the answer is punishable as defamation under Sec. 500; but protects the witness from prosecution and from the accusation being proved in the prosecution.

It is not correct to say that the compulsion referred to in the proviso includes the compulsion by the general or common law of the land and that there need not be special compulsion by the presiding officer of the Court.

When Sec. 132 refers to a witness being compelled to answer a certain question, it evidently refers to some other compulsion, e.g., compulsion with special reference to the question.

There is a duty (called "testimonial duty", by Wigmore) in every man to give evidence arising out of the right of the public to every man's evidence.[2]

Testimonial duty.

It was pointed out in *Blackmer* v. *United States*,[3] that it is the duty of a citizen to support the administration of justice by giving evidence.

Thus, giving evidence is a matter of duty and not of compulsion and the duty cannot be treated as a compulsion within the meaning of the proviso. Compulsion may have to be resorted to for forcing a person to perform his duty, but the duty itself is not compulsion. Further, our law regarding witnesses and their duties and liabilities is all codified, and compulsion must be, whether directly or indirectly, by a statutory provision.

Duty is not compulsion.

"The grounds for exemption from the testimonial duty are entirely extrinsic to the purpose of ascertaining the facts under investigation in the trial. They are based on a policy of dispensing with the compulsion to attendance and disclosure wherever it is not necessary, or is more disadvantageous in respect to other interests of the community".[4] All privileges of exemption from the duty are exceptional and there must be good reason plainly shown for their existence.[5] Consequently "the claim of privilege can be made solely by the witness himself ; the privilege is purely personal."[6] Section 132 far from conferring any privilege upon a witness denies the existence of a certain privilege.[7]

Witness to claim privilege himself.

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1. M.C.D. *v.* Amar Lal, (1977) 2 F.A.C. 283 (Delhi); Paulose *v.* State of Kerala, 1990 Cr.L.J. 100 at p. 102 (Ker.).
2. *See* Wigmore on *Evidence*, 3rd Ed., paras, 2192, 2194.
3. (1931) 284 U.S. 421 : 76 Law Ed. 375.
4. Wigmore on *Evidence*, 3rd Ed., para. 2196.
5. *Ibid.*, para. 2192
6. *Ibid.*, para. 2196.
7. Chotkan *v.* State, A.I.R. 1960 All. 606 at pp. 608-9 : 1960 A.W.R. 543 : 1960 A.L.J. 668.

3 Witnesses continue to be governed by the section.—The doctrine of immunity from self-crimination is founded on the presumption of innocence of the accused which characterizes the English system of criminal justice. In the words of Mayne in his *Criminal Law* : "It is the business of the Crown to prove him guilty, and he need not do anything but standby and see what case has been made out against him....."

Basis of immunity from self-crimination.

Duty of Crown to prove accused guilty.

The English Criminal Evidence Act of 1898 provides that although the accused is competent to be a witness on his own behalf, he cannot be compelled to give evidence against himself, and that if he does give evidence in his defence, the prosecution may comment upon such evidence but must not comment upon his omission to do so. In England the protection extends to witnesses also. The Fifth Amendment to the Constitution of the United States of America has adopted the same principle.

Under English law accused competent to be witness on his own behalf

Fifth Amendment to American Constitution.

The doctrine of protection against self-crimination has also to a substantial extent been recognized in the Anglo-Indian administration of criminal justice by incorporation into various statutory provisions, but definite form to it was given for the first time by Art. 20 (3) of our Constitution, though the rule laid down by the latter is narrower than the Anglo American rule, since the privilege has been kept confined to person "accused of any offence". Witnesses in India have been left untouched by the Constitution and continue to be governed by Sec. 132 of the Evidence Act.[1]

Protection against self-crimination recognized in Anglo-Indian system.

On going through the section, it can be seen that; a witness cannot be excused from answering any question that is relevant to the matter in issue. But on reference to the proviso to the said section, it can be seen that in case the answer to such question directly or indirectly criminates such witness or exposes him to penalty or forfeiture of any kind, he is also protected from arrest or prosecution on the basis of such answer. By virtue of the proviso, such answer also cannot be proved against him in any criminal proceeding.

It may not be incorrect to say that Sec. 132 of Evidence Act is a tailor made apparel from the yarn provided by Articles 20 (3) of the Constitution.

Once a person steps into a witness box, he would be under obligation to answer each and every question, irrespective of the fact that it criminates or tends to expose the maker of it to any penalty or forfeiture, subject to only one qualification that question must be relevant to the matter in issue.[2]

In the instant case, two prosecution witnesses were cartmen. The counsel defending the accused filed a petition for making the two cartmen already examined accused persons in the case. This was accordingly done. The learned Magistrate mentioned in his judgment that he had not considered their evidence at all in the case.

Held that it was not sufficient to say that their evidence would not be taken into consideration. There should have been a definite order to expunge it from the record and that should have been done.[3] The benefit of the proviso to Sec.

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1. Subedar *v.* State, A.I.R. 1957 All. 396 at p. 397.
2. **State of Maharashtra *v.* Balasaheb, 2002 (1) Mh. L.J. 148 at p. 157 (Bom.).**
3. Province of Bihar *v.* Bhim Bera, A.I.R. 1947 Pat. 284 at pp. 286, 288.

132 of the Evidence Act can be claimed by such a witness, who was once a co-accused but has since ceased to be such by reason of the separation of his trial with the other accused. When an oath could be administered to such a person then naturally the incidents to Sec. 132 of the Evidence Act will also attach themselves to such a person as a witness.[1]

Incidents to Sec. 132 when to attach to a co-accused.

It is not correct to say that a witness has any privilege beyond the immunity conferred by Sec. 132 of the Evidence Act, but even if he has any, that privilege can only be invoked at the time of answering a question having the tendency to incriminate him. The proceedings under Sec. 185 of Indian Companies Act, 1913, (now Sec. 468 of Companies Act 1956), do not partake of the character of criminal prosecution, and the person interrogated is not an accused person. As a witness, he cannot claim protection beyond what is contained in the proviso to Sec. 132 of the Evidence Act. The appropriate time when the privilege can be claimed is after the question is put and not in advance of the examination.[2]

Proceedings under Sec. 185, Companies Act, not criminal.

4. Question must be relevant.—It will be observed that the witness will be compelled to answer only when the question relates to "matter relevant to the matter in issue". This accords in some respect with a suggestion made in England and mentioned by Mr. Taylor, that where the question is material to the issue it should be left to the discretion of the judge whether or not he will enforce an answer, having due regard to the general interests of justice; provided always that if an answer be enforced, it should either have the effect of idemnifying the witness from any punishment, penalty, or forfeiture, with respect to the subject to which the answer relates ; or at least, such answer should not be admissible evidence in any future criminal proceedings instituted against the witness. The Evidence Act, although it gives the Judge no discretion as to the answer being compulsory where the matter is material confers such a discretion upon him when the question is put in cross-examination and relates to a matter not relevant except as affecting the credit of the witness.[3]

Answer under Sec. 132 not to be admissible evidence against the witness.

In view of the imperative language of Sec. 132 of the Evidence Act a witness cannot refuse to answer a question which is relevant to the matter under enquiry in which he is called as a witness even on the pain of self-incrimination. It would, therefore, appear that a witness when questioned in the witness box relevant to the matter in issue in a proceeding in which he is called as a witness has to answer the question put to him and cannot escape the obligation to answer the question even if the answer was likely to incriminate him except to the extent the qualified privilege is extended to him under the proviso.[4]

5. "Compelled" meaning of.—The word "compelled" in Sec. 132 only applies, where the Court has compelled a witness to answer a question and not to a case in which the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused.[5]

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1. *In re* Kandaswami Gounder, A.I.R. 1957 Mad. 727 at p. 734.
2. Peoples Insurance Co. Ltd. *v.* Sardar Sardul Singh Caveeshar, A.I.R. 1962 Punj. 101 at p. 110.
3. *See* Sec. 141, *post*.
4. S. Raghbir Singh Gill *v.* S. Gurcharan Singh Tohra, A.I.R. 1980 S.C. 1362 at p. 1369 ; *see* also Maneklal Sons *v.* Union of India, 1984 Cal. L.J. 1359.
5. Queen-Empress *v.* Moss, I.L.R. 16 All. 88 at p. 100 *per* Edge, C.J.

"Shall be compelled"—Force of the term

The term "shall be compelled" appears to be correlative of the term "shall be excused," and they presuppose the rule that every person giving evidence on any subject, shall be bound to state the truth, and an authority competent at the time to excuse or compel compliance with this rule.[1] This section does not in terms deal with all criminatory questions which may be addressed to a witness, but only with questions as to matters relevant to the matter in issue. Irrelevant questions should not be allowed.[2] Protection is afforded by this section only to answers which a witness has objected to give or which he has asked to be excused from giving and which then he has been compelled by the Court to give.[3]

The words "shall be compelled to give" in this section, apply to pressure put upon a witness after he is in the box and when he asks to be excused from answering a question.[4]

In *Emperor* v. *Cunna*,[5] Hayward, J., has said :

> "If a man voluntarily makes an incriminating statement, he must take the consequences for it. He can only plead protection if he has specifically declined to make the statement, and has been specifically compelled to do so by the Court."

These observations have been referred to with approval in the Full Bench case of *Bai Shanta* v. *Umrao Amir Malik*.[6] In *Elavarthi Pedabba Reddi* v. *Iyyala Varada Reddi*,[7] it is held that it is a question of fact in each case whether the witness had been compelled to answer the question complained of. The compulsion referred to in Sec. 132 being something more than being put in the witness-box, and being sworn to give evidence, but such compulsion may be express or implied.

In *Elavarthi Peddabba Reddi* v. *Iyyala Varada Reddi*,[8] Devadoss, J., said at page 239 that "compelled" means forcing or insisting upon a witness to answer the question. Later he observed that "where the Court makes a witness understand that he has no option but to answer, the proviso would apply whether the witness asks for protection or not."[9]

Meaning of "compelled".

"Compelled" in Sec. 132 to apply where Court compelled witness to answer.

Edge, C.J., said in *Queen-Empress* v. *Moss*[10] : Compelled "in Sec. 132... only applies where the Court has compelled a witness to answer a question, and not to a case in which the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused." In *Kashi Ram* v. *Emperor*,[11] Dalal, J., a witness examined by his own counsel made an answer defamatory to another person.

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1. Queen *v.* Gopal Das, I.L.R. 3 Mad. 271 at p. 276 : 2 Weir 781 ; *see* also the judgment of Turner, C.J., *Ibid.*
2. Queen *v.* Gopal Das, I.L.R. 3 Mad. 271 : 2 Weir 781.
3. Rat. Unrep. Crim. Rul. 360 at p. 361 : Queen- Empress *v.* Ganu Sonba, I.L.R. 12 Bom. 440 at p. 442 ; Queen- Empress *v.* Samiappa, I.L.R. 15 Mad. 63 at p. 65 : 2 Weir 792.
4. Meher Sheikh *v.* Queen-Empress 1, 21 Cal. 392.
5. A.I.R. 1920 Bom. 270 : 59 I.C. 324 : 22 Cr.L.J. 68 (F.B.).
6. A.I.R. 1926 Bom. 141 : 93 I.C. 151 : 27 Cr.L.J. 423 : I.L.R. 50 Bom. 162 (F.B.).
7. A.I.R. 1929 Mad. 236.
8. A.I.R. 1929 Mad. 236 : I.L.R. 52 Mad. 432 : 29 M.I.W. 210 : 1929 M.W.N. 87 : 56 M.L.J. 570.
9. 18 U.S.C., para. 3486.
10. I.L.R. 16 All. 88 at p. 100.
11. A.I.R. 1930 All. 493 : 1930 A.L.J. 1121.

The answer given by him was held to be a voluntary answer notwithstanding the testimonial duty. This case and *Emperor* v. *Banarasi*[1] show that whether a witness is compelled or not is a question of fact depending upon the circumstances and not of law.

When in law it can be said that a witness has been compelled to give an answer within the meaning of Sec. 132, Evidence Act, it is question of fact to be determined by the Tribunal in each case.[2] In *Emperor* v. *Banarasi*[3] a Bench of the Allahabad High Court held that.—

> "It has been held that the word 'compelled' involves the necessity of a formal objection to giving the answer, and an order made at the time to the witness compelling him to answer. We are of opinion that, that is too narrow an interpretation. The matter has been recently discussed in two or three cases, particularly by a member of High Court in *Emperor* v. *Ganga Sahai*[4] in which the judgment quotes with approval a sentence from Piggot, J.'s judgment in *Kallu v. Sittal*,[5] and we are of opinion that the interpretation put upon the word 'compelled' in the former case is right and ought to be followed. Subsequently Tudball, J., in *Emperor v. Chatur Singh*,[6] following the case in *Emperor* v. *Ganga Sahai*[7] and Piggot, J's dictum in *Kallu* v. *Sittal*,[8] held that a common sense meaning should be given to the word 'compelled'. In our view this really means that compulsion under that section is a question of fact."

In *Elavathi Peddabba Reddi* v. *Iyyala Varada Reddi*,[9] a Bench of the Madras High Court while considering the meaning of this proviso held that—

> The compulsion may be express or implied. It is not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form.

All the earlier important rulings on the point have been discussed in the above case some of which 'take a still more liberal view of the section, such as *Emperor* v. *Ganga Sahai*[10] and *Emperor* v. *Chatur Singh*.[11] Both these rulings are contrary to the observations of Sir John Edge in an earlier case of the same High Court in *Queen Empress* v. *Moss*.[12]

Distinction between express or implied compulsion difficult.

It is difficult to draw a distinction between compulsion express and implied. In every case compulsion is express although it may be couched in different words, and may give intimation to the witness that he is bound to answer not only the question which he has objected to but every other question which may on a particular point be put to him. An intimation of that nature might relieve the witness of objecting to every question which is put to him and which exposes him to an action, but before he can be said to have been compelled to answer a question, he must object to answer such question, or, at any rate, the

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1. A.I.R. 1924 All. 381.
2. Sheo Karan Lal *v.* Bandi Prasad, A.I.R. 1943 Pat. 117 at p. 120.
3. A.I.R. 1924 All. 381 : 77 I.C. 829 : 25 Cr.L.J. 477 : I.L.R. 46 All. 254 : 22 A.L.J. 144.
4. A.I.R. 1920 All. 140 : 54 I.C. 890 : 21 Cr.L.J. 186 : I.L.R. 42 All. 257 : 18 A.L.J. 112.
5. A.I.R. 1918 All. 260 : 43 I.C. 823 : 19 Cr.L.J. 231 : I.L.R. 40 All. 271 : 16 A.L.J. 201.
6. A.I.R. 1921 All. 362 : 58 I.C. 825 : 21 Cr.L.J. 825 : I.L.R. 43 All. 92 : 18 A.L.J. 940.
7. A.I.R. 1920 All. 140 : 54 I.C. 890 : 21 Cr.L.J. 186 : I.L.R. 42 All. 257 : 18 A.L.J. 112.
8. A.I.R. 1918 All. 260 : 43 I.C. 823 : 19 Cr.L.J. 231 : I.L.R. 40 All. 271 : 16 A.L.J. 201.
9. A.I.R. 1929 Mad. 236 : 116 I.C. 337 : 30 Cr.L.J. 613 : I.L.R. 52 Mad. 432 : 56 M.L.J. 570.
10. A.I.R. 1920 All. 140 : 54 I.C. 890 : 21 Cr.L.J. 186 : I.L.R. 42 All. 257.
11. A.I.R. 1921 All. 362 : 58 I.C. 825 : I.L.R. 43 All. 92.
12. I.L.R. 16 All. 88 : (1894) A.W.N. 23.

very first question on the same point so as to invite the attention of the Court to apply its mind to the question and to decide whether he is to be compelled to answer the same or not.[1]

Whether accused can be compelled to enter the witness-box.

There is no compulsion on a person accused of an offence to enter the witness-box. The necessity to enter the witness-box for substantiating his defence is not such a compulsion as would attract the protection of Art. 20 (3). Compulsion in the context of Art. 20 (3) must proceed from another person or authority.[2]

Protection of witness under Sec. 132 when complete.

It is not easy to find out the exact position in which witnesses are with regard to the statements which they make when giving evidence in Court. There can be no doubt that if the object to answering any particular question on the ground that a true answer to it may render them liable to legal consequences and they are then told by Court to answer their protection under Sec. 132, Evidence Act, is complete. It seems, however to be the view of all the High Courts that the protection given by Sec. 132 must be claimed directly or indirectly in some way or another.[3]

Mere record of deposition is no evidence of its compulsory or voluntary nature.

In the States where the Judges are permitted to simply make notes of the deposition of a witness, mere record of a deposition is not by itself sufficient evidence of complusory or voluntary nature of the statement of a witness.[4]

Witness when not to be said to have been compelled.

Where a person makes a defamatory statement as a witness in answer to a question in examination-in-chief without any protest and hesitation and without begging to be excused from answering the question, he cannot be said have been compelled to give answer, and is not entitled to benefit of the proviso.

The occasion for not excusing a witness from answering a question, the answer to which will expose him to a penalty, can arise only when a witness begs to be excused from answering it, if he answers it the question of his being excused from answering it simply cannot arise. The compulsion contemplated by the proviso must arise out of the refusal of his prayer to be excused. If he

Compulsion to arise out of refusal of witness's prayer to be excused.

answers the question even though it will expose him to a penalty without any protest or hesitation on prior refusal to answer it, he is not compelled and the consequence laid down in the proviso will not arise. How a witness's prayer to be excused from answering a question is rejected or how he is compelled to answer it is an altogether different question ; he may be compelled in more than one way. He may make the prayer to be excused expressly or impliedly, he may refuse to answer the question or he may beg to be excused from answering it or he may remain silent or he may protest against being placed in an incriminating situation; but if he is ordered by the presiding officer to answer the question or told that he is bound to answer or that his prayer is rejected, it amounts to his being compelled to answer it. The words used in the proviso are "be compelled" and not "be bound by law". This means that the compulsion emanates from the presiding officer and not by operation of any law.[5]

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1. Ghanshamdas Gianchand *v.* Nenumal, A.I.R. 1934 Sind 114 at pp. 117-18.
2. Tukaram G. Gaokar *v.* R.N. Shukla, A.I.R. 1968 S.C. 1050 at p. 1053 : 70 Bom. L.R. 718.
3. Rasool Bhai *v.* King, A.I.R. 1939 Rang. 371 at p. 372.
4. Surajmal *v.* Ramnath, A.I.R. 1928 Nag. 58 at p. 62.
5. Chotkan *v.* State, A.I.R. 1960 All. 606 at p. 609 : 1960 A.W.R. 543 : 1960 A.L.J. 668.

A full Bench of the Bombay High Court in *Bai Shanta* v. *Umrao*,[1] held that a witness is not entitled to the benefit of the proviso if he did not object to answering the question.

Witness not entitled to the benefit of proviso if not objected to question.

In *R.* v. *Boyes*[2] Cockburn, C.J., observed that it is for the Court to decide whether there is a reasonable ground to apprehend danger to the witness from his being "compelled to answer" and that the presiding officer is "bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril."

Court to decide reasonable ground to apprehend danger to witness.

These observations show that the witness must claim the privilege of silence and that compulsion arises when the privilege is denied and the presiding officer insists upon his answering the question. In *Ram Dayal* v. *Emperor*[3] and *Jaganath* v. *Emperor*,[4] a witness was held to be not entitled to the benefit of the proviso if he had not objected to the question.

Compulsion arises when Judge insists on answer.

This view is supported by *Rogers* v. *United States*,[5] where Vinson, C.J., laid down—

"The privilege 'is deemed waived unless invoked'.....the privilege against self-incrimination 'is solely for the benefit of the witness'."

Privilege deemed waived unless invoked.

Eighth Exception to Sec. 499 excludes a statement from the definition of defamation altogether, whereas the proviso to Sec. 132 excludes prosecution for defamation and bars proof of the accusation in a trial for defamation.

Section 499, Eighth Exception, I.P.C., differs from proviso to Sec. 132.

Consequently, in order to consider whehter the proviso is applicable or not, it is irrelevant to consider whether the answer contains defamation punishable under Sec. 500 or not.[6]

In *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdry*,[7] the following important passage occurs in the course of the judgment :

> ".....That it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."[8]

6. Answer given without compulsion, admissible evidence.—A suit was brought upon a promissory note executed jointly by *A* and his son *B*. Leave to defend was obtained upon an affidavit filed by *B* who further gave evidence at the trial on his behalf. Upon a subsequent trial of *B* for the forgery of his father's

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1. A.I.R. 1926 Bom. 141 : I.L.R. 50 Bom. 162.
2. (1861) 1 B. & S. 311 : 121 E.R. 730.
3. A.I.R. 1933 Oudh 370.
4. A.I.R. 1934 Oudh. 386.
5. (1950) 340 U.S. 367 at p. 370 : 95 Law Ed. 344.
6. Chotkan *v.* State, A.I.R. 1960 All. 606 at p. 608 : 1960 A.W.R. 543 : 1960 A.L.J. 668 : Haji Ahmad Hussain *v.* State, A.I.R. 1960 All. 623 : 1960 A.W.R. 141 : 1960 A.L.J. 109 : 1960 Cr.L.J. 1296.
7. 17 W.R. 283 : 11 Beng. L.R. 321 : 2 Suther. 547 : 3 Sar. 179 (P.C.).
8. Sheo Karan Lal *v.* Bandi Prasad, A.I.R. 1943 Pat. 117 at p. 120.

signature to this promissory note, the affidavit and deposition of *B* were admitted in evidence against him. The question whether this evidence had been properly admitted was referred to a Full Bench of five Judges. They held unanimously that the affidavit had been properly admitted. A majority of three further held that the deposition also had been properly admitted as *B* had made it voluntarily and without compulsion on the part of the Court.[1]

Distinction made by Sec. 132 between voluntary answer and compulsory ones.

In *Queen-Empress* v. *Ganu Somba*,[2] it was pointed out that this section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer and gives him a protection in the latter of those cases only. It was, therefore, held that protection is afforded only to answers which a witness has objected to give, or which he has asked to be excused from giving, and which he then has been compelled by the Court to give. The ruling in the case of *Queen* v. *Gopal Das*[3] was followed in the case of *Queen- Empress* v. *Samiappa*.[4] In this case reference was made to the case of *Manjayya* v. *Sesha Setti*[5] and *Bhikambar* v. *Bacharam Sirkar*.[6] The Calcutta High Court in *Digambar Halder* v. *Mohan Sirdar*[7] has approved of *Queen* v. *Gopal Das*[8] and *Queen-Empress* v. *Ganu Sonba*.[9] The result of these cases is that a witness is protected against the consequences for what he may say whilst under examination; but if he wishes to prevent his statements from being used against him as evidence of an offence previously committed, he must object to reply and only answer on being compelled by the Court.

English-law.

It has been held in England that a Judge is not bound to warn a witness of his privilege to refuse to answer cirminating questions nor will counsel be permitted to object to such questions. If the witness himself does not refuse to answer.

The decision of the Full Bench in the case of *Queen* v. *Gopal Das*[10] has been followed in *Queen-Empress* v. *Moss*[11]; *Moher Sheikh* v. *King Emperor*[12]; *Deputy Superintendent* v. *Promotha*[13]; *Junoo Miah* v. *King-Emperor*[14]; *E.* v. *Cunna*[15] ; *Kalu* v. *Sittal*[16]; *Ganga Sahai* v. *E.*[17] The Allahabad High Court has however held in a case that an answer given by a witness in criminal case, especially when the question is on a point which is relevant to the case is within the protection afforded by Sec. 132, whether or not the witness objected to the question asked to him.[18] In a

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1. Queen *v.* Gopal•Das, I.L.R. 3 Mad. 271.
2. I.L.R. 12 Bom. 440.
3. I.L.R. 3 Mad. 271.
4. I.L.R. 15 Mad. 63.
5. I.L.R. 11 Mad. 477.
6. I.L.R. 15 Cal. 264.
7. Cr. Ap. No. 626 of 1893, decided on 28th August, 1893.
8. I.L.R. 3 Mad. 271.
9. I.L.R. 12 Bom. 440.
10. I.L.R. 3 Mad. 271.
11. I.L.R. 16 All. 88.
12. I.L.R. 21 Cal. 392.
13. 14 C.W.N. 957 : I.L.R. 37 Cal. 878 (objection was taken by the pleader of the witness),
14. I.L.R. 39 Cal. 348 : 16 C.W.N. 503.
15. 22 Bom. L.R. 1247 (F.B.) : 22 Cr. L.J. 68.
16. I.L.R. 40 All. 271.
17. I.L.R. 42 All. 257.
18. E. *v.* Chatur, I.L.R. 43 All. 92, not following Queen *v.* Gopal Das, I.L.R. 3 Mad. 271 ; Queen-Empress *v.* Moss, I.L.R. 16 All. 88 ; Kallu *v.* Sital, I.L.R. 40 All. 271 ; Ganga Sahai *v.* E., I.L.R. 42 All. 257.

later case it was held by the same High Court that compulsion is a question of fact. A witness might be compelled, in particular cases, to answer questions put by the counsel and in such cases the section is clearly applicable.[1]

Compulsion is a question of fact.

Taking a thumb-impression of a witness by the Court is not equivalent to asking a question and receiving an answer within the purview of the proviso to this section, and therefore such a thumb-impression may be proved against the person giving it in a criminal trial.[2]

Thumb-impression may be proved against the person giving it.

7. Privilege whether absolute.—Our law of a defamation and the privilege or immunity from action in regard to a defamatory statement has been originally derived from the law of England but has from the very beginning been enacted in unmistakable words. The English law is that a witness is absolutely protected from action for defamation in respect of statements made by him in witness-box though possibly he could be indicated for perjury, in case the statement is false and known to be false. But even there, the statement, should relate to the subject-matter of the judicial proceeding. Courts in this matter are not, however, concerned with the English law as such except that the Madras High Court has in early cases accepted those principles. The Madras view in the Full Bench decision,[3] though followed in a number of cases has been substantially modified in the comparatively later cases in *Tiruvenga Mudali* v. *Tripurasundari*[4] and *Elavarthi Peddabba Reddi* v. *Iyyala Varada Reddi*.[5] The trend in Bombay also had originally been in the same direction as Madras; but in later decisions like *Bai Shanta* v. *Umrao Amir Malik*,[6] the view is that there was no absolute privilege. Calcutta has been more consistently against absolute privilege and the ruling is fairly typical of the decisions of that High Court. The majority view of the Allahabad High Court has been to the same effect. In general practically all our Courts are against the principle of absolute protection of a witness.[7]

Law of defamation derived from English law.

Under English law witness absolutely protected.

No absolute privilege under Sec. 132.

In *Chotelal* v. *Phulchand*,[8] it was held that—

> "A person giving evidence in a Court of law is not entitled to an absolute privilege in respect of the statement which he makes and consequently he is not immune from a complaint of defamation by reason of words uttered on oath in the witness box...."

Our law of defamation unlike the English law on the subject has been completely codified in Sec. 499, I.P.C., and the exceptions have been enacted in the section itself, it is really not proper to go beyond them and to invoke the principles of the English law laid down in another context.

Defamation law codified in Sec. 499 I.P.C.

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1. Emperor *v.* Banarsi, I.L.R. 46 All. 254 : 22 A.L.J. 144.
2. Junoo Miah *v.* King-Emperor, I.L.R. 39 Cal. 348 : 16 C.W.N. 503 : 15 C.L.J. 399.
3. Queen *v.* Gopal Doss, I.L.R. 3 Mad. 271 ; Manjayya *v.* Sesha Setti, I.L.R. 11 Mad. 477.
4. A.I.R. 1926 Mad. 906 (F.B.) : I.L.R. 49 Mad. 728.
5. A.I.R. 1929 Mad. 236 : I.L.R. 52 Mad. 432 : 29 M.L.W. 210 : 1929 M.W.N. 84 : 56 M.L.J. 570.
6. A.I.R. 1926 Bom. 141 (F.B.) : I.L.R. 50 Bom. 162.
7. Haider Ali *v.* Abru Mia, I.L.R. 32 Cal. 756.
8. A.I.R. 1937 Nag. 138 : I.L.R. 1937 Nag. 425 : 20 N.L.J. 33 : 169 I.C. 429.

Compulsion under Sec. 132 not latent one.

The compulsion in Sec. 132 is not the general latent compulsion over every witness, but something definite and express. The record itself should indicate that the witness was really unwilling to make the statement concerned, and was being pulled up by an insistent Court to give an answer. It may not be necessary for him to prove that the Court expressly threatened him with consequences if he refused to answer but compulsion should be clearly indicated.

Witness to ask the Court whether he is bound to answer.

The proper course for the witness is to ask the Court if he was bound to answer and if the Court still insisted, there would be compulsion attracting the proviso. But, if the witness goes on without showing the least hesitation or asking the Court to excuse him then, on facts, there is no compulsion. The principle of absolute privilege cannot be read into the proviso by presuming that there is compulsion whenever a witness comes into the box.[1]

In *Peddabba Reddi* v. *Varada Reddi*,[2] Devadoss and Waller, JJ., held, dissenting from *Manjayya* v. *Sesha Shetti*,[3] that in India statements made by witnesses are entitled not to an absolute but to only a qualified privilege so far as criminal prosecutions are concerned. All the High Courts have held that a person giving evidence in a Court of law is not entitled to an absolute privilege in respect of statements which he makes, and consequently he is not immune from a complaint of defamation by reason of words uttered on oath in the witness-box.[4]

Defamatory statement in judicial proceedings not absolutely privileged.

In this connexion it will be useful to refer to a decision by a Full Bench of five Judges in *Satish Chandra* v. *Ram Dayal De*.[5] where Mukerjee, Actg, C.J., held that a defamatory statement, on oath or otherwise, by a party to a judicial proceeding, falls within Sec. 499 of the Penal Code, and is not absolutely privileged. It is not open to the Court to engraft exceptions derived from the Common Law of England on the statute law of India. *In re Venkata Reddi*[6] was referred to and dissented from. The consensus of opinion in the various High Courts in India has converged on the conclusion that the question of absolute privilege to a witness does not arise in view of Sec. 499 of the Penal Code, which relates to a criminal prosecution.[7]

8. Doctrine of absolute privilege.—Under the English law, the following statements are absolutely privileged so that no action will lie in respect of them, however false, defamatory and malicious they may be.

Any statement made in course of and with reference to judicial proceedings made by any Judge., juryman, party witness, or advocate.

Statement having no connection with judicial proceedings—Qualification explained by Salmond.

If the offending statement has no connexion with the proceedings, and is made wantonly and without reference to these proceedings, the person making them cannot claim privilege. This qualification is explained by Salmond as follows :

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1. Hemraj Poonamachand *v.* Babulal Bhagirath, A.I.R. 1962 M.P. 241 at pp. 242-43.
2. A.I.R. 1929 Mad. 236 : I.L.R. 52 Mad. 432 : 30 Cr.L.J. 613.
3. I.L.R. 11 Mad. 477 : 1 Weir 586.
4. Narayana Ayyar *v.* G. Veerappa Pillai, A.I.R. 1951 Mad. 34 at p. 39 : I.L.R. (1951) Mad. 661 : L.W. 1040 : (1950) 2 M.L.J. 686 : 1950 M.W.N. 878.
5. A.I.R. 1921 Cal. 1 : 22 Cr. L.J. 31 (F.B.) : I.L.R. 48 Cal. 388.
6. I.L.R. 36 Mad. 216 : 14 I.C. 659.
7. Narayana Ayyar *v.* G. Veerappa Pillai, A.I.R. 1951 Mad. 34 at pp. 39-40 : I.L.R. (1951) Mad. 661 : 64 L.W. 1040 : (1950) 2 M.L.J. 686 : 1950 M.W.N. 878.

"The statement, in order to be privileged, need not be relevant in the sense of having a material bearing upon the matter in issue in the case. ....Nevertheless the statement though it need not be relevant in this sense, must, it would seem, be made in the course of and with reference to the case in hand."[1]

Winfield explains the limits of absolute privilege as regards statements made in judicial proceedings thus :

"The statement is not privileged if it has no reference to the inquiry which is proceeding. This is generously interpreted and the privilege of a witness is not limited to statements for which, if untrue, he might be indicted for prejury."[2]

Whether the doctrine of absolute privilege should be applied to statements made in judicial proceedings in India.

The question whether the doctrine of absolute privilege should be applied to statements made in judicial proceedings in India was answered in Full Bench of five Judges of the Allahabad High Court in *Chunni Lal* v. *Narshingh Das*.[3] In this case it was held that there was nothing in the circumstances and society of this country that would make it improper or inadvisable to apply to India the English rule of privilege, which is well established in England.

The doctrine of absolute privilege as a defence in a civil suit for defamation was firmly established by this decision and has been accepted and approved in every subsequent case.

But two aspects of this decision must, however, be noted. *Firstly* it related to a defamatory statement made by a party in judicial proceedings. *Secondly* it did not consider the limits of the doctrine of absolute privilege. Even under the English law the privilege is subject to the condition that the offending statement must have some connexion with the proceedings in which it is made.

The English law is virtually the same. In *Munster* v. *Lamb*,[4] it was held and this observation was quoted with approval in *Rahim Bakhsh* v. *Bachcha Lal*,[5] that "words spoken by an advocate in the course of the defence of his client, however defamatory they may be of the prosecutor, are not actionable, provided they be relevant to the matter in hand and spoken in good faith."

A similar limit has been fixed under the English law to the privilege claimed by a witness. In *Munster* v. *Lamb*,[6] the privilege of a witness was described thus: "with regard to witnesses, the chief cases are : *Revis* v. *Smith*,[7] and *Henderson* v. *Broomhead*,[8] and with regard to witnesses the general conclusion is that all witnesses speaking with reference to the matter which is before the Court whether what they say is relevant or irrelevant, whether what they say is malicious or not are exempt, liability to any action in respect of what they state, whether the statement has been made in 'words, that is, on *viva voce* examination, or whether it has been made upon affidavit. "Thus the absolute

1. Salmond on *Torts*, 11th Ed., p. 451.
2. Winfield on *Torts*, 6th Ed., p. 335.
3. 16 A.L.J. 360 : A.I.R. 1918 All. 69 (F.B.).
4. (1883) 11 Q.B.D. 588.
5. A.I.R. 1929 All. 214.
6. (1883) 11 Q.B.D. 588.
7. (1856) 18 C.B. 126.
8. (1859) 4 H. & N. 569.

privilege of a witness was confined to statements which are made by him with reference to the matter before the Court by necessary implication, it was held that a statement by a witness which has no connexion with the matter before the Court is not protected under the doctrine of absolute privilege.

In *Seaman* v. *Netherclift*,[1] it was held that a witness in a Court of justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness.

Cockburn, C.J., made it clear that the doctrine of absolute privilege conferred upon a witness is not without limits. He observed, "I quite agree that what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case before Lord Ellenborough in *Trotman* v. *Dunn*.[2] Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause of matter of inquiry in order to assail the character of another.....it certainly might well be said in such a case that the statement was.....not within the privilege."

The Allahabad High Court has recognized that there are limits to the absolute privilege conferred on counsel or witnesses appearing in judicial proceedings.

In *B. Sumat Prasad Jain* v. *Sheo Dutt Sharma*,[3] a Division Bench of the Allahabad High Court held that a counsel acting professionally in a cause, is absolutely protected from a suit for defamation even though the words are uttered or written without justification and maliciously and are irrelevant to issue then before the Court, unless it can be shown that the words said or written in the course of the administration of the cause or suit are not said or written in reference to that cause or suit and are in that broad sense irrelevant.

Protection to counsel for words spoken or written in his professional capacity.

Venkatasubba Rao, J., in *Duraiswami Thevan* v. *Lakshmanan Chettiar*,[4] observed that relevancy in relation to the absolute privilege is not to be construed narrowly, but rather in the sense of "having reference" or being "made with reference" to the inquiry in the course of which the question arises.

While accepting the authority of Full Bench in *Chunni Lal* v. *Narsingh Das*,[5] the Bench observed: "But I should not wish to imply that there is no limit to the immunity of an advocate from the consequences of his words and acts in the causes, he conducts. ....But, until it has been shown that what an advocate says or writes in the course of the administration of a suit is not said or written in reference to that suit, and is in the broad sense "irrelevant", I should hold that in his client's interest rather than in his own, he enjoys an absolute privilege. ....When however, irrelevance in the proper sense is established, then the absolute privilege of the advocate ceases."

The Bench also made it clear that the broad interpretation of absolute privilege given by it was limited to the case of an advocate and did not necessarily extend to a witness.

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1. (1876) 2 C.P.D. 53.
2. (1815) 4 Camp. 211.
3. A.I.R. 1946 All. 213.
4. A.I.R. 1933 Mad. 537.
5. A.I.R. 1918 All. 69 : I.L.R. 40 All. 341.

The Lahore High Court has also held that the doctrine of absolute privilege conferred upon a witness has its limits. In *Jiwan Mal* v. *Lachhman Das*,[1] it was held that a remark made by a witness wholly irrelevant to the matter of inquiry, uncalled for by any question of Court and introduced by the witness is not privileged.

In India the principles governing the privilege of a witness are not the same in criminal and civil defamation. Under Sec. 499, I.P.C., the absolute privilege enjoyed by a witness under the English law has been reduced to a qualified privilege. But in civil defamation, a witness making a statement in judicial proceedings, who is subsequently sued for slander for having made that statement, can claim absolute privilege unless it can be shown that the statement was made without any reference to the proceedings before the Court and had no connexion with them.[2]

9. Two exceptions to rule that the witnesses must answer.—It may be observed that witnesses examined by police officers investigating cases are not bound to answer criminating questions put by such officers (*see* Secs. 161 and 175 of the Code of Criminal Procedure). Collectors engaged in settlement operations and other proceedings are, by Cl. (1), Sec. 19 of Regulation VII of 1882, authorized to summon all *sadar malgujars* and to require the production of their accounts and to examine such persons as to the truth of such accounts; provided, however that no person shall be compelled to answer any interrogation regarding matters wherein he may have an immediate personal interest in concealing the truth, or in uttering what is false, not being an interest arising out of fear, favour, or reward, or any corrupt bargain or agreement with another party. These provisions are still in force, and are saved by Sec. 2, *ante*. As to *criminal documents*, *see* Sec. 130, *ante*.

Exceptions to witness's compulsion to answer.

10. Scope.—Where a person was examined as a witness and he made certain statements which are the subject-matter of a complaint against him under Sec. 500, I.P.C., he is not protected under the proviso to Sec. 132 of the Evidence Act for having made the statement in Court.[3]

11. Proviso.—It cannot be claimed that because witnesses in judicial proceedings have the benefit of the protection under the proviso to Sec. 132 of the Indian Evidence Act, person summoned and examined under Sec. 171-A of the Sea Customs Act (repealed) are entitled to the same protection.[4]

The provisions of proviso to Sec. 132, Evidence Act, clearly protects a witness from being prosecuted on the basis of the answers given by him in a criminal proceeding which tend to criminate him directly or indirectly.[5]

Where the petitioner was summoned as a witness and was examined as DW 1 and while being examined he has given an answer, that answer cannot be used against him in subsequent criminal proceedings. He is clearly protected under the proviso to Sec. 132 of the Evidence Act.[6]

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1. A.I.R. 1926 Lah. 486.
2. Rajendra Kishore Sahi *v.* Durga Sahi, A.I.R. 1967 All. 476 at pp. 477-80 : 1967 A.L.J. 158.
3. Gir Raj *v.* Sulla, A.I.R. 1965 All. 597 at pp. 597, 598 : 1965 A.W.R. (H.C.) 2.
4. Rainbow Trading Co. *v.* Assistant Collector of Customs, Madras, A.I.R. 1963 Mad. 434 at p. 448.
5. State (Delhi Admn.) *v.* Jagjit Singh, A.I.R. 1989 S.C. 598 at pp. 602, 603 : 1989 L.W. (Cr.) 430 at p. 435 (S.C.); *see* also Usha Devi *v.* Jagdish Prasad, 1989 (25) All. Cr.C. 382 at p. 383.
6. M. P. Gangadharan *v.* State of Kerala, 1989 (2) Cr. L.C. 686 at pp. 689, 691 (Ker.).

133. Accomplice.—An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

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1. Policy of the section.—It is not quite clear why this section was inserted. "It was not necessary, as Sec. 118 makes all persons competent to testify, except those there enumerated. Nor is there any rule which requires that the evidence of an accomplice should be corroborated. But the emphatic statement in this section might lead persons to suppose that the legislature desired to encourage convictions on the uncorroborated evidence of an accomplice. This, however, cannot have been the case, because in Sec. 114, we find given, the presumption 'that an accomplice is unworthy of credit, unless he is corroborated in material particulars.' It would, however, have been better to omit this section. The law on the subject would then have been the same as it is now, and the awkwardness of appearing to sanction a practice so universally condemned would be avoided."[1]

2. Accused cannot be put in the same position as that of witness by their acquittal.—It is now well settled that Art. 14 does not ensure absolute equality amongst all but ensures it amongst person similarly situated. The accused cannot be put in the same position as that of the witnesses by their acquittal. While dealing with the exclusionary theory of evidence enunciated by the American Federal Court, Cordozo, J., in *People* v. *Defore*,[2] in a different context says :

"We are confirmed in this conclusion when we reflect how far reaching in its effect upon society, the new consequences would be the pettiest peace officer would have it in his power, through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious. We may not subject society to these dangers until the Legislature has spoken with a clearer voice."

It is true that in the supposed interest of the society, constitutional guarantee cannot be reduced to nullity. But, if without bringing about the result of exposing

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1. Mark by on *Evidence*, p. 98.
2. (1915) 242 N.Y. 13, cited in Wigmore on *Evidence*, Mc Naughtoon Revision, p. 37.

the society to crimes, the accused can be resorted to equality, they cannot complain. The Court may if it is satisfied that the witnesses are similarly situated, order their prosecution, but ought not to acquit the accused only on this ground.[1]

3. The law.—Mr. Taylor, thus explains the law as to accomplices. "The *degree* of credit which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury...It is true that Judges, in their discretion, generally advice a jury not to convict a prisoner upon the testimony of an accomplice alone : Considering, too, the respect which is always paid by the jury to such advice from the Bench, it may be regarded as the settled course of practice not to convict a prisoner, except under very special circumstances, upon the uncorroborated testimony of an accomplice. The Judges do not in such cases withdraw the case from the jury by positive directions to acquit, but they only advice them not to give credit to the testimony." Mr. Roscoe says : As the law now stands, it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a Judge would be wrong who did not advise the jury not to convict ; whereas the Court of Criminal Appeal would be bound to pronounce an opinion that a Judge who did not so advise them was right."[2]

Only jury to give credit to testimony of accomplice

If accomplice not corroborated no conviction.

The law in India relating to the evidence of accomplices stands thus : Even before the passing of the Indian Evidence Act, 1872, it has been held by a Full Bench of the High Court of Calcutta in *R.* v. *Elahee Buksh*,[3] that the law relating to accomplice evidence was the same in India as in England. Then came the Indian Evidence Act.

Law relating to accomplice evidence.

Reading Sec. 133 and Illus. (*b*) to Sec. 114, Evidence Act, together the Courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The law in India, therefore, is substantially the same on the subject as the law in England.[4]

Evidence of one accomplice not to be used to corroborate that of other accomplice.

It is hardly necessary to deal at length with the true legal position in respect of the evidentiary value of an accomplice. An accomplice is undoubtedly a competent witness under the Indian Evidence Act. Section 133 of the Evidence Act says it in so many words that the accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon uncorroborated testimony of an accomplice. However, the rule of prudence regarding such witness has been provided for under Sec. 114 (*b*) of the Evidence Act, which says that an accomplice is unworthy of credit, unless he is corroborated in material particulars. The Courts faced with apparently two inconsistent provisions in the said Evidence Act have purported to harmonise the same by

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1. Lakshmandas Changanlal Bhatia *v.* State, A.I.R. 1968 Bom. 400 at p. 410 : 69 Bom. L.R. 808.
2. *Digest of the Law of Evidence in Criminal Cases. N.B.* Present Code of Criminal Procedure, 1973 has abolished trial with the aid of jury.
3. 5 W.R. Cr. 80 : Beng L.R. Sup., Vol. 459.
4. Bhuboni Sahu *v.* King, A.I.R. 1949 P.C. 257 at p. 258 : 76 I.A. 147 : 1949 A.L.J. 283 : 51 Bom. L.R. 955 : 84 C.L.J. 146 : 53 C.W.N. 609 : 51 P.L.R. 371 : (1949) 2 M.L.J. 194 : 62 L.W. 664 : I.L.R. 28 Pat. 592.

following the rule that an accomplice will be a competent witness no doubt in eye of law, but his evidence must receive sufficient corroboration.[1]

In the Full Bench case of *Queen* v. *Elahee Buksh*,[2] Peacock, C.J. (Kemp and Phear, JJ., concurring) said : "I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not new law, nor founded upon a new principle. The point was decided in England, as far back as the 10th December, 1662, after concurrence with all the Judges."

Thus, the law is not that the evidence of an accomplice deserves outright rejection if there is not corroboration. What is required is to adopt great circumspection and care when dealing with the evidence of an accomplice. Though there is no legal necessity to seek corroboration of accomplice's evidence it is desirable that Court seeks reassuring circumstances to satisfy the judicial conscience that the evidence is true.[3]

The whole of this judgment is well worthy of careful study. The state of the law as settled thereby is as follows : A conviction upon the uncorroborated evidence of one accomplice or more than one is valid in law.[4] But the Judge in summing up should advise the jury[5] as to the danger of convicting a prisoner on such evidence merely. If he omits to do so, and if, moreover, the Appellate Court is satisfied that the prisoner was prejudiced by such omission, there will be error in law, on account of which the verdict will be set aside. It would appear that the Evidence Act has not altered the law as settled by the above case. Reading together Sec. 114 and Illus. (*b*) thereto, the Court may consider, though is not bound to consider, an accomplice unworthy of credit, unless he is corroborated in material particulars. But the presumption allowed by Illus. (*b*) of Sec. 114 that an accomplice is unworthy of credit unless he is corroborated in material particulars, it has been said by the Bombay High Court, has become a rule of practice of almost universal application. A Judge who combines the functions of Judge and jury is bound to scrutinize accomplice evidence with great care and to consider whether there is any corroborating evidence when the main evidence is of an accomplice character.[6] Again, in another case,[7] it has been said by the some High Court : "The rule in Sec. 114 and that in Sec. 133 are part of one subject; ....and neither section is to be ignored in the exercise of judicial discretion. The result would, therefore, seem to be that it is discretionary with a Judge to presume or not to presume an uncorroborated accomplice unworthy of credit in any particular case. If he does not think proper to raise this presumption, and there are exceptional circumstances which show that he exercised a sound judicial discretion in not raising it, the conviction is not illegal because it is proceeded upon the uncorroborated testimony : of an accomplice. But in almost all cases he ought, in the exercise of a sound judicial discretion, to raise the presumption and suggest it to the jury, and this omission to do so will be held to have prejudiced the accused.[8]

Whether conviction on uncorroborated evidence of accomplice is valid.

Accomplice unworthy of credit unless corroborated in material particulars.

Rules in Secs. 114 and 133 part of one subject.

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1. Md. Yunus *v.* State of Bihar, 1977 Cr. L.J. 1243 at p. 1246.
2. B.L.R. Sup. Vol., (F.B.) 459 : 5 W.R. (Cr.) 80.
3. State of Tamil Nadu *v.* Suresh, A.I.R. 1998 S.C. 1044 at p. 1048 : 1998 Cr. L.J. 1416 : 1997 (4) Crimes 414 (S.C.).
4. *Ibid* ; *See* also Jadunath Khatua *v.* State, 1982 Cr. L.J. 954 (Orissa).
5. N.B. The Code of Criminal Procedure, 1973 has abolished trial with the aid of Jury.
6. Queen-Empress *v.* Maganlal and Motilal, I.L.R. 14 Bom. 115.
7. Queen-Empress *v.* Chagan Dayaram, I.L.R. 14 Bom. 331.
8. *See* Queen *v.* Sadhu Mandal, 21 W.R. (Cr.) 69 ; Queen-Empress *v.* Arumuga, I.L.R. 12 Mad. 196 and Queen-Empress *v.* O'Hara, I.L.R. 17 Cal. 642.

The true bearing of Sec. 114 (b) to this section has been the subject of much discussion in the Madras High Court, and the Judges have expressed different views on the subject. In *King-Emperor* v. *Nilakanta*,[1] White, C.J., and Ayling, J., held that Sec. 114 deals with presumptions of facts, and the illustration would seem to mean that a presumption of fact may be drawn, having regard to the facts of a particular case, that the uncorroborated evidence of an accomplice in that case is untrue. In a case where the Court is both Judge and jury it has to direct itself thus : "Consider the evidence of the approver, always bear in mind that it is tainted evidence, scrutinize it with the utmost care and accept it with the greatest caution. Then if you believe it, act on it, even if there is no corroboration in the strict sense of the word. If you do not believe it, reject it." The view that a Court cannot act on the evidence of an accomplice, unless it is corroborated, is not the law either of England or of India. Sankaran Nair, J., on the other hand, laid down that the presumption must first be drawn that the evidence of an accomplice is unreliable and exceptional circumstances must be proved to justify its acceptance. A person should not be convicted except under "very special circumstances," upon the uncorroborated testimony of an accomplice, and in cases tried by jury, they have to be advised accordingly. In *Muthukumaraswami Pillai* v. *King-Emperor*,[2] it was held by Benson, Wallis and Miller, JJ., that it is impossible consistently with the Indian Evidence Act to hold that, as a matter of law, the presumption must be raised, and rebutted by special circumstances or by corroboration, while Abdur Rahim, J., held the view that except in circumstances of an especial nature, it is the duty of the Court to raise the presumption and Sundara Iyer, J., held that it would be ordinarily right to require a Judge to do so but he would not go so far as to hold that the Judge must do it in every case. In *P.S. Narayana Iyer* v. *Emperor*,[3] it was held that it is quite unsafe to convict a man on the testimony of approver unless there is reliable corroborative evidence in material particulars.[4]

Presumptions of facts are dealt in Sec. 114.

Evidentiary value of uncorroborated evidence of accomplice.

Duty of Court to raise presumption.

An accomplice is a competent witness and there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad in law, but there is an established practice, which requires corroboration by some untainted evidence and that in a material particular pointing not only to the crime but to the participation of the accused in that crime.[5] On a charge of bribery two persons who gave bribes to the accused gave evidence against him. *Held* that although these witnesses were accomplices there could be no obligation to its admissibility.[6]

Accomplice, a competent witness.

Evidence of accomplice requires corroboration.

The evidence of one approver cannot be said to corroborate another's except where both have at the earliest opportunity, and before there has been any chance of corroboration, deposed to the same fact as having been committed by a particular accused

Evidence of one approver when not to corroborate another's.

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1. I.L.R. 35 Mad. 247.
2. I.L.R. 35 Mad. 397.
3. 15 Cr. L.J. 417 (Mad.).
4. *See* Queen-Empress *v.* Gobardhan, I.L.R. 9 All. 528 ; *see* also Khagendra-Jahan *v.* State, 1982 Cr. L.J. 487 (Orissa).
5. Siar Nonia *v.* Emperor, 18 C.W.N. 550 ; *see* also State *v.* Lallu Budhia, (1982) 23 C.L.R. 299.
6. Emperor *v.* Har Prasad Bhargava, I.L.R. 45 All. 226.

person.[1] A second accomplice does not improve the position of the first, and, if there are two, it is necessary that both should be corroborated.[2]

Admissibility of accomplice testimony.

It has been held by three out of five Judges in the case of *Muthukumaraswami Pillai* v. *Emperor*,[3] that the former statements of accomplices are legally admissible to corroborate their testimony at the trial, and may be considered for what they are worth, though the weight to be attached to them depends entirely on the facts of each case.

What is corroboration of testimony of an approver in trial under Sec. 400, I.P.C. ?

The rule that the evidence of accomplices or approvers must be corroborated, not only as to the crime but also as to the identity of each one of accused, and that the corroboration must ordinarily proceed, from an untainted source, is one founded on long judicial experience.[4] Corroboration of the testimony of an approver in a trial under Sec. 400, I.P.C. must connect the accused with the offence.[5] The accomplice must be corroborated as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration.[6]

Possession of property not to corroborate evidence of murder, but of robbery.

The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder; though no doubt it would be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property.[7] Exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence such as is ordinarily required to make it safe to convict a particular prisoner.[8] There is nothing in the law to justify the broad proposition that the evidence of witnesses who admit that they were cognizant of a crime that they made no attempt to prevent it and that they did not disclose its commission should only be relied on to the same extent as that of accomplices. The degree of credit to be attached to the evidence of such witnesses depends on the facts and circumstances of the particular case.[9]

Value of evidence to depend on facts and circumstances of a case.

When a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is an actual participator with the principal offender. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Courts must exercise careful discrimination and look at the surrounding circumstances.[10]

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1. Narain Das *v.* Crown, I.L.R. 3 Lah. 144 : 68 I.C. 113 (Punj.) *see* also King-Emperor *v.* Ningappa, 2 Bom. L.R. 610.
2. Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306 ; *see* also King-Emperor *v.* Mohiuddin, I.L.R. 25 Mad. 143.
3. I.L.R. 35 Mad. 397.
4. Emperor *v.* Noni Gopal Gupta, 15 C.W.N. 593.
5. Kader Sundar *v.* Emperor, 16 C.W.N. 69.
6. Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306 ; Queen-Empress *v.* Baldeo, I.L.R. 8 All. 509; Queen-Empress *v.* Krishnabhat, I.L.R. 10 Bom. 319.
7. Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306.
8. Queen-Empress *v.* Bepin Biswas, I.L.R. 10 Cal. 970.
9. Emperor *v.* Edward William Smither, I.L.R. 26 Mad. 1, *per* Benson, J.
10. Kamala Prasad *v.* Sital Prasad, I.L.R. 28 Cal. 339.

The Court has to judicially determine the extent to which his uncorroborated testimony can be considered as trustworthy by looking to the other relevant material and the attending circumstances on the basis of which the accused can be safely convicted. It is only when the approver's evidence is considered otherwise acceptable that the Court applies its mind to the rule that his testimony needs corroboration in material particulars connecting or tending to connect each one of the accused with the crime charged. In case his testimony is itself uninspiring and unacceptable justifying its rejection outright, then it would be futile and wholly unnecessary to look for corroborating evidence.[1]

4. Who is an accomplice.—The word "accomplice" is not defined either in the Indian Evidence Act or in the Indian Penal Code.

Tests for finding whether a person is or is not an accomplice.

The test for finding whether a person is or is not an accomplice of another who has committed a particular offence is to see whether the person concerned is directly or indirectly concerned in or privy to the offence, for which the main accused is charged.

In *Trilochan Singh* v. *Karnail Singh*,[2] Munsha Singh and Sunder Singh were out to sell the votes of the Harijans. It was through the effort and instrumentality of these two persons that the respondent was said to have been persuaded to pay the amount for the construction of *dharamsala*. Therefore, Munsha Singh and Sunder Singh were in the nature of accomplices.

An accomplice is a person who has concurred in the commission of an offence. The dictionary meaning of an accomplice is a partner in crime, an associate in guilt. Accomplice signifies a guilty associated in crime or when the witness sustains such a relation to the criminal act that he could be jointly indicated with the accused.[3]

In the *New Oxford Dictionary* it is stated that the wrod "accomplice" means a partner in crime, an associate in guilt.[4]

Meaning of accomplice.

The term "accomplice" signfies a guilty associate in crime.[5] The term "accomplice" has been explained in *Ismail Hassan Ali* v. *Emperor*.[6]

The word "accomplice" means a guilty associate or partner in crime or who, had a conscious hand in the offence.[7]

Meaning of accomplice.

The expression "accomplice" means a person who knowingly or volutarily co-operates with or aids and assists another in the commission of a crime. In the case in *Mahadeo* v. *King*,[8] their Lordships of the Privy Council held that the expression includes accessories after the fact. Mere acts of charity which relieve or comfort a felon, but do not hinder his apprehension and conviction nor aid

Accomplice defined.

Accessories after the fact.

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1. Ram Narain *v.* State of Rajasthan, A.I.R. 1973 S.C. 1188 at p. 1191, 1192.
2. A.I.R. 1968 Punj. 416 : I.L.R. (1968) 1 Punj. 496.
3. State of Assam *v.* Upendra Nath Rajkhowa, (1975) 1 Cr. L.J. 354 at p. 390.
4. Kailash Missir *v.* Emperor, A.I.R. 1931 Pat. 105 at p. 109.
5. United States *v.* Neverson, *Century Digest*, Vol. 14, Col. 1979. cited in Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 277 : Ghudo Ramdhar *v.* Emperor, A.I.R. 1945 Nag. 143 : K.S. Nirmalkum Arsinghji *v.* State, A.I.R. 1954 Sau. 55 ; Gobinda Balji Sonar *v.* Emperor, A.I.R. 1936 Nag. 245 ; Chetumal Rekumal *v.* Emperor, A.I.R. 1934 Sind 185.
6. A.I.R. 1947 Lah. 220 : 48 Cr. L.J. 103.
7. Jagannath *v.* Emperor, A.I.R. 1942 Oudh 221 at p. 223 ; Emperor *v.* Burn, 11 Bom. L.R. 1153.
8. A.I.R. 1936 P.C. 242 : 163 I.C. 681 (P.C.).

his escape do not render one an accessory after the fact.[1] He must be proved to have done some act to assist the felon personally.[2] The mere fact, that one had knowledge that a crime had been committed, and that he concealed or failed to disclose such knowledge, does not render him an accomplice. To render a person an accomplice his participation in the crime must be criminally corrupt.[3] The finding that made no attempt at all to prevent the commission of her husband's murder the wife is quite insufficient to render her an accomplice.[4]

Accessory to assist the principal.

Knowledge of a crime does not make a person accomplice.

Participation to make person accomplice.

It is not correct to say that is a man sees the perpetration of a crime and does not give information of it to anyone else, he might well be regarded in law as an accomplice.

Indeed, there can be no doubt that the Courts must be fully satisfied that he is a witness of truth.[5] Where the so-called independent prosecution witnesses were persons who knowingly made false declarations respecting various high denomination notes they are clearly accomplices.[6] A person who knowingly aids in the disposal of stolen property is an accomplice.[7]

Court to satisfy the witness is of truth.

Witnesses making false declarations knowingly are accomplice.

To attract Sec. 133, of the Evidence Act a person should be an accomplice as laid down in *R.K. Dalmia v. Delhi Administration*[8], para 141 of that judgment runs as under :

> "An accomplice is a person who—participates in the commission of the actual crime charged against an accused. He is to be a *particeps criminis*. There are two cases, however, in which a person has been held to be an accomplice even if he is not a *particeps criminis*. Receivers of stolen property are taken to be accomplices of the thieves from whom they receive goods, on a trial of theft. Accomplices in previous similar offences committed by the accused on trial are deemed to be accomplices in the offence for which the accused is on trial, when evidence of the accused having committed crimes of identical type on other occasions be admissible to prove the system and intent of the accused in committing the offence charged."

If there is no doubt that the witness took part in the commission of the offence for which the accused is charged and is sentenced, he can be termed as an approver.[9]

Where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime.[10] Mere being aware cannot make an accomplice.[11]

When a person is said to be accomplice.

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1. 4 Blackston's *Commentaries*, p. 38.
2. R. *v.* Chapple, (1823-41) 9 C. & P. 355.
3. Ismail *v.* Emperor, A.I.R. 1947 Lah. 220 at pp. 224-25.
4. *In re* Addanki Venkadu, A.I.R. 1939 Mad. 266 at p. 267 : 49 L.W. 175 ; but *see* Balbir Singh Balwant Singh *v.* State, A.I.R. 1959 Punj. 332 : I.L.R. (1959) Punj. 332 : I.L.R. (1959) Punj. 1473.
5. Vemireddy Satyanarayan Reddy *v.* State of Hyderabad, A.I.R. 1956 S.C. 379 at pp. 380-81 : 1956 S.C.A. 584 : 1956 S.C.R. 24 : 1956 S.C.J. 382.
6. J.M. Cohen *v.* King, A.I.R. 1949 Cal. 594 at p. 594 : 53 C.W.N. 479.
7. Mavuthalayan *v.* Emeperor, A.I.R. 1934 Mad. 721 at p. 722 : 1934 M.W.N. 1140.
8. A.I.R. 1962 S.C. 1821.
9. Bhagwansingh Tantee *v.* State of Madhya Pradesh, 1981 J.L.J. 324 at pp. 328, 329 ; 1981 M.P.L.J. 622.
10. Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271.
11. Narain Chandra *v.* Emperor, A.I.R. 1936 Cal. 101.

Failure to send copy each of the declaration and printed material to the District Magistrate does not make the printer of pamphlet an accomplice.

The mere fact that a person printed the offending leaflet cannot clothe him with the character of a guilty associate or partner in the crime of corrupt practice within the meaning of Sec. 123 (4) of the Representation of the People Act. In the instant case *R* was neither the election agent of the appellant nor is there any allegation that he published the offending leaflet. Section 127-A of the Act on which the counsel has placed strong reliance in support of his contention that *R* was in the position of an accomplice has no relavance. It has nothing to do with the offence in question. The omission on the part of *R* to send to the concerned District Magistrate a copy each of the declaration and the printed material as required by sub- section (2) of Sec. 127-A of the Act may lay him open to prosecution for an offence under sub-section (4) of Sec. 127-A of the Act but would not make him an accomplice or render his statement untrustworthy.[1]

Witness admitting having assisted the disposal of dead body not accomplice to the charge of murder.

In *Ramaswami Gounden* v. *Emperor*,[2] one of the witnesses admitted having assisted in disposing of the body after the murder had been committed; and it was held that since the accused had been charged with murder, the witness was not an accomplice. Where the witness sustains such a relation to the criminal act that he could be jointly indicted with the defendant, he is an accomplice.[3]

An accomplice is a man who could have been equally tried with the accused for the offences of which they have been convicted.[4] An accomplice witness is one who is either being jointly tried for the same offence, and makes admissions which may be taken as evidence against a co-prisoner, or one who has received a conditional pardon.[5] Accessories stand on a very different footing from accomplices. They have not the same interest in making a charge against others to save themselves.[6] Where a person took no means to prevent or disclose crime, his evidence must be considered as no better than that of an accomplice.[7] In the case of *Ishan Chandra* v. *Queen-Empress*,[8] it was held :

Testimony of informer not sufficient to justify conviction.

"Where an informer was....cognizant of the commission of an offence, and omitted to disclose it for six days, the Court *held* that his testimony was not such as to justify a conviction except where it was corroborated."

In the case of *Queen* v. *Chando Chandalinee*,[9] Markby and McDonell, JJ., held—

Accused not to be convicted on evidence of participants in the crime.

"An accused person cannot be convicted solely upon the evidence of persons who are more or less participants in the crime of which he is accused...."

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1. Virendra Singh *v.* Vimal Kumar, A.I.R. 1976 S.C. 2169 at p. 2173.
2. I.L.R. 27 Mad. 271 : 2 Weir 803 : 14 M.L.J. 226.
3. White *v.* Commonwealth, *Century Digest*, Vol. 14, Col. 1780, cited in Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 277.
4. *In re* S.A. Sattar Khan, A.I.R. 1939 Mad. 283 at p. 286 : 1938 M.W.N. 962 : 181 I.C. 364.
5. *Per* Glover, J., in Queen *v.* Ramsaday Chuckerbutty, 22 W.R. (Cr.) 19.
6. *Per* Norman, J., in Queen *v.* Chutterdharee Singh, 5 W.R. (Cr.) 59.
7. Queen *v.* Cando Chandalinee, 24 W.R. 55 ; *see* Jagannath *v.* Emperor, A.I.R. 1929 Nag. 215 ; Muhammad Usuf Khan *v.* Emperor, A.I.R. 1942 Oudh 221 ; Behari Mandal *v.* State, A.I.R. 1957 Orissa 260 at p. 262.
8. I.L.R. 21 Cal. 328.
9. 24 Suth. W.R. (Cr.) 55.

In the case of *Umed Sheikh* v. *King-Emperor*,[1] the learned Judges quoted with approval the above two decisions.

In the case of *Hayatu* v. *Emperor*,[2] it was held :

> "Witnesses who admittedly had witnessed the crime,...and who have not attempted to give any information either to the police or to any other persons....are in very little better position than that of accomplices and it would be unsafe to accept their testimony unless corroborated by some independent circumstances."[3]

Where a witnesses appeared to have taken an active part in carrying away a person after he had been grievously assaulted *held* that it would be most unsafe for the Court to rely upon their evidence, unless corroborated in material respects, in convicting the accused.[4] A person concealing the dead body of a murdered man or omitting to give information of it, should not be regarded as an accomplice.[5] Mere presence without taking any part in the transaction does not make one an accomplice.[6] Where a person sees a murder committed and takes no means to disclose it, his evidence must be considered as no better than that of an accomplice.[7] The witness standing by, not interfering to prevent the deceased being killed, is an accomplice.[8] *G*, the servant of a firm of merchants, loaded a consignment of goods on behalf of the firm at the appellant's (a station master) station. A sum of Rs. 2 more was alleged to have been paid by *G*, and appropriated by the accused. *Held, per* Newbould, J., that *G* was not an accomplic. *Held, per* Chaudhuri and Shamsul Huda, JJ., that *G* was no better than an accomplice.[9] A witness is nonetheless an accomplice because at the time of his giving evidence, he has already been convicted on his own confession.[10] Where a person was convicted of a different offence before a trial and gave evidence in Court, he could not be said to be an accomplice in law.[11]

Witness held to be accomplice.

In the case reported as *Pingal Khadia* v. *State*,[12] the accused called P.Ws. 8 and 9 to come to the house of Budni to take liquor. P.Ws. 8 and 9 found the dead body of the deceased inside Budni's house. *Held* that P.Ws. 8 and 9 were not analogous to accomplices and the Court should accept their evidence as reliable.

Witness held not to be accomplice.

The petitioner was a merchant of Salur in Madras Presidency. He was convicted for contravention of Cl. VII (*i*) of the Orissa Foodgrains Control Order, 1947. The driver of the lorry has figured as a prosecution wintess. It was contended that the evidence of the driver should not be accepted without

Whether the evidence of a driver of a lorry can be accepted.

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1. 45 C.L.J. 581.
2. A.I.R. 1929 Lah. 540.
3. *See* also Loki Prasad Ram *v.* State of Orissa, A.I.R. 1957 Orissa 258 at p. 262.
4. Alimuddin *v.* Queen-Empress, I.L.R. 23 Cal. 361.
5. Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 ; *see* Jehana *v.* Crown, A.I.R. 1923 Lah. 345.
6. Emperor *v.* Edward William Smither, I.L.R. 26 Mad. 1.
7. Nawab *v.* Crown, 5 L.L.J. 322 : 76 I.C. 624 (Punj.).
8. Queen-Empress *v.* O'Hara, I.L.R. 17 Cal. 642.
9. Surjya Kanta Bhattacharjee *v.* King Emperor, 24 C.W.N. 119 : 31 C.L.J. 30.
10. Queen *v.* Ramsaday Chuckerbutty, 20 W.R. (Cr.) 19.
11. Priya Nath Bisal *v.* King-Emperor, 15 C.L.J. 692.
12. A.I.R. 1969 Orissa 245 at p. 247.

adequate corroboration inasamuch as he was an accomplice in the commission of the crime. *Held* that this contention was correct.[1]

Law as to accomplice evidence.

The law as to accomplice evidence is well settled. The effect of Sec. 133 Evidence Act is that the Court trying an accused may legally convict him on the single evidence of an accomplice. To this there is a rider in Illus. (*b*) to Sec. 114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. This rule of caution or prudence has almost the standing of a rule of law.

In *Rameshwar* v. *State of Rajasthan*,[2] the Supreme Court laid down certain general rules about the nature of corroboration needed before accomplice evidence may be accepted. It is there pointed out that some additonal independent evidence must be looked for to see whether the approver is speaking the truth and there must be some evidence, direct or circumstantial which connects the co-accused with the crime independently of the accomplice. It is only when false implication is excluded after close scrutiny that confession of a co-accused can be used to lend assurance to other evidence. This was so stated by Sir Lawrence Jenkins in *Emperor* v. *Lalit Mohan Chuckerburty*,[3] and accepted by the Supreme Court, and a retracted confession cannot obviously go further or have higher value.[4]

Some additional independent evidence must be looked for in addition to the story of the accomplice.

Person trapping another.

A person who is not a willing party to giving of bribe and who is only actuated by the motive of trapping another cannot be regarded as an accomplice, but the evidence of such a witness is that of a partisan witness who was out to entrap another. A partisan witness merely means a person who is interested in the prosecution,

Interested witnesses.

there is no rule that in case of interested witness there must always be independent corroboration. If after scrutinizing the evidence of an interested witness the Courts finds it safe to accept such evidence, independent corroboration is not necessary.

Where a witness is not concerned with the commission of the crime for which the accused is charged he cannot be said to be an accomplice in crime.[5] But where the witness in his own showing was fully collaborating with accused in a criminal design, it was held that he was no better than an accomplice whose testimony cannot be accepted in any material particular in the absence of corroboration from reliable sources.[6]

Accomplice confesses himself criminal.

An accomplice confesses himself a criminal who has been concerned in the commission of a crime *particeps criminis*. It is well-settled law that all accessories before the fact, if they participate in the preparation for the crime, are accomplices, but if their participation is limited to the knowledge that a crime is to be commited they are not accomplices. Persons to be accomplices must participate in the commission of the same crime as the accused persons in a trial are charged.[7]

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1. Vaikuntham Jaganadham *v.* State of Orissa, A.I.R. 1952 Orissa 164 at pp. 164-65 : 17 Cut. L.T. 154.
2. 1952 S.C.R. 377 : A.I.R. 1952 S.C. 54.
3. I.L.R. 38 Cal. 559 at p. 588.
4. Haroom Haji Abdulla *v.* State of Maharashtra, A.I.R. 1968 S.C. 832 at pp. 835-37.
5. Jagannath *v.* Emperor, A.I.R. 1942 Oudh 221 at p. 223 ; Crown *v.* Ghulam Rasul, A.I.R. 1950 Lah. 129.
6. State (Delhi Administration) *v.* V.C. Shukla, 1981 M.L.J. 1 at p. 16 (S.C.) : A.I.R. 1980 S.C. 1382.
7. Jagannath *v.* Emperor, A.I.R. 1942 Oudh 221 at p. 224.

Unwilling participant not accomplice.

Sometimes as was said by Sir John Beaumont, C.J., in *Papa Kamal Khan* v. *Emperor*,[1] a person is "not a willing participant in the offence but a victim of it". Such a person should not be called an accomplice.[2]

If the evidence of the victim does not suffer from any basic infirmity, and the "probabilities-factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the "probabilities-factor" is found to be out of tune.[3]

Girl victim of outrageous act not an accomplice.

A girl who is a victim of an outrageous act is, generally speaking, not an accomplice though the rule of prudence requires that her evidence should be corroborated.[4]

As regards the corroboration of the evidence of a prosecutrix, independent confirmation of every material circumstance is not requried and corroboration need not be direct evidence that the accused committed the crime but it is sufficient if it is merely circumstantial evidence of the connection with the crime.[5]

Who is or not accomplice.

The fact that a person is passively helping another to commit a crime or does not inform the police or helps the criminal, in disposing of the murdered body or concealing it, would not make him an accomplice. In this connexion the cases of *Ramaswami Gounden* v. *Emperor*,[6] *In re Adanni Venkadu*,[7] *Nurul Amin* v. *Emperor*,[8] would be in

Nature and extent of participation in crime.

point. One has to take into consideration the nature and extent of his participation in the crime.[9]

Where witnesses who admittedly witnessed the crime, assisted in concealing the evidence of that crime, or connived at such being done, it would be unsafe to accept their testimony unless corroborated by some independent circumstances.[10] In *Dhanapati De* v. *Emperor*, [11] *R* was aware that the crime was about to be committed and he assisted the criminal to the extent of keeping a look out to see whether the police were approaching. *Held* that *R* was, strictly speaking, an accomplice whose evidence requried corroboration.

An accomplice includes one who poses as an accomplice.[12]

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1. A.I.R. 1935 Bom. 230 : 156 I.C. 615 : I.L.R. 59 Bom. 486.
2. Sriniwas Mall *v.* Emperor, A.I.R. 1947 P.C. 135 at p. 139 : 1947 A.L.J. 497 : 49 Bom. L.R. 688 : 51 C.W.N. 900 : (1947) 2 M.L.J. 328 : 60 L.W. 634 : 1947 M.W.N. 589 : 1948 A.W.R. (P.C.) 1.
3. Bharwada Bhoginbhai Hirjibhai *v.* State of Gujarat, 1983 Cr. L.J. 1096 at p. 1100 (S.C.).
4. Sidheswar Ganguly *v.* State of West Bengal, A.I.R. 1958 S.C. 143 at p. 147 : 1958 S.C.A. 147 : 1958 S.C.R. 749 : 1958 S.C.J. 349 : 1958 A.W.R. 391.
5. A.W. Khan *v.* State, A.I.R. Cal. 641 at pp. 643, 646.
6. I.L.R. 27 Mad. 271.
7. A.I.R. 1939 Mad. 266 : 49 L.W. 175 : 1938 M.W.N. 1272.
8. A.I.R. 1939 Cal. 335 : I.L.R. 1 Cal. 511.
9. Abdul Munim Khan *v.* State of Hyderabad, A.I.R. 1953 Hyd. 145 at p. 151.
10. Hayatu *v.* Emperor, A.I.R. 1929 Lah. 540 at p. 542.
11. A.I.R. 1946 Cal. 156 at p. 158 : I.L.R. (1944) 2 Cal. 312.
12. Golam Asphia *v.* Emperor, A.I.R. 1932 Cal. 295 at p. 296 : 137 I.C. 497.

A labourer carrying a bundle without knowing that the bundle contained articles stolen from the *math* is not an accomplice.[1]

Accomplies to be connected with the offence.

Accomplices are those who are in some way or other connected with the offence in question.[2]

Whether an unidentified person in charge of the cart on which the dead body was found is an accomplice.

An *ekka* driver who knew of the criminal intention of his passengers and in a way aided them by taking them to the spot and by helping them in making good their escape is as good an accomplice.[3] Where, however, an unidentified person was in charge of the cart on which the dead body was found, it cannot be assumed that the unidentified person is an accomplice.[4]

5. Accomplices when cannot be treated as infamous witnesses but as a worthy citizen to be respected and encouraged.—Abettors of crime are accomplices and must be looked upon as such, if they are produced as witnesses for the prosecution. An accomplice is one who has concurred in the commission of an offence and is a guilty associate in the crime. Accomplices are usually interested and always infamous witnesses. One accomplice cannot corroborate another and the corroboration of the evidence of accomplices must come from independent sources. But there are various kinds of bribe givers. There is the unblushing giver who pays the bribe and gets the advantage and subsequently gives evidence for some ulterior purpose. Such a person is an accomplice of the darkest hue. There may be a person who, from the very beginning, had no intention of giving a bribe, but makes a show of doing it so as to bring the dishnonest public servant to book. Such a person, far from being an accomplice, is a worthy citizen who is to be respected and encouraged.[5]

6. All accomplices cannot be treated on same footing.—In considering the question of corroboration, all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing; the nature of the offence and the circumstances in which the accomplices make their statements must always be considered. No general rule on the subject can be laid down. The decisions, however, show the principles on which Judges have acted in particular case.

Accomplices not to be treated alike.

Principal evidence of accomplice needs corroboration.

If, then, the principal evidence is of accomplices it is tainted evidence and hence there is need for corroboration.

Approver must prove his worthiness for credibility in Court.

An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in Court. This test is fulfilled, *firstly*, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given of minute details according with reality is likely to save it from being rejected

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1. King-Emperor *v.* Sheo Shankar Singh, A.I.R. 1954 Pat. 109.
2. Yacoob *v.* Emperor, A.I.R. 1933 Rang. 199 at p. 200.
3. State *v.* Ram Autar, A.I.R. 1955 All. 138 at p. 152 : 1955 A.L.J. 330.
4. Hadu *v.* State, A.I.R. 1951 Orissa, 53 at p. 57 : I.L.R. (1950) Cal. 509.
5. Sashi Bhusan Kar *v.* State of Orissa, 1985 (2) Cr. L.C. 346 at p. 357 : 1985 C.L.T. 510 (Orissa); *see* also Anant Chintaman Lagu *v.* State of Bombay, A.I.R. 1960 S.C. 500.

brevimanu. *Secondly*, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner, as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case taking into consideration all the factors, circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the Court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bringing closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by approver appertaining directly to an accused, if reliable by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based. Judged by the principles mentioned above, the evidence of the approver while revealing the story stands amply corroborated by the facts deposed to by the independent witnesses in certain material and clinching aspects connecting the accused with the crime.[1]

Accessories before the fact.

Participation in crime essential.

It is well settled that all accessories before the fact, if they participate in the preparation for the crime are accomplices, but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices. Persons to be accomplices mut participate in the commisison of the same crime as the accused person in a trial are charged.[2]

7. Evidence of accomplice is tolerated as a necessity.—It is well understood that evidence of accomplice is tolerated as a necessity to get sufficient evidence of crimes. Usually pardon is tendered and an accomplice is taken as approver.[3]

Scope of Sec. 494, Cr.P.C.

Under Sec. 494, Cr. P.C., (now Sec. 321) any Public Prosecutor may with the consent of Court withdraw from the prosecution of any person. Where intererst of justice may require that every offender should be booked, equally interests of justice may require that where it is not possible, some at least are arranged and the rest retained for giving evidence at the trial.[4] Aboot L., C.J., observed in 33 How St. Tr. 689, that—

> "...Great encouragement will be given to bad men, by withdrawing from their minds the fear of detention and punishment through the instrumentality of their partners in guilt...."

The law makes an approver's evidence admissible. The law is conscious of the fact that a participator in a crime is not a person who is worthy of credit. He is a tainted witness and he comes into the witness box without unblemished conduct. But, the law realises that there are certain offences which could never be proved unless the evidence of an approver was made available. Therefore, the policy underlying the provisions of the law that an anccomplice is a competent witness against co-participators in the crime. The evidence of an accomplice being that of an interested witness or tainted one, caution requires that there should be corroboration from an independent source in some material aspect not only commission of crime but also in his involvement in it, before its acceptance. However, it is not necessary to excpect corroboration on all the circumstances of the case of every details of the crime. It would be sufficient to

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1. Ravinder Singh *v.* State of Haryana, A.I.R. 1975 S.C. 856 at pp. 860, 861.
2. Narain Chandra Biswas *v.* Emperor, A.I.R. 1936 Cal. 101 at p. 104 : 63 C.L.J. 191 : 161 I.C. 289.
3. 11th Ed. p. 1200.
4. P. Sirajuddin *v.* Government of Madras, A.I.R. 1968 Mad. 117 at pp. 124-25 : (1968) M.L.J. 480.

have corroboration as to material circumstance of the crime and of the identity of the accused in relation of the crime.[1]

8. Accomplice in the crime whether to be joined with accused at trial.—In *Narayandas* v. *State*,[2] it has been held that the provisions regarding joinder of accused contained in the Criminal Procedure Code do not give an accused a right to insist that some one else, though he may be an accomplice in the crime alleged, be joined with him at the trial.[3]

9. Accessories after the fact.—An accomplice means a person who is believed to have participated in the offence.[4] The principals and abettors are the only classes of accomplices contemplated under the Indian law.[5] In *Nga Pauk* v. *King*,[6] it was held that in this country there is no such thing as accessory after the fact.

Accomplices contemplated under Indian law.

But in the case in *Mahadeo* v. *King*,[7] their Lordship of the Privy Council held that the expression includes accessories after the fact. Where witnesses are clearly accessories after the fact, a Court must insist on adequate corroboration of their testimony before it can sustain the conviction.[8]

Interpretation of accomplice.

Accessories after the fact are no better than accomplices.[9]

In *Brijpal Singh* v. *Emperor*,[10] it was held that the evidence of accessories after the commission of the crime cannot be accepted as proving the guilt of the accused without corroboration in material particulars by independent witnesses.

Evidentiary value of accessories testimony.

In *Emperor* v. *Kallu*,[11] the murder was committed in the presence and within sight of Mst. Duiji. Her conduct in not divulging the crime was clearly intended to assist the accused.

Failure to divulge crime.

Held that in the circumstances she must be regarded as an accessory after the fact.

In *Alimuddin* v. *Queen-Empress*,[12] two men were said to have helped to carry the injured man away from the field where he was attacked. The Bench held that these two witnesses were no better than accomplices.

Persons helping to carry the injured were not better than accomplices.

A near relation who has knowledge that a crime has been committed cannot in law be deemed to be accessory after the fact.[13]

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1. Vinit *v.* State of Maharashtra, 1994 Cr. L.J. 1791 at p. 1798 (Bom.) (D.B.) .
2. (1964) 66 Bom. L.R. 17.
3. Lakshmandas Chaganlal Bhatia *v.* State, A.I.R. 1968 Bom. 400 at p. 417 : 69 Bom. L.R. 808.
4. Nizam-ud-din *v.* State, A. 1963 J. & K. 34 ; Balbir Singh Balwant Singh *v.* State, A.I.R. 1959 Punj. 332 at p . 335.
5. *In re* Ambajan Ammal, A.I.R. 1954 Mad. 326 at p. 330.
6. A.I.R. 1937 Rang. 513 at p. 514 ; *see* also R. *v.* Chutterdhoru Singh, 5 W.R. (Cr.) 59.
7. A.I.R. 1936 P.C. 242 : 163 I.C. 681 (P.C.).
8. Ashutosh Roy *v.* State, A.I.R. 1959 Orissa 159 at p. 162 : 52 Cut. L.T. 269.
9. Ashutosh Roy *v.* State, A.I.R. 1959 Orissa 159 at p. 162 ; Emperor *v.* Kalu, A.I.R. 1957 Oudh 259 ; Mahilikilili Dhalamini, A.I.R. 1943 P.C. 4 ; Kr. Shyam Kumar Singh *v.* Emperor, A.I.R. 1941 Oudh 131 ; Mahadeo *v.* King, A.I.R. 1936 P.C. 242 ; Ismail *v.* Emperor, A.I.R. 1947 Lah. 220.
10. A.I.R. 1936 Oudh 413 ; *see* also Turab *v.* Emperor, A.I.R. 1935 Oudh 1.
11. A.I.R. 1937 Oudh 259 at p. 261.
12. I.L.R. 23 Cal. 361.
13. State of Bihar *v.* Srilal Kejriwal, A.I.R. 1960 Pat. 459 at p. 467: 1960 B.L.J. 560 : 61 Cr. L.J. 1360.

10. Burden of proving that a witness is an accomplice.—The question whether a witness is or is not an accomplice is a question for the jury to determine. This view is supported by *E. St. C. Moss* v. *Emperor*.[1]

The burden of proving that a witness is an accomplice ordinarily is upon the body alleging it, namely, the accused, though it is the duty of the prosectuion to bring the accomplice character of the evidence to the notice of the Court.[2]

11. Accomplice, how differs from detective or spy.—An accomplice may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man; he may think that the course he pursues is absolutely essential for the protection of his own interest and those of society.[3] Spies are not such persons as would require corroboration of their evidence.[4]

Spy or detective, not accomplice.

Those persons do not partake of the criminal contamination of accomplices, who enter into "communication with the conspirator with an original purpose of discovering their secret designs, and disclosing them for the benefit of the public."[5]

Act of a detective not to be treated as that of accomplice.

The action of a spy and informer in suggesting and initiating a criminal offence is justied by the doctrine which distinguishes the spy from the accomplice.[6]

12. Whether a person is spy or accomplice.—The test to determine whether a person is a spy or an accomplice has been laid down in by the Lahore High Court in *Karim Baksh* v. *Emperor*.[7]

Test to determine spy or accomplice.

It has to be seen whether the witness had entered into the conspiracy for the sole purpose of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those till he turned on his former associates and gave information to the police.[8]

Evidence of a spy needs no corroboration.

In *King* v. *S.N. Singh Rai*,[9] it was laid down that the evidence of a spy does not stand in need of corroboration. It is always for the Judge of fact in each particular case to decide whether it is safe to rely and act upon a decoy witness. The character, position in life and social standing of the witness would go a great way in helping the Judge to appreciate his evidence.

In *R.* v. *Dowling*,[10] it is held that if a witness merely lent himself to a scheme for the purpose of convicting the guilty, he is not an accomplice.

Even applying the rule stated by Niyogi, J., in *B.N. Mukerji* v. *Emperor*,[11] when a case depends mostly if not entirely on the evidence of the police witnesses

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1. A.I.R. 1927 Cal. 460 : 100 I.C. 358.
2. Jagannath *v.* Emperor, A.I.R. 1942 Oudh 221 at pp. 223-24.
3. *Per* Justice Maule, in Reg. *v.* Mullins, cited in Queen-Empress *v.* Javesharam, I.L.R. 19 Bom. 363 at pp. 369, 370.
4. *Ibid.*
5. *Per* Lord Ellenborough, at the trial of Colonel Despard cited in Queen-Empress *v.* Javesharam, I.L.R. 19 Bom. 363 at p. 369.
6. Queen-Empress *v.* Javesharam, I.L.R. 19 Bom. 363.
7. A.I.R. 1928 Lah. 193 : I.L.R. 9 Lah. 550.
8. Mangat Rai *v.* Emperor, A.I.R. 1928 Lah. 647 at p. 649 : 29 Punj. L.R. 708.
9. A.I.R. 1951 Orissa 297 at p. 299 : I.L.R. (1949) Cut. 585.
10. (1848) 3 Cox. C.C. 509.
11. I.L.R. (1945) Nag. 176.

and spies, their evidence must be subjected to close and critical examination and received with a great deal of caution.[1] While dealing with the evidence of trap-witness the Supreme Court observed in *Barsay* v. *State of Bombay*[2] :

Supreme Court's view.

"We are definitely of opinion that both the Courts had approached the evidence of Lawrence (decoy or spy and agent provocateur) from a correct standpoint. Though Lawrence was not an approver, he...could at least be equated with a partisan witness and it would not be admissible to rely upon such evidence without corroboration. It would be equally clear that his evidence was not a tainted one, but it would only make a difference in the degree of corroboration required rather than the necessity for it."

Evidence of witnesses to be judged whether they are reliable witnesses.

Evidence of witnesses, even if they are spies, has to be judged by the Judge of fact in order to find out whether the witnesses by themselves are reliable witnesses.

In this case, *held* that *C* and *L* were clearly witnesses who are called "agents provocateurs" and were such whose evidence needed corroboration.[3]

The evidence of disreputable police spy is looked upon with suspicion and distrust and is seldom, if ever relied upon in support of a conviction.[4]

Legal position of spy, detective paid informer, etc.

The legal position of a spy, detective, decoy, paid informer, trap-witness, etc. associating with the wrong-doers for discovery and disclosure of an offence has been elucidated in standard commentaries on the Evidence Act in America, Canada, England and India.

Wigmore on *Evidence*, 3rd Ed. (U.S.A. and Canadian Edition), p. 339 (Sec. 2060) has the following to say :

"A mere detective or decoy or paid informer is...not an accomplice; nor an original confederate who betrays before the crime's committal..."

The following extract from 20 *American Jursiprudence*,[5] p. 361 (Sec. 400) is apposite :

American law.

"Evidence produced by eavesdropping is not to be excluded because of the manner in which it was obtained or procured and neither is the evidence of spies...

"Similarly, the evidence of detectives who feign themseleves as accomplices and thereby obtain evidence is receivable.....This manner of obtaining such evidence bears merely upon its credibility, not its admissibility."

Popple in his *Canadian Criminal Evidence*, 2nd Ed., 410, when dealing with agents provocateur, police spies, informers, has the following to say ;

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1. State Government of Madhya Pradesh *v.* Hiralal Tejulal, A.I.R. 1952 Nag. 58 at pp. 59-60.
2. A.I.R. 1961 S.C. 1762 at pp. 1780-81.
3. Nitya Nand Prem Lal *v.* State, A.I.R. 1954 Punj. 89 at pp. 90, 93.
4. Hazura Singh *v.* Emperor, A.I.R. 1929 Lah. 436 at p. 436 : 118 I.C. 544.
5. Olmstead *v.* United States, (1927) 277 U.S. 438 : 72 Law Ed. 944 ; *Contra* Canada : R. *v.* Tommy, R. *v.* Kinney, R. *v.* Mckinley, (1930) 1 D.L.R. 973 : 52 Cox. C.C. 321 (police officer investigating of an offence) ; R. *v.* Rodgers, (1926) 4 D.L.R. 609 : (elaborate opinion).

"An agent provocateur is a 'competent witness'....[1]

Agent provocateur.

13. Position of an informant.— Mr. Taylor says : "One class of persons, *apparently accomplices*, may here be named to whom the rule requiring corroborative evidence does not apply namely, persons who have entered into communication with conspirators, but who...have disclosed the conspiracy to the public authorities...."[2]

Objection to the evidence of accomplices not to apply with similar force.

A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence is not an accomplice but a spy, detective or decoy whose evidence requires no corroboration.[3] But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission, is an accomplice requiring corroboration.[4] When the crime of conspiracy is complete, members of the conspiracy, who out of fear or repentance, transformed themselves into spies and informers, do not thereby cease to be accomplices.[5] The act of a detective in supplying marked money for the detection of a crime cannot be treated as that of an accomplice.[6]

An act of detective held not as that of accomplice.

14. Decoy witness.—Where a witness has acted as a decoy, that is not sufficient to reject his testimony.[7] The rule of prudence requires that evidence of a decoy witness must find some corroboration in material particulars.[8]

Evidentiary value of decoy evidence.

The necessity of corroboration of evidence of decoy or trap witnesses depends on the facts and circumstances of each case.[9]

A decoy witness is not always or necessarily an accomplice. He would be an accomplice if he induced the acceptor of the bribe to do an act for him or to show him some concession or favour on receipt of the bribe. He would fall out of the accomplice class

Decoy witness distinguished from accomplice.

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1. A short history of the law on this subject with illustrative cases will be found in some of the decided cases : R. *v.* Berino, (1924) 3 W.W.R. 198 : R. *v.* Acker, (1934) 62 Cox. C.C. 269 ; Amsden *v.* Rodgers, 26 Cox. C.C. 389. In some Courts their evidence is looked upon as unsafe without corroboration, especially in cases where they induce the commission of the offence; R. *v.* Hills, (1924) 44 Cox. C.C. 329 : 1 W.W.R. 651 ; R. *v.* Rodges, (1926) 46 Cox. C.C. 372 : 4 D.L.R. 609 ; R. *v.* Sands, 25 Cox. C.C. 116; R. *v.* Horpenink, 81 Cox. C.C. 108. But there is no rule of law that their evidence must always be looked upon with suspicion : R. *v.* White, (1945) 84 Cox. C.C. 126.
   The practice of declining to convict, on the uncorroborated evidence of an accomplice does not apply to the evidence of a "special constable" in the employ of Government for the purpose of detecting and prosecuting offences: Amsden *v.* Rodgers, 26 Cox. C.C. 389 ; R. *v.* Kinney, (N.B.) (App. Ct.) 55 Cox. C.C. 350 at p. 356. And in R. *v.* Rice, (N.S.) (App. Ct.) 52 Cox. C.C. 380, it was held that the uncorroborated evidence of an agent provocateur who has induced a sale of liquor cannot be disregarded.
2. Section 891 ; Sec. 971, 8th Ed. ; *see* also Queen *v.* Ramsaday Chakravartti, 20 W.R. (Cr.) 19.
3. E. *v.* Chaturbhuj, I.L.R. 38 Cal. 96 : 15 C.W.N. 171, distinguishing Queen-Empress *v.* Javesharam, I.L.R. 19 Bom. 363.
4. *Ibid.*
5. Pulin Behary Das *v.* King-Emperor, 16 C.W.N. 1105.
6. Queen-Empress *v.* Javesharam, I.L.R. 19 Bom. 363.
7. Laurie E. Jacobs *v.* Union of India, A.I.R. 1958 All. 481 at p. 485 : I.L.R. (1958) 1 All. 133.
8. State of Gujarat *v.* Bai Radha, (1968) 9 Guj. L.R. 278 at p. 293.
9. Kesho Parshad *v.* State, A.I.R. 1967 Delhi 51 at p. 53 : 69 Punj. L.R. (Delhi) 354.

if his intention is not to secure any benefit for himself by offering the bribe, but to have the offender disclosed and brought to book. In *Emperor v. Chatur Bhuj Sahu*[1], a Division Bench held that—

Mens rea to decide the role of witness

> "a person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before association with wrong-doers or before the actual prepetration of the offence is not an accomplice, but a spy, detective or decoy whose evidence does not require corroboration..."

Evidence of spy, detective or decoy require no corroboration

But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.[2]

An accomplice is a co-accused, who has participated in the commission of the offence. In this case, it cannot be stated that P.W. 1 has committed any offence. No doubt the payment of the illegal gratification also is an offence under the Prevention of Corruption Act. But in this case P.W. 1 had no intention of achieving his purpose by payment of Rs. 200/- to the appellant but only in order to expose the conduct of this appellant and to bring him to book, he paid the amount as directed by the police. Therefore, he cannot be treated as an accomplice.[3]

15. Evidence of the witnesses of the raiding party.—The correct rule is this : If any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested.[4]

16. Persons connected with a bribery transaction.—A person who offers a bribe to a public servant, is an accomplice.[5]

A bribe deal is usually a benefit, both syndrome and the payer's lips carry little conviction in the absence of reassuring support.[6]

After introduction of Sec. 165-A of the Indian Penal Code who offers bribe guilty of abetment of bribey the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon.[7]

It is not the law that if the money given as bribe is provided by a particular officer of the police then the evidence of all the witnesses becomes evidence of accomplices.[8]

Where the accomplice and the accused are only two persons, one cannot expect corroboration.[9] Persons who actually pay bribes or co-operate, in such payments or are instrumental in the negotiations for the purpose, are also

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1. 8 I.L.R. 38 Cal. 96.
2. State *v.* Bashambar Dayal, A.I.R. 1953 Pepsu 82 at p. 84.
3. Rajasingh *v.* State, 1995 Cr. L.J. 955 at p. 960 (Mad.).
4. State of Bihar *v.* Basawan Singh, A.I.R. 1958 S.C. 500 at p. 506 : 1958 S.C.J. 856 : 1958 S.C.R. 195 : 1958 A.L.J. 608 : 1958 A.W.R. 609 : 1958 Mys. L.J. 713.
5. Queen-Empress *v.* Chagan Dayaram, I.L.R. 14 Bom. 331 ; Queen *v.* Magan Lal, I.L.R. 14 Bom. 115.
6. Raghubir Singh *v.* State of Haryana, A.I.R. 1974 S.C. 1516 at p. 1521.
7. Pannalal Damodar Rathi *v.* State of Maharashtra, A.I.R. 1979 S.C. 1191 at p. 1192.
8. Ramanlal Mohanlal Pandya *v.* State of Bombay, A.I.R. 1960 S.C. 961 at p. 963.
9. *In re* K.V. Ayyaswamy, A.I.R. 1965 A.P. 105 at p. 114 : (1965) 1 Andh. W.P. 9.

accomplices. This is clearly laid down in *Queen-Empress* v. *Magan Lal*[1] and in *Queen-Empress* v. *Deodhar Singh*.[2] A person who with knowledge that the bribe has to be paid advances money, is an accomplice.[3] A person who gives bribes is an accomplice. The question as to the amount of corroboration depends on the circumstances of each case.[4] The evidence of the person who bribes is admissible against the person bribed.[5] Witnesses who accompany the bribe-giver for paying or assisting in the payment of the bribe, are no better than accomplices.[6] A person who actually pays bribe to a public servant under the orders of his master, is an accomplice.[7] The mere presence of a person on the occasion of giving a bribe and his omission to promptly inform the authorities, do not constitute him an accomplice.[8] Where money was paid to a Police Sub-Inspector by a money-lender, for obtaining the release of a person wrongfully confined. *Held* that the money-lender could not be regarded as an accomplice.[9] Where the complainant did not willingly offer the bribe, but the accused, a police officer demanded it; *held* that the circumstances would justify a conviction on the testimony of accomplices with degree of corroboration ; *held* also that those who lent money to the complainant and those who were present when money was paid to the accused could not be said to be accomplices.[10]

Person advancing money is accomplice.

Amount of corroboration to depend on circumstances and facts.

Payer of bribe under order of his master is accomplice.

Payment to police for release of person wrongfully confined.

When a person gives a bribe to a public servant with a view to induce him to abstain from doing his duty, his evidence would certainly require a greater amount of corroboration than in the case of person who is compelled by force of circumstances to give bribe to a public servant.[11] This principle has been laid down by a ruling of the Bombay High Court in the case of *Papa Kamal Khan* v. *Emperior*.[12]

The same view is taken in *Narayan Prasad* v. *Emperor*.[13] This ruling of the Bombay High Court was referred to by the Privy Council in the case of *Srinivas Mall* v. *Emperor*.[14]

In *Rajani Kant Bose* v. *Asan Mullik*,[15] a Bench of the Calcutta High Court held that where certain persons accompanied another, who was entrusted with and carried the money intended to be given as a bribe, they were accomplices. Their evidence is tained and should be carefully scrutinized before being accepted.

Person accompanying the bribe-giver when an accomplice.

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1. I.L.R. 14 Bom. 115.
2. I.L.R. 27 Cal. 144.
3. Muhammad Usuf Khan *v.* Emperor, A.I.R. 1929 Nag. 215 at p. 217 : 115 I.C. 279.
4. King-Emperor *v.* Malhar Martand Kulkarni, I.L.R. 26 Bom. 193.
5. R. *v.* Obhoy Churn, 3 W.R. (Cr.) 19.
6. Jogendra *v.* Sanyal, 2 C.W.N. 55 ; Rajani Kanta Basu *v.* Asan Mullick, 2 C.W.N. 672.
7. Emperor *v.* Edward William Smither, I.L.R. 26 Mad. 1.
8. Queen *v.* Deodhar, I.L.R. 27 Cal. 144 ; Khadam Ali *v.* Emperor, 20 Cr. L.J. 258 : 50 I.C. 18 (Punj.).
9. Akhoy Kumar *v.* Jagat, I.L.R. 27 Cal. 925 : 4 C.W.N. 755.
10. Deo Nannan Pershad *v.* Emperor, I.L.R. 33 Cal. 649, approving Queen-Empress *v.* Deodhar Singh, I.L.R. 27 Cal. 144 and distinguishing Queen *v.* Chando Chandalinee, 24 W.R. (Cr.) 55.
11. State *v.* Keshavolal L. Oza, A.I.R. 1951 Sau. 25 at p. 30.
12. A.I.R. 1935 Bom. 230 : I.L.R. 59 Bom. 486 : 36 Cr. L.J. 968.
13. A.I.R. 1948 Nag. 342 : 1949 Nag. L.J. 92 : I.L.R. (1948) Nag. 270.
14. A.I.R. 1947 P.C. 135 : 1947 M.W.N. 589 : 1947 A.L.J. 497 : 49 Bom. L.R. 688 : 51 C.W.N. 900 : (1947) 2 M.L.J. 328 : 60 L.W. 634 : I.L.R. 26 Pat. 460.
15. (1898) 2 C.W.N. 672.

In *In re Lakshminarayana Aiyar*,[1] a Bench of the Madras High Court held that even a superior official who sets a trap to catch a corrupt subordinate, would be technically guilty of the abetment of bribery.

Madras High Court's view.

In *Mohammad Usuf Khan* v. *Emperor*,[2] it was held that persons who actually pay the bribes or co-operate in such payments or are instrumental in the negotiations for the purpose, are also accomplices of the person bribed and a person who with the knowledge that the bribe has to be paid, advances money, is clearly an abettor and as such an accomplice.

Nagpur High Court's view.

In *Queen-Empress* v. *Favesharam*,[3] it was held that the act of a detective in supplying marked money for the detection of a crime cannot be treated as that of an accomplice but the action of a spy and informer in suggesting and initiating a criminal offence is itself an offence.

Bombay High Court's view.

In *Emperor* v. *Chaturbhuj Sahu*,[4] the Bombay case just mentioned was dissented from and it was held that a person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence either before associating with wrong-doers or before the actual perpetration of the offence is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration. But a person who is associated with an offence with a criminal design and extends no aid to the prosecution till after its commission, is an accomplice requiring corroboration.

In *Surat Bahadur* v. *Emperor*,[5] Messrs Wazir Hasan, J.C., and Pullan A.J.C. referred to the divergence in the views taken by the High Courts of Bombay and Calcutta. They, however observed that—

Spy evidence.

> "whichever view we follow, we are satisfied that the evidence of such a spy requires corroboration to practically the same extent as that of an accomplice."

If the witnesses associated themselves with the accused without any criminal intention with the sole object of entrapping the accused in order to detect an offence, they cannot be regarded as participants in the crime. They are merely spies or detectors.[6]

Though a person who gives a bribe is technically an accomplice of the person who receives it, his position is different from that of a co-offender.

In the case of bribe-givers a less strict standard of corroboration may be applied than in the case of accomplices.[7]

In *Papa Kamal Khan* v. *Emperor*,[8] it was pointed out that "the objections which usually arise to the evidence of an accomplice do not really apply where the person who pays the bribe is not a willing participant in the offence. In *State* v. *Minaketan*,[9] Narasimham J., made the following observations :

Bribe-giver when to be treated accomplice.

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1. (1917) 19 Cr. L.J. 29 : 42 I.C. 989.
2. 114 I.C. 457 : A.I.R. 1929 Nag. 215.
3. I.L.R. 19 Bom. 363.
4. I.L.R. 38 Cal. 96 : 11 Cr. L.J. 560 : 8 I.C. 119.
5. A.I.R. 1925 Oudh 158 : 81 I.C. 986 : 25 Cr. L.J. 1162.
6. Bhuneshwari Pershad *v.* Emperor, A.I.R. 1931 Oudh 172 at pp. 175-76.
7. State of Kerala *v.* Samuel, A.I.R. 1961 Ker. 99 at p. 105.
8. A.I.R. 1935 Bom. 230 : I.L.R. 59 Bom. 486.
9. A.I.R. 1952 Orissa 267.

"....A person engaged by the police to give marked currency notes to a public officer with a view to detect the offence of bribery, is not an accomplice, because he lacks the necessary criminal intention."

Court how to be satisfied as to evidence.

All that is insisted on as a matter of prudence is that before acting upon such evidence the Court must be satisfied that such evidence has been corroborated in material particulars by other items of independent evidence. In *Papa Kamal Khan* v. *Emperor*,[1] it was pointed out that the rule of the Court which requires corroboration of the evidence of an accomplice, applies with very little force to a case in which the charge against the accused is that he extorted bribe from other persons.[2] Persons who are compelled by the bribe-takers to take hush money are not accomplices in the real sense of the term.[3] In the case of a bribe-giver, he is an accomplice only when he gives it with the intention of gaining some undue official favour, but not one who gives it in order to aid the detection of a crime. He has not the *mens rea*.[4]

Bribe-giver when is or not accomplice.

Proof of passing of marked notes from decoy witness not sufficient evidence.

To establish a case of bribery against the accused it is not sufficient to prove that marked notes passed from the decoy witness to the accused. There should be independent corroboration of the statement of the decoy witness, that the money was received by the accused person for an illegal purpose.[5]

The receiver of a bribe in relation to the giver is certainly an accomplice.

Weight of evidence of a receiver of a bribe.

An accomplice in the eyes of law is no doubt a competent witness. As observed by the Supreme Court in *Rameshwar Kalyan Singh* v. *State of Rajasthan*,[6] in weighing his evidence and basing a conviction thereon, the necessity of corroboration as a matter of prudence except where the circumstances make it safe to dispense with it must be present to the mind of the Judge. The same consideration must prevail in weighing the evidence of the receiver of bribe in an election. The tainted nature of his testimony must subject his evidence to scrutiny before it can be accepted. Mr. Justice Grove in *Wakefiled's* case,[7] as to the value of the evidence given by persons who allege that they have been bribed, observed that—

"It is prefectly true that where witnesses are called to prove that they themselves were bribed, their testimony is open to suspicion, varying in degree with the circumstances under which that testimony is given."

The dictum of the Supreme Court in relation to the testimony of accomplices applies to persons who say they received bribe.[8]

On the uncorroborative evidence of a decoy punter a conviction cannot be sustained.[9]

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1. A.I.R. 1935 Bom. 230 : I.L.R. 59 Bom. 486.
2. K.M. Narayanaswami *v.* Kerala State, A.I.R. 1957 Ker. 134 at pp. 137-38 : 1957 Ker. L.T. 784 : I.L.R. (1957) Ker. 559.
3. Pandita Gangaram *v.* Crown, A.I.R. 1950 Nag. 1 at p. 4 : 1950 N.L.J. 435 : I.L.R. (1950) Nag. 229.
4. King *v.* S.N. Singh Rai, A.I.R. 1951 Orissa 297 at p. 299 : I.L.R. (1949) Cut. 585.
5. *See* Emperor *v.* Anwar Ali, A.I.R. 1948 Lah. 27 : 48 Cr. L.J 964 ; *see* also State of Gujarat *v.* Mangabhai Jethabhai Vaghela, 1982 Cr. L.J. 1317 (Guj.).
6. A.I.R. 1952 S.C. 54 ; *see* also Sheonandan Paswan *v.* State of Bihar, 1983 S.C.C. (Cr.) 224.
7. (1874) 2 O.M. & H. 100.
8. Chadalavada Subba Rao *v.* Kasu Brahmananda Reddy, A.I.R. 1967 A.P. 155 at pp. 162, 163: (1966) 2 Andh. W.R. 401.
9. Tarsem Lal Shanti Ram *v.* State, A.I.R. 1960 Punj. 72 at p. 73 : 61 Punj. L.R. 439.

Different voters, who were bribed in one and the same place and on one and the same occasion, were not acomplices of each other.[1]

Caution be observed in accepting accomplice evidence.

The evidence of an accomplice requires to be accepted with a great deal of caution and scrutiny, because, among others, he is likely to swear falsely in order to shift the guilt from himself. But this consideration hardly applies to the evidence of one who testifies that he has bribed the accused.[2]

In *Kamal Khan* v. *Emperor*,[3] Wadia, J., made the following observations :

Bombay High Court's view

"But in cases of bribey...a distinction has to be made between persons who have voluntarily paid a bribe to a public servant in order to secure some advantage for themselves, and persons...who have been compelled by improper pressure put upon them by a public servant to pay a bribe. In cases of this kind, where the payment of the bribe has not been voluntary, very slight corroboration would...be sufficient to make the evidence of such persons admissible against the receiver of the bribe."

In *Srinivas Mall* v. *Emperor*,[4] the Privy Council observed :

Privy Council view.

"No doubt the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must, however, vary according to the extent and nature of the complicity."[5]

In *K.H. Bhattacharjee* v. *Emperor*,[6] it has also been stated as follows :

Calcutta High Court's view.

"...The person who pays bribe is an accomplice of the person who received the bribe ; but the position is essentially differnt from that of say one dacoit deposing regarding the dacoity against his fellow dacoits..."

Bribe giver, an abettor of the offence.

The giver of the bribe is, in law, an abettor of the offence and, therefore, an accomplice. But in the case of bribe-giving under threats, whether the evidence of the accomplice is safe to be acted upon, depends on circumstances.[7]

After the amendment of Sec. 165-A of the Indian Penal Code, the status of a complainant in a corruption cases is that of an accomplice.[8]

17. Accomplice in bribing public servant—Clerk—Onlooker.—A person, who bribes a public servant is an accomplice.[9] A person (clerk) who actually pays a bribe, though under the order of his master, is an accomplice.[10] But, a mere eye-witness to the giving of the bribe is not an accomplice.[11] So, also, persons,

Bribe-giver when accomplice.

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1. Rex *v.* Boyes, 9 Cox. C.C. 32, cited in Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at pp. 277-78.
2. Emperor *v.* Shriniwas Krishna, 7 Bom. L.R. 969 : 3 Cr. L.J. 32.
3. I.L.R. 59 Bom. 486 : A.I.R. 1935 Bom. 230 : 156 I.C. 615 : 36 Cr. L.J. 968.
4. A.I.R. 1947 P.C. 135 : I.L.R. 26 Pat. 460 (P.C.).
5. *See* Narayan Prasad *v.* Emperor, A.I.R. 1948 Nag. 342 at p. 343 : I.L.R. (1948) Nag. 276 : 1949 N.L.J. 92 : 1949 N.L.J. 92 : 1949 A.W.R. Sup. 40.
6. A.I.R. 1944 Cal. 374 : 48 C.W.N. 632 : 215 I.C. 298.
7. Biswabhusan Naik *v.* State, A.I.R. 1952 Orissa 289 at p. 299 ; I.L.R. (1952) Orissa 107.
8. Brij Mohan *v.* State of Punjab, 1985 (1) Crimes 139 at p. 142 (P. & H.).
9. Emperor *v.* Edward William Smither, I.L.R. 26 Mad. 1 : 2 Wier 521 ; Queen-Empress *v.* Magan Lal, I.L.R. 14 Bom. 115.
10. Emperor *v.* Edward William Smither, I.L.R. 26 Mad. 1 : 2 Weir 521.
11. *Ibid.*

who took the account of the bribery subsequent to the transaction, are not accomplices.[1]

N.B. The evidence of the last two classes of witnesses does not require corroboration.[2]

Conviction of public servant unsafe on uncorroborated evidence of bribe-giver.

While it is usually unsafe to convict a public servant of receiving bribes on the uncorroboated evidence of persons who say they have given them, the question as to the amount of corroboration depends on the circumstances of each case.[3]

In *Kishan Dayal* v. *State*,[4] Nandlal was not a willing party to the giving of the bribe to the accused. *Held* that Nandlal could not be said to be an accomplice.

Bribe-giver is an accomplice.

When bribery is the offence charged, the giver of the bribe is the accomplice of the receiver.[5] There are of course obvious exceptions to such cases as for instance where the illegal gratification is given under coercion or is tendered in order to entrap the receiver of the bribe. On the same principle a thief who sells stolen proeprty to a reciver would be an accomplice in the offence of receiving stolen property.[6] But a receiver of stolen property is not necessarily an accomplice of a thief.[7]

Giver of illegal gratification under coercion, etc. is not accomplice.

18. Sexual crimes.—In adultery, the other party may well be deemed an accomplice;[8] and so also, perhaps, in *incest*[9] and in *pandering* or *pimping*.[10] But the woman is not an accomplice in *rape*,[11] *rape under age*,[12] *seduction*[13] or *abortion*[14] nor the participant in *sodomy*.[15]

Woman in sexual crimes whether accomplice.

A woman who has been raped is not an accomplice. So also in the case of unnatural offences. But in all these cases a large volume of case-law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence. This branch of the law is the same as in England and the lucid exposition of it is given by Lord Reading, in *King* v. *Baskereville*.[16]

Woman raped not accomplice.

The learned Chief Justice says at page 663 :

> "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law...But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices."

Uncorroborated evidence of an accomplice is admissible.

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1. Emperor *v.* Edward William Smither, I.L.R. 26 Mad. 1 : 2 Weir 521.
2. *Ibid*.
3. King-Emperor *v.* Malhar Martand Kulkarni, I.L.R. 26 Bom. 193.
4. 1958 R.L.W. 596 at pp. 603-4.
5. *See* Queen-Empress *v.* Chagan Dayaram, I.L.R. 14 Bom. 331 ; Queen-Empress *v.* Magan Lal, I.L.R. 14 Bom. 115 ; Emperor *v.* Malhar Martand Kulkarni, I.L.R. 26 Bom. 193 : 3 Bom. L.R. 694.
6. Chetumal Rekumal *v.* Emperor, A.I.R. 1934 Sind. 185 at p. 187.
7. Kundan *v.* Emperor, A.I.R. 1948 Sind 65 at p. 67.
8. State *v.* Henderson, 84 Iowa 161 at p. 165 : 50 N.W. 758.
9. Brown's case, (1910) 6 Cr. App. 24 ; Drive's case, (1911) 7 Cr.) App. 43.
10. King's case, (1914) 10 Cr. App. 117.
11. Trimble *v.* Terr, (1903) 8 Ariz 273.
12. Republic *v.* Parsons, (1896) 10 How 601 at p. 606.
13. Keller *v.* State, (1898) 102 Ga. 506.
14. R. *v.* Schwartzenhaner, (1953) 2 D.L.R. 739 at p. 745.
15. People *v.* Troutman, (1921) 187 Cal. 313 ; Wigmore, Sec. 2060 at pp. 336-338.
16. (1916) 2 K.B. 658.

That is exactly the law in India so far as accomplices are concerned and it is certainly not any higher in the case of sexual offences. The only clarification necessary for purposes of this country is that the Judge should give some indication in his judgment that he has had this rule of catuion in mind.[1] There can be no assumption, in the absence of evidence, that the complainant in a rape case is an accomplice.[2]

Rule of caution in sexual offences.

It is a rule of caution that in sexual offences, it is not safe to rely on the evidence of the prosecutrix, unless it is corroborated in material details.[3]

Gril victim of outrageous act not accomplice.

A girl who is a victim of an outrageous act is, generally speaking, not an accomplice though the rule of prudence requries that the evidence of a prosecutrix should be corroborated before a conviction can be based upon it.[4]

The view that the evidence of a prosecutrix in a rape case requires corroboration in the same manner as that of an accomplice though it is shared by Ghosh, J., in *Emperor* v. *Nur Ahmad*,[5] is not shared by Henderson, J., who was a party to the judgment in *Surendranath* v. *Emperor*,[6] as is clear from his remarks in *Sikander Mian* v. *Emperor*.[7] At any rate such a view is dissented from in the later decision of the Calcutta High Court in *Harendra Prasad Bagchi* v. *Emperor*.[8] The view of Sen, J., in the above case has been approved by Beaumont, C.J., in *Emperor* v. *Mahadeo Tatya*.[9]

Prosecutrix in rape case is accomplice.

An accomplice is a person who voluntarily participates in the commission of the crime along with others. In the case of a prosecutrix for rape she is a victim of the offence and not an offender. The case of an accomplice, therefore, materially differs from that of a prosecutrix for rape and the evidence of both cannot be placed on the same footing. The Madras High Court in *Boyachinnappa, In re*,[10] agreed with the view expressed in *Harendra Prasad Bagchi* v. *Emperor*,[11] which is approved in *Emperor* v. *Mahadeo Tatya*.[12] In law, therefore, the evidence of a prosecutrix does not require corroboration like that of an accomplice.

Case of an accomplice differs from that of prosecutrix.

Henderson, J., in *Sikander Mian* v. *Emperor*,[13] states that the rule of prudence requires that the evidence of a prosecutrix in a rape case must be corroborated in material particulars by independent testimony connecting the accused with the crime and he further states that the previous statement of the prosecutrix is not

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1. Rameshwar Kalyan Singh *v.* State of Rajasthan, A.I.R. 1952 S.C. 54 at pp. 56-57 : 1952 S.C.A. 40 : 1952 S.C.J. 46 : 1952 S.C.R. 377.
2. Harendra Prasad Bagchi *v.* Emperor, A.I.R. 1940 Cal. 461 at p. 462 : 44 C.W.N. 830 : I.L.R. (1940) 2 Cal. 180 : 19 I.C. 48.
3. Sailendra Kumar Roy Choudhury *v.* Territory of Tripura, A.I.R. 1959 Tripura 11 at p. 16.
4. Sidheswar Ganguly *v.* State of West Bengal, A.I.R. 1958 S.C. 143 at p. 147 : 1958 S.C.A. 417 : 1958 S.C.R. 774 : 1958 S.C.J. 297.
5. A.I.R. 1934 Cal. 7 : 356 Cr. L.J. 796.
6. A.I.R. 1933 Cal 833 : 35 Cr. L.J. 508.
7. A.I.R. 1937 Cal. 321 : 41 C.W.N. 641 : 39 Cr. L.J. 371.
8. A.I.R. 1940 Cal. 461 : I.L.R. (1940) 2 Cal. 180 : 44 C.W.N. 830.
9. A.I.R. 1942 Bom. 121 : 43 Cr. L.J. 621 (F.B.).
10. A.I.R. 1951 Mad. 760 : 1951 M.W.N. 60 : I.L.R. (1951) Mad. 973 : (1951) 1 M.L.J. 110 : 64 L.W. 265.
11. A.I.R. 1940 Cal. 461 : I.L.R. (1940) 2 Cal. 180 : 44 C.W.N. 830.
12. A.I.R. 1942 Bom. 121 : 43 Cr. L.J. 621 (F.B.).
13. A.I.R. 1937 Cal. 321 : 39 Cr. L.J. 371 : 41 C.W.N. 641 : 173 I.C. 881.

the kind of corroboration sought in such cases. Beaumont, C.J., also has expressed himself strongly in favour of corroboration in *Emperor* v. *Mahadeo Tatya*.[1] Each case depends upon its facts and if after taking all the circumstances into consideration the evidence of the prosecutrix could be believed then the accused could be convicted on her evidence alone, although there is no corroboration by independent testimony connecting the accused with the crime.[2] It is very well-settled rule of practice in this country, following the English rule, that in rape cases the evidence of complainant must be corroborated. The nature of the corroboration must necesarily depend on the facts of each particular case. Where rape is denied the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to other parts of her body, which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused, or on the places where the offence is alleged to have been committed ; and in all cases importance is attached to the subsequent conduct of the complainant. Whether she makes a charge promptly or not is always relevant.[3]

Conviction of accused possible on evidence of prosecutrix.

Corroboration in rape cases.

In *Maung Be Tin* v. *Emperor*,[4] the conviction for rape was set aside although the prosecutrix had reported the matter to a number of people and in spite of medical evidence that she had recent sexual intercourse. Her own previous statements were not considered sufficient for conviction.

Conviction in sexual offence when to be set aside.

Coming to the Lahore High Court, it was observed by Chevis, J., in *Kanshi Ram* v. *Emperor*,[5] that in cases of rape, it is unsafe to convict on the evidence of the woman who has been raped.

In *Mahla Ram* v. *Emperor*,[6] it was held that when there is no independent evidence of support for the statement of the complainant it would be most dangerous to base a conviction on her uncorroborated testimony. When there is no evidence of any struggle having taken place, nor marks of any injuries on the person of the complainant or the accused, rape cannot be said to have been proved.

Dangerous to base conviction on uncorroborated evidence of complainant.

So far as the statements of the ravished woman are concerned they can certainly be used to corroborate her under Sec. 157. Corroboration of the prosecutrix in a case of rape is not always indispensable. The thing to be remembered in such cases, is whether it is safe to convict on the solitary statement of the complainant.[7]

Statements of ravished woman to be used to corroborate her.

No doubt, in cases of rape it has almost become an accepted proposition that a person shall not be convicted of the offence of rape solely on the evidence of the prosecutrix, yet Courts have held again and again that even in such cases it is open to them to base the conviction solely on the evidence of the prosecutrix if they are satisfied that the evidence is worthy of credence.

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1. A.I.R. 1942 Bom. 121 : 43 Cr. L.J. 621 (F.B.).
2. *In re* Boya Chinnappa, A.I.R. 1951 Mad. 760 at pp. 763-64 : 1951 M.W.N. 60 : I.L.R. (1951) Mad. 973 : (1951) 1 M.L.J. 110 : 64 L.W. 265.
3. Emperor *v.* Mahadeo Tatya, A.I.R. 1942 Bom. 121 at p. 123.
4. A.I.R. 1927 Rang. 67 : 98 I.C. 180.
5. 67 I.C. 827 : 23 Cr. L.J. 475 (Lah.).
6. A.I.R. 1924 Lah. 69 : 625 Cr. L.J. 74.
7. Muhammad Afzal *v.* Crown, A.I.R. 1950 Lah. 151 at pp. 153-54.

In this connection it would be helpful to refer to the decision in *Emperor* v. *Banubai Ardeshir Irani*,[1] where the rule that the Courts require that woman's evidence shall be corroborated, is restricted to cases of rape only and should not be extended to other cases of sexual nature.[2]

Rule of corroboration not applicable to a case of abduction.

In cases of rape a rule has been laid down that the Courts require that woman's evidence shall be corroborated. The rule of practice has no application to a case of abduction.[3] In this connection it would be useful to refer to *Emperor* v. *Kassomali Mirzalli*.[4]

In *Bhagwat Prakash* v. *State*,[5] there is a valuable observation to the effect that if a girl does come forward and alleges that she has been raped, her evidence should carry more weight than the evidence of an ordinary witness.[6]

19. Principles relating to the need of corroboration of a prosecutrix in rape cases.—The principles relating to the need of corroboration of a prosecutrix in rape cases have been laid down in two decisions of the Supreme Court, namely, *Rameshwar Kalyan Singh* v. *State of Rajasthan*[7] and *Sidheswar Ganguly* v. *State of West Bengal*.[8] In *Rameshwar Kalyan Singh* v. *State of Rajasthan*,[9] the Supreme Court made it clear that : (1) the prosecutrix in a case of rape cannot be treated as an accomplice ; (2) that the Evidence Act nowhere provides that the evidence of a prosecutrix in a rape case requires corroboration ; and that (3) as a matter of prudence, Courts have insisted on the need of corroboration of the evidence of the prosecutrix.

Principle laid down by the Supreme Court.

The eventual principle laid down by the Supreme Court was finally stated as follows :

> "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge...before a conviction without corroboration can be sustained."

Their Lordships also made it clear that the corroboration should be such as to render the prosecution story reliable and safe to act upon.

Prosecutrix cannot be considered as an accomplice.

It is well settled that prosecutrix cannot be considered as an accomplice. As a rule of prudence, however, Court normally looks for some corroboration of her testimony so as to satisfy its conscience that the person accused of rape on her has not been falsely implicated.[10]

Verdict of Supreme Court.

The matter is not *res integra*. In *Rameshwar* v. *State of Rajasthan*,[11] the Supreme Court observed :

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1. A.I.R. 1943 Bom. 150 (F.B.) : 45 Bom. L.R. 281 : 206 I.C. 592.
2. Motiram Krishnarao *v.* State of Madhya Pradesh, A.I.R. 1955 Nag. 121 at p. 124 : I.L.R. (1945) Nag. 922 : 1955 N.L.J. 61. But *see* Sachinder Rai *v.* Emperor, A.I.R. 1939 Pat. 536 ; Mohammad Sadiq *v.* Emperor, A.I.R. 1938 Lah. 474 : 40 Punj. L.R. 730
3. Emperor *v.* Banubai Ardeshir, Irani, A.I.R. 1943 Bom. 150 at p. 154 : 45 Bom. L.R. 281 ; Ramjilal *v.* State, A.I.R. 1951 Raj. 33.
4. A.I.R. 1942 Bom. 71 : 44 Bom. L.R. 27.
5. A.I.R. 1956 All. 22.
6. Dharam Pal *v.* State, A.I.R. 1971 H.P. 17 at p. 20.
7. A.I.R. 1952 S.C. 54.
8. A.I.R. 1958 S.C. 143.
9. A.I.R. 1952 S.C. 54.
10. Gurcharan Singh *v.* State of Haryana, A.I.R. 1972 S.C. 2661 at p. 2664-65.
11. 1952 S.C.R. 377 : A.I.R. 1952 S.C. 54.

"Now a woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage..In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences..."

After referring to the well-known English decision in *King* v. *Baskerville*,[1] the law in India was stated to be exactly the same so far as the accomplices are concerned and it was observed that in case of sexual offences it could not be any higher. The true rule, after consideration of decided cases is stated thus :

"In my opinion, the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the Judge...The tender years of the child, coupled with other circumstances appearing in the case, may render corrobroation unnecessary but that is a question of fact in every case...There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

Adverting to the nature and extent of corroboation required when it is not considered safe to dispense with it this Court added :

"....Its nature and extent must necessarily vary with circumstances of each case and also according to the particular circumstances of the offence charged."

In *Sidheswar Ganguly* v. *State of West Bengal*,[2] the decision in *Rameshwar* v. *State of Rajasthan*,[3] was approved and it was added that the nature of the corroborative evidence should be such as to lend assurance that the evidence of the prosecutrix can be safely acted upon. In *Janardan Tewari* v. *State of Bihar*,[4] it was observed :

Nature of the corroborative evidence—Weight of the prosecutrix evidence.

"We...In this connexion, the law is that the evidence of the prosecutrix must be corroborated in some measure to connect the accused."[5]

In *State Government, Madhya Pradesh* v. *Sheodayal Gurudayal*,[6] the law was laid down as follows :

Test to determine whether the evidence of a prosecutrix requires to be corroborated or not.

"The test as to where corroboration is necessary lies in the naturalness of the story deposed to by the prosecutrix. If there be any doubt as regards its genuineness, there is the need of caution and, therefore, of corroboration."

The principle laid down in the cases should be looked at merely guiding principles and not inflexible rule of law.[7]

20. Persons in the nature of accomplices.—A person who in any way helped in the commission of the offence or was cognizant of it, and omitted to disclose it for a time, is not a person whose testimony could justify a conviction, except where there is corroboration.[8]

Corroboration whether required in case of helper in commission of offence.

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1. (1916) 2 K.B. 658.
2. A.I.R. 1958 S.C. 143.
3. 1952 S.C.R. 377 : A.I.R. 1952 S.C. 54.
4. (1971) 3 S.C.C. 927.
5. Gurcharan Singh *v.* State of Haryana, A.I.R. 1971 S.C. 2661 at pp. 2664-65.
6. A.I.R. 1956 Nag. 8.
7. Gopishankar *v.* State of Rajasthan, A.I.R. 1967 Raj. 159 at pp. 167-68 : 1967 Raj. L.W. 326.
8. *See* Isan Chandra *v.* Queen-Empress, I.L.R. 31 Cal. 328.

There is nothing in law to justify the proposition that evidence of a witness, who happens to be cognizant of a crime, or who made no attempt to prevent it, or who did not disclose its commission, should only be relied on to the same extent as that of an accomplice. The real question in such a case was the degree of credit to be attached to the testimony of such a witness ; and that depends on all the facts and circumstances of the particular case. *See* the observations of Davis, J., in the case of *Emperor* v. *Edward Wiliam Smither.*[1]

Credibility of person who did not disclose or prevent crime

In *Har Nath* v. *State,*[2] one Ganesh went on watching the alleged offence from the beginning to the end. He neither raised a hue and cry for help nor ran to the help of prosecutrix. *Held* that no reliance could be placed on his evidence unless fully corroborated otherwise.

Though an accomplice is not an incompetent witness, it is unsafe to base a conviction on his statement unless it is corroborated in material particulars.[3]

21. Section 133 must be read along with the provisions of illustration *(b)* to Sec. 114 of the Act.—Section 133 of the Evidence Act expressly provides that an accomplice is a competent witness against his co-accused and it renders admissible the testimony of an accomplice against his co-accused. It has, however, been a long settled practice of law that Sec. 133 of the Evidence Act must be read along with the provisions of illustration *(b)* to Sec. 114 of the Evidence Act. Section 114 of the Evidence Act empowers the Court to presume the existence of certain facts and illustration *(b)* in express terms says that an accomplice is unworthy of credit unless he is corroborated in material particulars. Thus, it follows, that whereas law permits the conviction of an accused person on the basis of the uncorroborated testimony of an accomplice by virtue of the provisions of Sec. 133 who is treated as a competent witness, the rule of prudence which has rightly been always accepted by the Courts embodied in illustration *(b)* of Sec. 114 of the Evidence Act strikes a note of warning/caution to the Court that an accomplice does not generally deserve to be relied upon, unless his testimony is corroborated in material particulars. Thus, as a matter of practice and prudence the Courts have held that the testimony of an approver may be accepted in evidence for recording conviction of an accused person provided it receives corroboration from direct or circumstantial evidence in material particulars. The Courts have generally looked upon with suspicion the statement of an approver because he is considered to be a person of low morals and not a wholly trustworthy person who for the sake of earning pardon for himself is willing to let down his erstwhile accomplices and therefore before recording conviction Courts insist upon independent corroboration of his testimony.[4]

In *Suresh Chandra Bahri* v. *State of Bihar,*[5] Supreme Court observed as :

A combined reading of the two provisions that is Sec. 133 and illustration *(b)* of Sec. 114 of Evidence Act go to show that it was considered necessary to place the law of accomplice evidence on a better footing by stating in unambigous terms that according to Sec. 133 a conviction is "not illegal or in other words not unlawful" merely because it is founded on the uncorroborated testimony of an accomplice while accepting that an accomplice is a competent witness. But at the same time the Legislature intended to invite attention to the illustration *(b)* of

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1. I.L.R. 26 Mad. 1 ; Hafizuddin *v.* Emperor, A.I.R. 1934 Cal. 678 at p. 680 : 38 C.W.N. 777 : 151 I.C. 486.
2. A.I.R. 1952 Ajmer 49 at pp. 49-50.
3. Atta Mohammad *v.* State, A.I.R. 1952 J. & K. 36 : (1952) Cr. L.J. 1579 at p. 1582.
4. Rampal Pithwa Rahidass *v.* State of Maharashtra, 1994 Cr. L.J. 2320 at p. 2324 (S.C.).
5. 1994 Cr.L.J. 3271 at p. 3289 (S.C.) : A.I.R. 1994 S.C. 2420.

Sec.114 of the Evidence Act with a view to emphasis that the rule contained therein as well as in Sec. 133 are parts of one and the same subject and neither can be ignored in the exercise of judicial discretion except in cases of very exceptional nature. However, the difficulty in understanding the combined effect of the aforementioned two provisions arises largely due to their placement at two different places of the same Act. It may be noticed that illustration *(b)* attached to Sec. 114 is placed in Chapter VII of Evidence Act while Sec. 133 is inserted in Chapter IX of the Act. The better course was to insert the illustration *(b)* to Sec. 114 as an explanation or in any case as proviso to Sec. 133 of the Act instead of their insertion at two different places and that too in different Chapters of Evidence Act. In any case since an approver is guilty companion in crime and, therefore, illustration *(b)* to Sec. 114 provides a rule of caution to which the Courts should have regard. It is now well settled by a long series of decisions that except in circumstances of special nature it is the duty of the Court to raise the presumption in Sec. 114 illustration *(b)* and the Legislature requires that the Courts should make the natural presumption in that section.

Though a conviction can be based on uncorroborated evidence of an accomplice but as a rule of prudence it is unsafe to place reliance on the uncorroboated testimony of an approver as required by illustration *(b)* of Sec. 114 of the Evidence Act.[1]

A conviction is not illegal, merely because it proceeds upon uncorroborated testimony of an accomplice. It is a rule of caution, that it generally requires corroboration.[2] The combined effect of Secs. 133 and 114, Illus. (*b*), may be stated as follows : Though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal, yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars.[3] The law was stated in *R.* v. *Baskerville*,[4] as follws :

Court not to accept the evidence of accomplice without corroboration.

> "....the uncorroborated evidence of an accomplice is admissible in law.[5] But it has been long a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of a accomplice."[6]

Admissibility of an uncorroborated evidence of accomplice.

Illustration (*b*) to Sec. 114, Evidence Act, is to be read along with Sec. 133, Evidence Act, and neither rule is to be ignored in the exercise of judicial discretion.[7]

There is no antithesis between Sec. 133, and Illustration (*b*) to Sec. 114 of the Evidence Act because the illustration only says that the Court "may" presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be

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1. Suresh Chandra Bahri *v.* State of Bihar, A.I.R. 1994 S.C. 2420 at p. 2439 : 1994 Cr. L.J. 3271.
2. Balbir Singh Balwant Singh *v.* State, A.I.R. 1959 Punj. 332 at p. 335.
3. Bhiva Doulu Patil *v.* State of Maharashtra, A.I.R. 1963 S.C. 599 at p. 601 : 1963 A.W.R. (H.C.) 163 : (1963) 2 S.C.J. 327 : 1963 A.L.J. 253 : 65 Bom. L.R. 34 : 1963 M.P.L.J. 225.
4. (1916) 2 K.B. 658.
5. R. *v.* James Atwood, (1787) 1 Leach. 464.
6. R. *v.* Stubbs, (1855) Dears C.C. 555; *In re* Meunier, (1894) 2 Q.B. 415 ; Bhiva Doulu Patil *v.* State of Maharashtra, A.I.R. 1963 S.C. 599 at p. 601.
7. Baboo Singh *v.* Emperor, A.I.R. 1936 Oudh 156 at p. 160 ; *see* also Union Territory of Arunachal Pradesh *v.* Lea Tagun, 1982 Cr. L.J. 1519 (Gau.).

placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime. The risk involved in convicting an accused on the testimony of an accomplice, unless it is corroborated in material particulars, is so real and potent that what during the early development of law was felt to be a matter of prudence has been elevated by judicial experience into a requirement or rule of law. All the same, it is necessary to understand that what has hardened into a rule of law is not that the conviction is illegal, if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration must be present to the mind of the Judge and that corroboation may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it.[1]

Dealing with these sections Phear, J., in *Queen* v. *Sadu Mundul*,[2] at page 70, laid down the following sound proposition of law :

" 'On the whole result' of these sections appears to be that the Legislature has laid it down as a maxim or rule of evidence...that an accomplice is unworthy of credit against an accused person....unless he is corroborated in material particulars, in respect to that person."

Accomplice unworthy credit against accused.

In *Rex* v. *Wilkes*,[3] Baron Alderson said :

"The confirmation which I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged."

Jury to require confirmation of the accomplice.

Two further illustrations are given to Illus. (*b*) in the Act. They show circumstances in which the presumption normally to be drawn is capable of being displaced. The following clear propositions have been laid down in this respect : *First* : The cumulative effect of the evidence of two or more of accomplices may be sufficient to remove the *prime facie* presumption of the individual unworthiness of credit of their statements. The same observations applies to the cumulative effect of the evidence of accomplice and the confession of a co-accused. *Secondly* : The evidence from a source which is not *prima facie* unworthy of credit may prove a fact which displaces in a particular case the presumption that an accomplice is unworthy of credit. *Thirdly* : That corroboration must proceed from a source extraneous to the person whose testimony it is sought to corroborate. The above conclusions in so far as they differ from dicta on the same point in either *Aung Hla* v. *Emperor*,[4] or *Nga Aung Pe* v. *Emperor*,[5] must be regarded as superseding the earlier dicta. What has been said of accomplices applies to approvers and *vice versa*.[6]

Corroboration from where to proceed.

Where there is no such caution the Court will quash the conviction.[7] Where there is a proper caution the Court of Criminal Appeal will quash the conviction if the verdict is clearly unreasonable and unsupported by the evidence.[8]

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1. Dagdu *v.* State of Maharashtra, A.I.R. 1977 S.C. 1579 at p. 1584.
2. (1874) 21 W.R. (Cr.) 69.
3. (1836) 7 C. & P. 272.
4. I.L.R. 9 Rang. 404 at p. 427 (S.B.) : A.I.R. 1931 Rang. 235 : 1931 Cr. C. 875 : 135 I.C. 849 : 33 Cr. L.J. 205.
5. A.I.R. 1937 Rang. 209 : 169 I.C. 705 : 1937 R.L.R. 110 : 38 Cr. L.J. 785.
6. King *v.* Nga Myo, A.I.R. 1938 Rang. 177 at pp. 178-80.
7. R. *v.* Norris, (1916) 12 Cr. App. 156 : 86 L.J.K.B. 810 : 116 L.T. 160 : 25 Cox. C.C. 601 ; R. *v.* Beebe, (1925) 28 Cox. C.C. 47 : 133 L.T. 736 : 89 J.P. 175 : 41 T.L.R. 635 : 19 Cr. App. Rep. 22.
8. R. *v.* Baskerville, (1916) 2 K.B. 658 : 86 L.J.K.B. 28 : 115 L.T. 453 : 80 J.P. 446 : 25 Cox. C.C. 524 : 60 S.J. 696 and R. *v.* Bryant, (1917) 13 Cr. App. 49 and *see* Arehbold's *Criminal Pleadings*, 24th Ed., p. 461 and Roscoe's *Criminal Evidence*, 14th Ed., pp. 153-54.

Participation in crime by the witness concerned might vary in the extent of the complicity. The crime again might be either a serious one or light, uncommon or common, and the degree of corroboration in material particulars would vary accordingly, and in exceptional cases might even entirely be dispensed with. Illustration (*b*) of Sec. 114 is but a maxim, i.e. a rule of caution and of guidance, and the raising of the presumption would, therefore, be left to the Court's sound judicial discretion. As is observed in *Emperor* v. *Shrinivas Krishna*,[1] the right to raise a presumption was sanctioned by the Evidence Act, and it would accordingly be an error of law to disregard it.

Rule of caution—Court's discretion in case of evidence of accomplice.

In the case where the witness was merely a youthful tool in the hands of the accused the rule was held to have no application.[2] Similar observations are to be found in *Emperor* v. *Nilkanta*,[3] *Rex* v. *Tate*,[4] and *In re Meunier*.[5] The presumption of untrustworthiness may be rebutted by special circumstances.[6] As held in *Queen Empress* v. *Chagan Dayaram*[7] and *King Emperor* v. *Mohiuddin Sahib*,[8] the rule in Sec. 133 and Sec. 114, Illus. (*b*), are parts of one subject and neither section is to be ignored in the exercise of judicial discretion.

Illustration (*b*) is, however, the rule and when it is departed from, the Court should show, or it should appear, that the circumstances justify the exceptional treatment of the case.[9] It is an established practice to require corroboration of the evidence of an accomplice by independent evidence on some material particular implicating the accused.[10]

It is not illegal to base a conviction on the evidence of an accomplice alone, nor is a Court required to set aside a verdict based upon the uncorroborated testimony of an accomplice, unless it is clear that by the omission to require corroboration, a failure of justice has, in fact, occurred.[11]

Verdict based on accomplice evidence.

The rule of corroboration can have no application where the evidence is led only for the purpose of proving that the complainant was in possession of some property which is alleged to be stolen.[12]

Scope of rule of corroboration.

As pointed out by the Privy Council in *Srinivas Mal Bairolia* v. *Emperor*,[13] the degree of suspicion which will attach to the evidence of an accomplice must, however, vary according to the extent and nature of the complicity.[14]

Degree of suspicion.

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1. (1905) 7 Bom. L.R. 969 : 3 Cr. L.J. 33.
2. *Vide* the case of Ramaswami Goundan *v.* Emperor, I.L.R. 27 Mad. 271 : 2 Weir 803 : 14 M.L.J. 226.
3. I.L.R. 35 Mad. 247 : 13 Cr. L.J. 305 : 14 I.C. 849.
4. (1908) 2 K.B. 680 : 77 L.J.K.B. 1043 : 72 J.P. 391 : 99 L.T. 620 : 21 Cox. C.C. 693.
5. (1894) 2 K.B. 415 : 63 L.J.M.C. 198 : 10 R. 400 : 71 L.T. 403 : 42 W.R. 637 : 18 Cox. C.C. 15.
6. *Vide* Muthukumaraswami Pillai *v.* Emperor, I.L.R. 35 Mad. 397 : 13 Cr. L.J. 352 : 14 I.C. 896 (F.B.).
7. I.L.R. 14 Bom. 331.
8. I.L.R. 25 Mad. 144 : Weir 8.
9. *Vide* observations of Jardine, J., in Queen-Empress *v.* Chagan Dayaram, I.L.R. 14 Bom. 331.
10. *Vide* Taylor on *Evidence* (10th Ed.), p. 967; Kailash Missir *v.* Emperor, A.I.R. 1931 Pat. 105 at pp. 109-10 : 11 Pat. L.T. 545 : 129 I.C. 535.
11. State *v.* Anil Ranjan Dutta, A.I.R. 1952 Cal. 534 at p. 538.
12. State *v.* Bassappa Chalappa Bekwad, A.I.R. 1956 Bom. 341 at p. 342.
13. (1947) M.W.N. (Cr.) 125 at p. 130 : A.I.R. 1947 P.C. 135.
14. *In re* Amir Sultan, A.I.R. 1957 Mad. 796 at p. 798 : 1957 M.W.N. 162.

If the Court credits the evidence of an accomplice, a conviction proceeding upon it is not illegal.[1] The Court may consider that the accomplice is unworthy of credit.[2] It would be unsafe to convict the accused, where the testimony of the accomplice is not corroborated in any material point except by the confession of a fellow-prisoner.[3] Sections 114 and 133 of this Act are to be read together, and neither section is to be ignored in the exercise of judicial discretion.[4]

The provision in Sec. 133 of the Evidence Act is an absolute rule of law and the rule in illustration (*b*) in Sec. 114, Evidence Act, only a rule of guidance. To put it in another way the illustration is only a rule of practice and not a rule of law. But the practice laid down in the illustration is usually followed with the same rigour as if it were a rule of law. Section 133 only says that it is not illegal to base a conviction solely on the evidence of an accomplice. It says nothing about the propriety of the conviction. The section does not go to the length of saying that a conviction based upon the uncorroborated testimony of an accomplice is proper. In that view there is really no conflict between the provisions of Sec. 133 and illustration (*b*) to Sec. 114 of the Evidence Act. Anyway a note of caution is given in Sec. 114 illustration (*b*) of the Evidence Act that the Court should not ordinarily act on the evidence of an accomplice without corroboration on material particulars and that applies with equal force to witnesses in the nature of accomplices also. The combined effect of the section and the illustration is explained in *Mohd. Hussain Umar Kochra* v. *K.S. Dalipsinghji,*[5] at page 53, the following observations occur : [6]

The corroboration must connect the accused with the crime. The corroboration must be from an independent source. One accomplice cannot corroborate another.[7]

In England it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a person on the uncorroborated testimony of an accomplice, and in the discretion of the Judge he may recommend them not to do so. The rule in India is exactly the same. In *Emperor* v. *Jamaldi Fakir,*[8] the dictum of Reading, C.J., in *R.* v. *Baskerville*[9] has been quoted with approval by the learned Bench that—

In India in practice the Courts have invariably started with the presumption against the trustworthiness of the accomplice unless corroborated in material particulars. The considered opinion in this country as also in England is that a conviction based upon the uncorroborated testimony of an accomplice is not illegal though it is highly dangerous to base a conviction upon his uncorroborated evidence.

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1. Reg. *v.* Ramasami Padayachi, I.L.R. 1 Mad. 394 : 2 Ind. Jur. 600 ; Queen *v.* Koa, 19 W.R. (Cr.) 48 ; *see* also Mohan Wahi *v.* State, C.B.I. New Delhi, 1982 Cr. L.J. 2040 (Delhi).
2. Queen *v.* Luchmee Pershad, 19 W.R. (Cr.) 43 ; *see* also Queen *v.* Sadhu Mundul, 21 W.R. (Cr.) 69.
3. Queen *v.* Udhan Bind, 19 W.R. (Cr.) 68.
4. Queen-Empress *v.* Chagan Dayaram, I.L.R. 14 Bom. 331 (*per* Jardin, J.).
5. A.I.R. 1970 S.C. 45.
6. Kuruchiyan Kunhaman *v.* State of Kerala, 1974 K.L.T. 328 at pp. 366, 426.
7. *See* Bhiva Dulu Patil *v.* State of Maharashtra, (1963) 3 S.C.R. 830 : A.I.R. 1963 S.C. 599 ; R. *v.* Baskerville, (1916) 2 K.B. 658 ; Mohad. Hussain Umar Kochra *v.* K.S. Dalipsinghji, A.I.R. 1970 S.C. 45 at p. 53 : 72 Bom. L.R. 74.
8. A.I.R. 1924 Cal. 701 : I.L.R. 51 Cal. 160 : 28 C.W.N. 536 : 81 I.C. 712.
9. (1916) 2 K.B. 658.

In *Nga Aung Pe* v. *Emperor*,[1] Roberts, C.J., said :

"The rule of law says that the (accomplice) is competent to give evidence, and the rule of practice says that it is almost always unsafe to convict upon his testimony alone."

So also has Phear, J., remarked in *R.* v. *Sahdu Mundul*,[2] that the combined result of the two sections[3] appears to be that the Legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person, unless he is corroborated in material particulars in respect to that person. It has been held therein that his evidence must be received with very great caution. The rule of practice that an approver must be corroborated before he is treated as worthy of credit is almost of universal applicability. But then it has to be borne in mind that the corroboration, forthcoming, must specifically connect each accused with the actual commission of the offence. It has been held in *Ranbir Singh* v. *Emperor*[4] that—

Corroboration must specifically connect accused with the crime.

"...Prudence requires that the connexion of each individual with the crime should be proved and corroborated by independent evidence...."

This dictum has been passed by Harrison, J., who delivered the judgment on behalf of the Bench.[5]

It must be remembered that corroboration must be in respect to material particulars and not with respect to each and every item however minor or insignificant it may be. Actually the requirement of corroboration is a rule of prudence which the Courts have followed for satisfying the test of the reliability of an approver and has now been crystallised into a rule of law. It is equally well settled that one tainted evidence cannot corroborate another tainted evidence because if this is allowed to be done then the very necessity of corroboration is frustrated.[6]

22. Danger of accomplice evidence.— The danger of accomplice evidence is that, when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others. The evidence of accomplices should be carefully sifted and tested, before they can be relied on in a Court of law.[7] The evidence of an approver is not sufficient to convict a person charged with an offence.[8]

In *In re B.K. Rajagopal*,[9] the Court founded a conviction upon the evidence of an accomplice supported only by the confession of a co-accused. Their Lordships of the Privy Council in *Bhuboni Sahu* v. *King*,[10] whilst not doubting that such a conviction is justified in law under Sec. 133, Evidence Act would nevertheless observe that Court should be slow to depart from the rule of prudence, based on long experience, which

Court not to depart from rule of prudence.

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1. 1937 Rang. L.R. 110.
2. 21 W.R. (Cr.) 69.
3. Sections 133 and 114, Illus. (b).
4. A.I.R. 1932 Lah. 204 : 33 Punj. L.R. 241 : I.L.R. (1932) Lah. 137.
5. Ghulam Nabi *v.* State, A.I.R. 1953 J. & K. 3 at pp. 7-8.
6. Chonampara Chellappan *v.* State of Kerala, A.I.R. 1979 S.C. 1761 at p. 1762.
7. Queen *v.* Reas Ali, 6 W.R. (Cr.) 77.
8. 3 B.L.R. (A. Cr.) 66; Queen *v.* Issen Mundle, 3 W.R. (Cr.) 8 ; Queen *v.* Nawab Jan, 8 W.R. (Cr.) 19 ; Queen *v.* Ram Sagor, 8 W.R. (Cr.) 57 ; Queen *v.* Chirag Ali, 12 W.R. (Cr.) 5.
9. I.L.R. (1944) Mad. 308 : A.I.R. 1944 Mad. 117 : 45 Cr. L.J. 373 (F.B.).
10. A.I.R. 1949 P.C. 257 at p. 261.

requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all its details as to eight of them, but untrue as to the other two, whose names have been introduced because they are enemies of the approver. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused. This aspect of the matter was well expressed by Sir George Rankin in *Ambikacharan Roy* v. *Emperor*.[1]

Danger of acting upon the accomplice evidence.

The testimony of a professed accomplice requires to be carefully scrutinized with anxious search for possible corroboration.[2]

Evidence of professed accomplice to be scrutinized carefully.

Usually the evidence of an accomplice is accepted only with very great care. The reasons for that are not far to seek. An accomplice is a participator in crime and so an immoral person. He is a person who has betrayed his associates. Accomplice evidence does not suffer from any internal defect or invalidity. It is as good and as valid as any other piece of evidence. The law only says that one should be guarded before accepting it. After taking all safeguards like taking corroboratory evidence it is open to Courts to act upon it. Corroboration is not for curing any defect in the testimony of the accomplice or to give validity to it. It is only to enable the Court to have moral conviction about it being a true version in order to embolden the Court to act upon it and not to validate it and once the Court feels it can safely act on it, it is as valid, as good and as strong as any other evidence.[3]

Reasons for the need of corroboration.

How the evidence of an accomplice is to be treated is no longer open to any doubt. As was observed by the Supreme Court in *Rameshwar Kalyan Singh* v. *State of Rajasthan*,[4], the rule laid down in *King* v. *Baskerville*,[5] with regard to the admissibility of the uncorroborated evidence of an accomplice is also the law in India. The rule is that the Judge must warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice. In *Rameshwar Kalyan Singh* v. *State of Rajasthan*,[6] it was pointed out—

How evidence of an accomplice is to be treated.

> "....that the Judge should give some indication in his judgment that he has had this rule of caution in mind and should show why he considers it safe to convict without corroboration in that particular case."[7]

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1. 35 C.W.N. 1270 at p. 1274 : A.I.R. 1931 Cal. 697 : 33 Cr. L.J. 9 (S.B.) ; Bhuboni Sahu *v.* King, A.I.R. 1949 P.C. 257 at p. 261 : 76 I.A. 147 : 1949 A.L.J. 283 : 51 Bom. L.R. 955 : 84 C.L.J. 146 : 52 C.W.N. 609 : 51 P.L.R. 371 : (1949) 2 M.L.J. 194 : 62 L.W. 664 : I.L.R. 28 Pat. 592.
2. W.C. Macdonald *v.* Fred Latimer, A.I.R. 1929 P.C. 15 at p. 18 : 29 M.L.W. 155 : 112 I.C. 375.
3. Kuruchiyan Kunhaman *v.* State of Kerala, 1974 K.L.T. 328 at pp. 425, 426.
4. A.I.R. 1952 S.C. 54 : 1952 S.C.R. 377 at p. 385.
5. (1916) 2 K.B. 658.
6. 1952 S.C.R. 377 at p. 385 : A.I.R. 1952 S.C. 54.
7. State of Bihar *v.* Basawan Singh, A.I.R. 1958 S.C. 500 at p. 505 : 1958 S.C.J. 856 : 1956 S.C.R. 195 : 1958 A.L.J. 608 : 1958 A.W.R. 609.

What those principles are set forth in *Queen Empress* v. *Magan Lal*[1] by Scott, J., at page 119 :

Reasons for untrustworthiness of accomplice evidence.

"Accomplice evidence is held untrustworthy for three reasons : (1) because an accomplice is likely to swear falsely in order to shift the guilt from himself; (2) beacuse an accomplice is likely to disregard the sanction of an oath ; and (3) because he gives his evidence under promise of a pardon, or in the expectation of an implied pardon...."

23. Accomplice evidence—Law and practice in England and India.—The law in England is that corroboration of accomplices is not required in strict law;[2] but it is the general practice to require corroboration, and for the prosecution to give other evidence confirmatory of at least some of the leading circumstances of his story, [from which the jury may be able to presume that he has told the truth as to the rest,] and for the Judge to tell the jury not to act upon the uncorroborated testimony of an accomplice.[3] In England it was formerly held that, if an accomplice be confirmed as to the particulars of the story, he did not require corroboration as to the persons charged, but this doctrine has been rejected in later cases.[4] The law is practically the same in this country.[5]

Accomplice is a competent witness.

An accomplice is a competent witness against an accused person; and a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice. This is a rule of law embodied in Sec. 133. There is, however, a rule of prudence contained in Illus. (*b*) to Sec. 114 of the Evidence Act. The necessity of corroboration is stressed therein. The credit of an accomplice who is first convicted and thereafter examined as a witness against a co-accused is affected because of such conviction. As between his statement on oath and the statement

Verdict of the Supreme Court.

of a co-accused from the dock there is no good reason to prefer the former, unless it is corroboated in material particulars by some untained independent evidence.[6] In *Sarwan Singh* v. *State of Punjab*,[7] the Supreme Court observed that—

"an accomplice is undoubtely a competent witness....Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence."

Corroboration may be by way of some circumstance that supplies sufficient confirmation of the truth of the evidence of the accomplice. There has to be independent corroboation of the participation of each accused in the crime as laid down in *Bhiva* v. *State of Maharashtra*.[8]

The rule about the nature and extent of corroboation was considered at some length in the oft-cited case in the *King* v. *Baskerville*.[9] This case has been quoted

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1. I.L.R. 14 Bom. 115.
2. R. *v.* Atwood, 1 Leach. 464.
3. Rex. *v.* Rudd, 1 Cowp. 331 at p. 336 ; *In re* Meunier, L.R. (1894) 2 Q.B. 415, cited in Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 283 : 2 Weir 803.
4. R. *v.* Webb, 6 C. & P. 594 ; Rex *v.* Wilkins, 7 C. & P. 272 and other cases cited in Ramaswami Gounden *v.* Emperor I.L.R. 271 at p. 283.
5. *See* Queen-Empress *v.* Magan Lal and Moti Lal, I.L.R. 14 Bom. 115 ; Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 283.
6. Ibrahim Husen *v.* State, A.I.R. 1969 Goa 68 at p. 70.
7. A.I.R. 1957 S.C. 637.
8. A.I.R. 1963 S.C. 599.
9. (1916) 2 K.B. 658.

with approval by their Lordships of the Supreme Court in more than one decision.[1] It has also been cited in what is commonly known as the Goa Bom case.[2]

In *Haroom Haji* v. *State of Maharashtra*,[3] the question of accomplice evidence is discussed. The material passage reads thus :

Effect of the provision of Sec. 133, Evidence Act.

"The effect of the provision is that the Court trying an accused may legally convict him on the single evidence of an accomplice. To this there is a rider in Illus. (*b*) to Sec. 114 of the Act.....This cautionary provision incorporates a rule of prudence...This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law."

In *Bhuboni Sahu* v. *King*[4] [the law in India relating to accomplice evidence was considered, and] Sir Johan Beaumont said :

Privy Council on law relating to accomplice evidence in India.

"The law in India relating to the evidence of accomplice stands thus .....It had been held in *Queen* v. *Elahee Buksh*,[5] that the law relating to accomplice evidence was the same in India as in England. Then came the Indian Evidence Act...

"Reading these two enactments [Sec. 133 and Illustration (*b*) to Sec. 114] together, the Courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is a rule of prudence.....that it is unsafe to act upon evidence of an accomplaice unless it is corroborated in material respects so as to implicate the accused ; and further, that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice.

"The law in India, therefore, is substantially the same on the subject as the law in England...."

After considering all the decisions on the point—English and Indian— Bose, J., ... observed that though a woman, who has been raped, is not an accomplice,

Raped woman, whether an accomplice ?

but in all these cases a large volume of case law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence. His Lordship then said :

"...this branch of the law is the same as in England.....the lucid exposition of it given by Lord Reading,....in *King* v. *Baskerville*[6] cannot be bettered.

The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge.

The nature and the extent of the corroboration that is required when it is not considered safe to dispense with it, must necessarily vary with the circumstances of each case, and also according to the particular circumstances of the offence charged.

Nature and extent of corroboration required.

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1. *See* Rameshwar Kalyan Singh *v.* State of Rajasthan, A.I.R. 1952 S.C. 54 ; Jnanendra Nath *v.* State of West Bengal, A.I.R. 1959 S.C. 1190 at p. 1201, and E.G. Barsay *v.* State of Bombay, A.I.R. 1961 S.C. 1762.
2. State *v.* Olavo-Perpetuo Noronha Fenandes and State *v.* Richardo de Lima e Melo, Criminal Revn. Appln. No. 333 of 1965 and Criminal Appeal No. 325 of 1965 decided by Goa High Court on 13th November, 1967 (Goa).
3. A.I.R. 1968 S.C. 832.
4. A.I.R. 1949 P.C. 257.
5. 5 Suth. W.R. (Cr.) 80.
6. (1916) 2 K.B. 658.

It is, however, clear (*i*) that all that is required is that there must be "some additional evidence rendering it probable that the story of the accomplice (or the complainant) is true and that it is reasonably safe to act upon it" ; (*ii*) the independent evidence must in some way reasonably connect the accused with crime ; (*iii*) the corroboration must come from independent sources ; (*iv*) the corroboration need not be direct evidence that the accused committed the crime ; it is sufficient if it is merely circumstantial evidence of his connexion with the crime.

"Independent" merely means independent of sources which are likely to be tainted.[1]

Position of several accomplices.

If several accomplices simultaneously give a consistent account of the crime implicating the accused, the Court may accept the several statements as corroborating each other.[2] But it must be established that the several statements of accomplices were given independently and without any previous concert.[3]

24. Evidence of an accomplice and evidence of a partisan witness—Distinction between.—In *State of Bihar* v. *Basawan Singh*,[4] the Supreme Court over-ruled the decision in *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh*.[5] No different rule was laid down in *E.G. Barsay* v. *State of Bombay*.[6] It is now well settled by a series of decisions of the Supreme Court that while in the case of evidence of an accomplice, no conviction can be based on his evidence unless it is corroborated in material particulars but as regards the evidence of a partisan witness it is open to a Court to convict an accused person solely on the basis of that evidence, if it is satisfied that that evidence is reliable. But it may in appropriate case look for corroboration.[7]

25. Whether evidence of partisan witnesses must be corroborated.—In the Supreme Court in case of *State of Bihar* v. *Basawan Singh*,[8] their Lordships formulated the correct rule in these words :

> "The correct rule is this : if any of the witnesses....are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested by the application of diverse considerations which must vary from case to case, and in a proper case, the Court may even look for independent corroboration before convicting the accused person..."

Where *panchas* were with the raiding party and witnessed the preparation and carrying out of the raid.

Therefore, a person who is concerned in the success of the trap is to be treated as a partisan or interested witness. In *Ramanlal* v. *State of Bombay*,[9] the *panchas* were also with the raiding party and witnessed the preparation and carrying out of the raid. Their Lordships say at page 663 :

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1. Shamsher Bahadur Saxena *v.* State of Bihar, A.I.R. 1956 Pat. 404 at pp. 411-12 : 1955 Bih. L.J. 537 : I.L.R. 34 Pat. 781.
2. *See* Haroon Haji Abdulla *v.* State of Maharashtra, A.I.R. 1968 S.C. 832 at p. 837 : 70 Bom. 540 at p. 545.
3. *See* Bhuboni Sahu *v.* King, 76 Ind. App. 147 at pp. 156-57 : A.I.R. 1949 P.C. 257 ; Raj Kumar Mohan Singh *v.* Raj Kumar Pashupati Nath Saran Singh, A.I.R. 1970 S.C. 42 at p. 56 : (1969) 2 S.C.J. 866.
4. (1959) S.C.R. 195 : A.I.R. 1958 S.C. 500.
5. 1954 S.C.R. 1098 : A.I.R. 1954 S.C. 322.
6. (1962) 2 S.C.R. 195 : A.I.R. 1961 S.C. 1762.
7. Bhanuprasad Hariprasad Dave *v.* State of Gujarat, A.I.R. 1968 S.C. 1323 at pp. 1326-27 : 9 Guj. L.R. 853 ; Barsay *v.* State of Bombay, (1962) 2 S.C.R. 195 : A.I.R. 1961 S.C. 1762.
8. A.I.R. 1958 S.C. 500.
9. A.I.R. 1960 S.C. 961.

"....It cannot be said that these two witnesses were not independent witnesses even though they consented to become search or *panch* witnesses."

The two witnesses their Lordships refer to are the two *panch* witnesses.

Weight of the evidence of the *panch* witnesses.

Therefore, the evidence of the *panch* witnesses was treated not on the same footing as the evidence of partisan or interested witnesses but as additional evidence to be considered on its own merits. The true position, therefore, is that as regards *panch* witnesses the mere fact that they accompanied the police and witnessed the raid does not make them interested witnesses. They may stand on that footing if the circumstances show that they share in the intention to raid or have become parties to that intention by any subsequent conduct on their part such as being actually interested in the result of the raid. The Bombay High Court in *Ramchand Tolaram* v. *State*,[1] pointed out that if the *panchas* are not parties to the trap and are there only primarily for the purpose of witnessing what was taking place, there is no reason to treat them not as independent witnesses but as partisan witnesses. Their Lordships drew attention to the danger involved in treating *panch* witnesses as necessarily partisan witnesses.

Danger involved in treating *panch* witnesses as necessarily partisan witnesses.

They pointed out that if *panchas* who come forward to do their duty in the administration of justice as respectable citizens lose in the bargain their independent character and carry a stigma of being a partisan witness, it would become a serious matter.[2]

It appears in the instant case that the approach made by the learned Judge towards the prosecution has been independent but one with a tainted eye and an innate prejudice. It is manifest that if one wears a pair of pale glasses, everything which he sees would appear to him to be pale. In fact, the learneed Judge appears to have been so much prejudiced against the prosecution that he magnified every minor detail or omission to falsify or throw even a shadow of doubt on the prosecution evidence. This is a very antithesis of a correct judicial approach to the evidence of witnesses in a trap case. Indeed, if such a harsh touchstone is prescribed to prove a case it will be difficult for the prosecution to establish any case at all. In the instant case, presuming that the witness was a person of diabolical character, the learned Judge without any evidence refused to believe the incident of the night in the absence of any legal warrant for the same.[3]

Their Lordships of the Supreme Court, in *Bhanuprasad Hariprasad Dave* v. *State of Gujarat*,[4] were pleased to observe :

"It is now well settled...that...as regards the evidence of a partisan witness it is open to a Court to convict an accused person solely on the basis of that evidence, if it is satisfied that that evidence is reliable. But it may, in appropriate cases, look for corroboration."[5]

A person who lends himself to be a tool in the hands of the police in a trap may evidently be regarded as partisan witness and to that extent his evidence requires corroboration.[6]

Partisan witness.

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1. A.I.R. 1956 Bom. 287.
2. Manilal Harchand Mehta *v.* State of Gujarat, (1967) 2 Lab. L.J. 497 at pp. 506-7.
3. State of Maharashtra *v.* Narsingrao Gangaram Pimple, 1984 Cr. L.J. 4 at p. 13 (S.C.) : A.I.R. 1884 S.C. 63 : *see* also B.K. Kutty *v.* The State, 1984 Cal. L.J. 1289.
4. A.I.R. 1968 S.C. 1323.
5. Meharchand *v.* State of Rajasthan, 1969 Raj. L.W. 601 at p. 604.
6. State *v.* Pundlik Bhikaji Ahire, A.I.R. 1959 Bom. 543 at p. 546 : 1959 Bom. L.R. 837 : 60 Cr. L.J. 1421.

Testimony of a partisan witness.

If the witnesses are not accomplices but are partisans or interested witnesses, their evidence must be tested in the same way as other interested evidence is tested and in a proper case the Court may even look for independent corroboation before convicting the accused person.[1]

It is very often contended that reliance should not be placed on the trap witnesses as they are interested in the success of the prosecution of the accused The answer to this contention is found in a number of cases decided by the Supreme Court and other Courts. It has been emphazised that there was no rule of prudence which was crystallised into a rule of law, nor indeed into any rule of prudence, which requires that the evidence of such officer should be treated on the same footing as evidence of accomplice and there should be insistence on corroboration. This was the view categorically expressed by the Supreme Court in *Hazari Lal* v. *State (Delhi Administration).*[2] Thus, the testimony of these officers who had laid the trap would have to be judged on their merits and they will not be treated as interested witnesses merely because they are interested in the succuessful prosecution of the case.[3]

Corroboration of evidence of partisan witness is rule of prudence.

After all the rule regarding independent corroboration is only a rule of prudence. If in any particular case the evidence of partisan wtinesses is seen to be thoroughly reliable and trustworthy, there will be nothing wrong in the Court in acting upon such evidence and entering a conviction against the accused.[4]

No rule as to non-acceptance of evidence of partisan witness.

In *Shiv Bahadur Singh* v. *State of Vindhya Pradesh,*[5] it was not laid down as a rule of law that without independent corroboration the evidence of partisan witnesses can under no circumstances be relied on as sufficient to sustain a conviction of the accused.

26. Evidence of approver.—Whether the evidence of the approver should in any given case be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether his evidence is merely self-exclupatory and so on and so forth. The Court has, in addition, to ascertain whether his evidence has been corroboated sufficiently in material particulars. What is necessary to consider is whether applying all these tests the evidence of the approver should be acted upon.[6]

It is well settled that the evidence of the approver should be corroborated in material particulars connecting each of the accused with the crime. When both the Courts have found that so far as the story of the approver is concerned there is nothing to suggest that it is not true, having found that the version of the approver is *prima facie* acceptable, the Courts proceeded and found that there was required corroboration.[7]

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1. Kunhi Mohammed *v.* State, A.I.R. 1959 Ker. 88 at p. 92 : 1958 Ker. L.T. 676.
2. 1980 Cr. L.J. 564 : A.I.R. 1980 S.C. 873.
3. Surendra Pal Singh *v.* State, 1981 A.L.J. 1153 at p. 1157.
4. K.M. Narayansawami *v.* Kerala State, A.I.R. 1957 Ker. 134 at p. 138 : 1957 Ker. L.T. 784.
5. A.I.R. 1954 S.C. 322 : 1954 S.C.A. 1316 : 1954 S.C.J. 362 : 1954 S.C.R. 1098.
6. State of Andhra Pradesh *v.* Cheemalapati Ganeswara Rao, A.I.R. 1963 S.C. 1850 at p. 1872.
7. G.S. Bakshi *v.* State, (Delhi Adminisstration), A.I.R. 1979 S.C. 569 at p. 572.

The evidence of an approver must show that he is a reliable witness and that is a test which is common to all witnesses, is when that test is satisfied the second test which still remains to be applied is, that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver. In the present case, the appreciation of the evidence fo the witness does not satisfy even the first test of the reliability of his statement. The question of second test i.e. there being sufficient corroboration to the material facts in the statement arises only when it satisfied the first test.[1]

For corroborative evidence the Court look at the broad spectrum of the approver's version and then find out whether there is other evidence to corroboate and lend assurance to that version. The nature and extent of such corroboation may depend upon the facts of different cases. Corroboration need not be in the form of ocular testimony of witnesses and may be even in the form of circumstantial evidence. Corroborative evidence must be independent and not vague or unreliable. Relying upon its earlier judgment in *Suresh Chandra Bahri* v. *State of Bihar*,[2] Supreme Court in *Naranjan Singh* v. *State of Punjab*,[3] held that once the evidence of the approver is held to be trustworthy, it must be shown that the story given by approver so far as an accused is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. Insistence upon corroboration is based on the rule of caution and not merely a rule of law.[4]

Law is well settled that interestedness does not make the version of a prosecution witness untrustworthy. There cannot be a universal rule that all independent witnesses necessarily tell the truth and all interested witnesses versions are false.[5]

It was not for the Sessions Judge to have considered the possible weight of the approvers evidence, even before it was given. In any case, the evidence of an approver does not differ from the evidence of any other witness except that his evidence is looked upon with great suspicion. But the suspicion may be removed and if the evidence of an approver is found to be trustworthy and acceptable then that evidence might well be decisive in securing a conviction (see *Suresh Chandra Bahri* v. *State of Bihar*).[6] The Sessions Judge could not and indeed should not have assessed the probable value of the possible evidence of the respondent No. 1 in anticipation and wholly in the abstract.[7]

In considering whether the approver's evidence passed the test of reliability, the Court would have to consider whether taken as a whole and in the light of the facts and circumstances of the case it was a credible version or not.[8]

It was held by the Supreme Court in *Sarwan Singh* v. *State of Punjab*,[9] that an approver's evidence to be accepted must satisfy two tests.[10]

Approver's evidence to satisfy two tests.

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1. Gulati T.D. *v.* State of Rajasthan, 1983 R.L.W. 226 at pp. 230, 232.
2. 1994 A.I.R. SCW 3420 : A.I.R. 1994 S.C. 2420 : 1994 Cr. L.J. 3271.
3. (1996) 5 JT (SC) 582 : 1996 A.I.R. SCW 2220 : A.I.R. 1996 S.C. 3254 : 1996 Cr. L.J. 2506.
4. **Narayan Chetanram Chaudhary *v.* State of Maharashtra, A.I.R. 2000 S.C. 3352 at p. 3365 : 2000 Cr. L.J. 46 (S.C.).**
5. **Subash Chandra Panda *v.* State of Orissa, 2001 Cr.L.J. 4108 at p. 4116 (Orissa).**
6. 1994 A.I.R. S.C.W. 3420 : A.I.R. 1994 S.C. 2420 : 1994 Cr.L.J. 3271.
7. **Jasbir Singh *v.* Vipin Kumar Jaggi, 2001 Cr.L.J. 3993 at pp. 3998-99 : A.I.R. 2001 S.C. 2734 : (2001) 8 S.C.C. 289.**
8. Madan Mohan Lal *v.* State of Punjab, A.I.R. 1970 S.C. 1006 at p. 1008 : 1970 S.C. (Cr.) 573 ; *see* also Siwa Ram Nagial *v.* Union of India, 1983 Cr. L.J. 1788 (J.K.) ; Kali Charan *v.* State of Madhya Pradesh, (1984) 1 Crimes, 428.
9. 1957 S.C.R. 953 : A.I.R. 1957 S.C. 637.
10. Lachhi Ram *v.* State of Punjab, A.I.R. 1967 S.C. 792 at p. 795.

In *Sarwan Singh Rattan Singh* v. *State of Punjab*,[1] Gajendragadkar, who spoke for the Court held that—

Supreme Court on accomplice's evidence.

"....His evidence must show that he is a reliable witness...If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration."

Regarding the extent of corroboration his Lordship goes on to observe as follows :

Extent of corroboration.

"Courts are naturally reluctant to act on the tainted evidence of an approver unless it is corroborated in material particulars by other independent evidence..."

Whether complete corroboration is necessary or not.

The position, therefore, is that the Court may accept the evidence of an approver if he is found to be reliable and his testimony receives corroboration from independent sources. While it is not necessary to insist on complete corroboration, nevertheless it is well to bear in mind the fact that the witness having won pardon for his part in the crime on the undertaking to help to obtain the conviction of his erstwhile collaborators it is not at all unlikely that he may indulge in exaggeration or prevarication in an attempt to carry out his part of the bargain.[2]

While considering the evidence of approver and for basing conviction on the evidence of the approver, certain principles have been laid down by the Supreme Court. They are : (*i*) whether he was a reliable witness and his version was intrinsically credible ; and (*ii*) if so, whether his evidence was corroborated against each accused in material particulars by other evidence direct or circumstantial. These tests are laid down in *Piara Singh* v. *State of Punjab*.[3]

The necessity of corroboration of such evidence was considered in *Sheshanna* v. *State of Maharashtra*.[4]

The nature and extent of corroboration was considered in *Rameshwar* v. *State of Rajasthan*.[5]

In the end it is said : All that is required is that there must be "some additional evidence rendering it probable that the story of the accomplice or complainant is true and that it is reasonably safe to act upon it". This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. All that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness story that the accused was the one or among those, who committed the offence.[6]

In *Maghar Singh* v. *State of Punjab*,[7] apart from other circumstantial evidence the Kirpan recovered from the possession of the appellant Maghar Singh contained blades of hair of the deceased stuck to it and on scientific examination the blades were found to be identical with the hair of the deceased. It was held that this completely establishes that it was the accused Maghar Singh alone who had

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1. A.I.R. 1957 S.C. 637 at pp. 640, 641, 642 ; *see* also Asst. Collector of Customs, New Delhi *v.* Harbans Lal Sharaf, (1980) 2 Cr. L.J. 618 at pp. 626, 630.
2. A.P. Kuttan Panicker *v.* State of Kerala, 1962 Ker. L.T. 996 at p. 1003.
3. 1970 S.C.C. (Cri) 404.
4. A.I.R. 1970 S.C. 1330.
5. A.I.R. 1952 S.C. 54.
6. Bhagwansingh Tantee *v.* State of Madhya Pradesh, 1981 J.L.J. 324 at p. 329 : 1981 M.P.L.J. 622.
7. A.I.R. 1975 S.C. 1320 at p. 1323.

caused the death of the deceased with the Kirpan and this circumstance is not explainable on any other hypothesis except that the accused was guilty of the offence of murder. Thus the circumstantial evidence against the accused is not only conclusive and independent to prove the charge for the offence of murder but also constitutes substantial and sufficient corroboration of the approver's statement in material particulars.

27. Guidelines in respect of approver's evidence.—The guidelines in respect of the approver's evidence, appear to be : (1) according to Sec. 133 of the Indian Evidence Act, an approver is a competent witness and conviction shall not be illegal if based upon an uncorroborated testimony of the approver, (2) according to the illustration (*b*) of Sec. 114 of the Indian Evidence Act, the Court may presume that an approver is a man of untrustworthiness until he is corroborated in material particulars ; (3) Court should not ordinarily convict unless the evidence of the approver is corroboated in material particulars *qua* the accused ; and if more than one, *qua* each accused; (4) such corroboration can be direct and circumstantial ; (5) if the evidence of an approver is intrinsically or inherently impossible or is otherwise unreliable or unacceptable, it should be rejected straightway, without caring to seek for corroborations ; (6) there are several circumstances by which the reliability of an approver has to be adjudged, one important test of reliability is that he is corroborated by other evidence in material particulars ; and (7) the approver should be a *particeps criminis* on his own admission or appear to be so by evidence.[1]

Undoubtedly, an accomplice is a competent witness but his evidence must satisfy two tests, i.e. his evidence must show that he is a reliable witness and his evidence must be corroborated in material particulars by independent evidence. Although Sec. 133 is a rule of law and an accomplice is a competent witness to give evidence but in view of the provisions as contained in Sec. 114, Illustration (*b*) of the Evidence Act, it is a rule of practice and it is almost always unsafe to convict upon the testimony of an accomplice though such conviction would not be said to be illegal yet from the trend of the decision it indicated that the Courts as a matter of practice do not accept the evidence of such accomplice without corroboration in material particulars. The Court should evaluate the evidence of an approver *de hors* the corroborating pieces of evidence for if the approver's testimony is itself uninspiring and unacceptable justifying its rejection outright then it would be futile and wholly unnecessary to look for corroborative evidence. It is only when the approver's evidence concerned is otherwise acceptable then only the Court seeks for necessary corroboation in material particulars. That an accomplice is unworthy of credit unless he is corroborated in material paritculars as illustrated in Sec. 114 of the Evidence Act, is a note of caution or a warning that an accomplice does not generally deserve to be believed unless corroborated in material particulars by independent evidence inasmuch as an accomplice is a person who participates in the commision of actual crime charged against an accused. He is a *particeps criminis*.[2]

An accomplice, by long legal tradition, is a notoriously infamous witness, one who being *particeps-criminis*, purchases his immunity by accepting to accuse others. In indictments, particularly of serious crimes, the counsel of caution and the rule of prudence enjoin that it is unsafe to rest a conviction on the evidence of guilty partner in a crime without independent corroboration on the material

1. Data Ram *v.* State of Rajasthan, 1977 Cr. L.J. 1428 at pp. 1433-1434.
2. Bholanath Yadav *alias* Bholanath Palwar *v.* State of West Bengal, 1988 C.Cr.L.J. 155 at p. 162.

particulars. Judicial experience was, thus elevated to a rule of law. "It is a practice" it is said "which deserves all the reverence of law".[1]

While looking for corroboration, the Court must first look at the broad specturm of the approver's version and then find out whether there is other evidence to lend assurance to that version. The nature and extent of the corroboration may depend upon the facts of each case. The corroboration need not be of any direct evidence that the accused committed the crime. The corrobroation even by circumstantial evidence may be sufficient. But such evidence as to corroboration must be independent and must not be vague or unreliable.[2]

The testimony of the approver requires to be viewed with great caution in as much as he is a self-confessed traitor and his earlier statements have been kept back by the prosecution which gives rise to the adverse inference that the earlier statements did not support the prosecution. Where a person turns an approver about 20 months after the occurrence, and implicates some one for the first time in his statements, no reliance can be placed on his evidence.[3]

In *Amar Nath* v. *Emperor*,[4] the Lahore High Court made following observations in respect of the evidence of approvers :

> ".....I may, at the risk of repetition, observe that the fact must be borne in mind throughout that an approver...has thrown to the wolves his erstwhile associates and friends in order to save his own skin. And...he is a criminal himself....that he can easily substitute an innocent man for the person who was actually participating with him in a particular crime. The danger must be guarded against and...his evidence must be corroborated in important and material particulars.[5]

28. The evidence of an approver has more sanctity than a mere confession under Sec. 164, Cr. P.C.—Section 114 (*b*) of the Indian Evidence Act, 1872, says that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Section 133 of the Indian Evidence Act, 1872 says that an accomplice shall be competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroboated testimony of an accomplice. Even so, Courts have always been insisting on corroboration of evidence of an accomplice in material particulars. As to what are the material particulars on whcih the Court should look for corroboration is a question which has to be decided on the facts and circumstances of each case. Before adverting to a recent judgment of the Supreme Court we would like to refer to Sec. 30 of the Evidence Act relating to the consideration of a proved confession, affecting the person making it and others jointly under trial for the same offence. The evidence of an approver has more sanctity than a mere confession under Sec. 164, Cr. P.C. because the approver deposed in open Court and he is subjected to cross-examination by the other accused.[6]

29. The approver's evidence must pass the double test of reliability and corroboration.—It is well settled that the approver's evidence must pass the double test of reliability and corroboration in material particulars. It is said that the approver is a most unworthy friend and he having bargained for his immunity

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1. Balwant Kaur *v.* Union Territory of Chandigarh, 1988 All. Cr.C. 3 at p. 5 (S.C.).
2. Ranjeet Singh *v.* State of Rajasthan, 1988 East Cr. C. 317 at pp. 319, 320 (S.C.).
3. Lalchand *v.* State of Haryana, 1984 S.C. 226 at pp. 229, 230.
4. A.I.R. 1931 Lah. 406 : 1931 Cr. Cas. 646.
5. *See* also Indar Datt *v.* Emperor, A.I.R. 1931 Lah. 408 at p. 410.
6. *In re* : Deivendran, 1996 Cr. L.J. 2209 at p. 2219 (Mad.).

must prove his worthiness for credibility in Court. Firstly we will have to scrutnize the evidence of Gurjant Singh (P.W. 3), approver carefully to find out as to whether his evidence can be accepted as trust worthy. Secondly, once that hurdle is crossed the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilty beyond reasonable doubt. Ordinarily, combined effect of Sections 133 and 114 of the Evidence Act is that conviction can be based on uncorroborated testimony of as an approver but as a rule of prudence it is unsafe to place reliance on the uncorroborated testimony of an approver. Section 114 illustration (*b*) incorporates a rule of caution to which the Courts should have regard.[1]

30. Approver should have been examined at first.—In *Thangbul* v. *Government of Manipur*,[2] approver was examined after all the witnesses.

Held that the approver should have been examined at first.

31. Retracted confession and evidence of accomplice.—In the case of the person confessing who has resiled from his statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition the Court must feel that the reasons given for the retraction in the case of a confession are untrue.[3]

Govinda Menon, J., in *Subramania Gounden* v. *State of Madras*,[4] placed a confesssion on a slightly higher level than accomplice evidence. The confession there considered was intended to be used against the maker and not against a co-accused. The observations of Govinda Menon, J., therefore, must not be applied to those cases where the confession is to be used against a co-accused. As pointed out by the Supreme Court in *Nathu* v. *State of Uttar Pradesh*,[5] confessions of co-accused are not evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending some assurance to the verdict.

Verdict of the Supreme Court.

A retracted confession is a weak link against the maker and more so against a co-accused.

32. Retracted confession of accused.—The retracted confession of an accused may be sufficient corroboration of the approver's statement as against himself. But little or no reliance can be placed upon such a retracted confession so far the co-accused is concerned.[6] As it has been held in a judgment of the Supreme Court in *Kashmira Singh* v. *State of Madhya Pradesh*,[7] a retracted confession does not come within the definition of evidence and their Lordships approved of the observations of Reilly, J., in *Periyaswami Moopan* v. *Emperor*.[8]

Supreme Court's view.

A retracted confession of the co-accused is tainted evidence and is not as such accepted as sufficient corroboration.[9]

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1. Niranjan Singh *v.* State of Punjab, 1996 (2) Crimes 251 at p. 256 (S.C.) : 1996 S.C.C. (Cr.) 939 ; *see* also Suresh Chandra Bahri *v.* State of Bihar, 1995 Supp. (1) S.C.C. 80 relied on.
2. A.I.R. 1968 Manipur 34 at p . 38.
3. Subramania Gounden *v.* State of Madras, A.I.R. 1958 S.C. 66 at pp. 71-72 : 1958 S.C.J. 321 : 1958 S.C.R. 428 : 1958 A.W.R. Sup. 78 : (1958) 1 M.L.J. (S.C.) 130 : 1958 M.W.N. 66 : 1958 Mys. L.J. 376.
4. 1958 S.C.R. 428 : A.I.R. 1958 S.C. 66.
5. A.I.R. 1956 S.C. 56.
6. Paillia *v.* Emperor, 12 P.W.R. (Cr.) 1919 ; Baboo Singh *v.* Emperor, A.I.R. 1936 Oudh 156.
7. A.I.R. 1952 S.C. 159.
8. A.I.R. 1931 Mad. 177 at p. 178 ; *See* also Rattan Lal *v.* State, A.I.R. 1955 Punj. 110 at pp. 111-12 : 55 Punj. L.R. 488.
9. Dhanpati De *v.* Emperor, A.I.R. 1946 Cal. 156 at p. 159 : I.L.R. (1942) 2 Cal. 312.

Case-law.

It has been laid down in *Yasin* v. *Emperor*[1] and *Emperor* v. *Lalit Mohan Chuckerbutty*,[2] that a retracted confession should carry practically no weight as against the person other than the maker, and the very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath.[3]

33. Dying declaration and evidence of an accomplice.—An accomplice is unworthy of credit unless his evidence is corroboated in material particulars and this has now been accepted as a rule of law.

The same cannot be said of a dying declaration. Generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver.[4]

34. Traps.—Demand by the accused for the bribe is an essential ingredient of the offence and that has an important part to pay in ascertaining whether the trap laid is legitimate or illegitimate.

> "...Thus where the bribe has already been demanded from a man, and the man goes out offering to bring the money, but goes to the police and the Magistrate and brings them to witness the payment, it will be a 'legitimate trap'.....But where a man has not demanded a bribe and only suspected to be in the habit of taking bribes, and he is tempted with a bribe, just to see whether he would accept it or not and to trap him, if he accepts it, it will be an illegitimate trap...."[5]

Verdict of the Supreme Court.

In the matter of laying traps the Supreme Court in *Ramjanam Singh* v. *State of Bihar*,[6] has made the following observations :

> "However regrettable the necessity of employing agents provocateurs may be, it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime....and quite another to egg him on to do that which it has been finally and firmly decided shall not be done..."

When the trap laid has to be characterised as "illegitimate trap" all the actors in the drama must be dubbed accomplices. Unless their evidence is corroborated in material particulars, it will be unworthy of acceptance and could hardly be made the sole basis for a conviction.[7]

35. Trap witness.—A man has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law.[8] This kind of trap really amounts ot the creation of an artificial crime, and the abetment of that crime, either by the police authorities or their tools. Where such a metohd is employed, practically this alone might make the conviction illegal.[9]

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1. I.L.R. 28 Cal. 689 : 4 C.W.N. 670.
2. I.L.R. 38 Cal. 559 : 15 C.W.N. 593 : 10 I.C. 582 : 12 Cr. L.J. 296.
3. Moyez Sardar *v.* Emperor, A.I.R. 1925 Cal. 406 at p. 407 : 40 C.L.J. 551 : 84 I.C. 712.
4. Khushal Rao *v.* State of Bombay, A.I.R. 1958 S.C. 22 at p. 28 : (1959) 1 S.C.A. 281 : 1958 S.C.J. 198 : 1958 S.C.R. 552 : 1958 A.L.J. 91 : 1958 A.W.R. 38 : 1958 A.L.J. 175 : 1958 M.W.N. (S.C.) 1 : 1958 Mys. L.J. 428.
5. *Vide the Law relating to Bribery and Corruption* by Soonavala, 1964 Ed., p. 229.
6. A.I.R. 1956 S.C. 643.
7. Cherian Lukose *v.* State of Kerala, A.I.R. 1968 Ker. 60 at p. 62 : 1967 Ker. L.T. 968.
8. Ramjanam Singh *v.* Bihar State, A.I.R. 1956 S.C. 643.
9. *In re* R.G. Jacob, A.I.R. 1961 Mad. 482 at p. 484.

It was held in the case of *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*,[1] that witnesses not willing party to giving of bribe to accused but only actuated with the motive of trapping the accused are partisan witnesses and as such their evidence cannot be relied upon without independent corroboration.

Whether a trap-witness is not an approver.

Subsequently, in the case of *Major Barsay* v. *State of Bombay*,[2] the Supreme Court emphasized that a trap-witness could at least be equated with a partisan witness and it would not be admissible to rely upon his evidence without corroboration.[3]

A trap-witness is not an accomplice. But at the same time Court will closely scrutinise his testimony.

Prudence requires that the Court should demand and the prosecution should adduce some corroborative evidence.

The evidence which merely raises a suspicion that acused is the guilty party is not sufficiently corroborative of the testimony of a trap-witness to warrant a conviction nor will uncertain nor equivocal corroboration suffice.[4]

Kinds of traps.

There are two kinds of traps—"a legitimate trap", where the offence has already been born and is in its course, and "an illegitmate trap", where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not. In the case of a legitimate trap, the officers taking part in the trap, like Magistrate and the witnesses to the trap, like (assistant Parcel Clerk) would in no sense be "accomplices" and their evidence will not require, under the law, to be corroborated as a condition precedent for conviction though the usual rule of prudence will require the evidence to be scrutinized carefully and accepted as true before a conviction can be had.[5]

A distincition has to be made in various kinds of traps of payments of bribe. There may be a case in which a bribe is going to be paid in the normal course of business and on information being received by the police a trap is arranged for watching this normal course of transaction. No legitimate objection for laying such a trap can be made but there may be another case in which it is not the intention of a bribe-giver to pay any bribe and it is only the police which wants that a bribe should be paid in order that an offence may be staged and detected.

It is this kind of trap which has been disapproved in the pronouncements of the various High Courts as also by the Supreme Court.[6]

There are many gradations of accomplicehood, and need far more or less corrboration. There is the giver, who goes half-way with the intention of paying, but for some reasons beyond his control thinks it wise or safe to report to the authorities and becomes a witness. Another who changes his mind without external pressure, is still technically an accomplice, but not as unreliable as the two other types. Then there is the decoy or the spy. The professional spy or decoy, doing this for pecuniary or other advantages, though not an accomplice, is suspect all the same and requries corroboation. If on the other hand, the decoy is not acting for gain, but being himself the victim of the demand helps the authorities

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1. A.I.R. 1954 S.C. 322.
2. A.I.R. 1961 S.C. 1762.
3. Ganadhesh *v.* Khandeparkar *v.* State, A.I.R. 1968 Goa 63 at p. 64.
4. Public Prosecutor *v.* A. Thomas, A.I.R. 1959 Mad. 166 at pp. 174-75 : 1958 M.W.N. 561.
5. *In re* M.S. Mohiuddin, A.I.R. 1952 Mad. 561 at p. 562 : (1952) 2 M.L.J. 11 : 1952 M.W.N. 220.
6. State *v.* Har Prasad Sharma, A.I.R. 1958 All. 334 at p. 335 : 1957 A.W.R. 874 : 1957 A.L.J. 934.

spontaneously from a sense of citizen's duty, he is a reliable and respectable witness. Out of the rulings on this topic one need refer here only to the following, besides *Huntley's* case,[1] *Emperor* v. *Chaturbhuj Sahu*,[2] *King-Emperor* v. *Malhar*,[3] *Ramaswami* v. *Emperor*,[4] *Govinda* v. *Emperor*,[5] *Bhuneshwari Prasad* v. *Emperor*[6] and *Amir Chand* v. *Sant Das*.[7]

In case of *Emperor* v. *Gokuldas Morarka*,[8] it was held in that case that a police officer who lays a trap and who receives a gratification in order to bring to book the person who had offered him the gratification, cannot be said to be an accomplice. In his judgment, the learned Chief Justice cited with approval the observations made by Maule, J., in *Reg.* v. *Mullins*.[9]

R, was forced to agree to give a bribe, because otherwise he thought that his sale-deed would not be registered. *Held* that such a person could not be treated as an accomplice.[10]

Supreme Court on accomplice in a bribery case.

As observed by their Lordships of the Supreme Court, a person who is not a willing party to giving of bribe and who is only actuated by the motive of trapping another cannot be regarded as an accomplice, but the evidence of such a witness is that of partisan witness. Their Lordships did not lay down the principle that his evidence requires to be corrobrated by independent evidence. A partisan witness merely means a person who is interested in the prosecution. If

Interested witnesses.

after scrutinizing the evidence of an interested witness, the Court finds it safe to accept such evidence, the independent corroboration is not necessary. It may be found in some cases to be unsatisfactory in some respects. In such cases, independent corroboration would be necessary before the prosecution case can be accepted. This is the principle laid down by their Lordships of the Supreme Court in *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*.[11] Their Lordships referred to independent corroboration because the evidence of the witnesses was unsatisfactory. Their Lordships did not say that even if the evidence of such witnesses is satisfactory and credible, independent corrobration is necessary.[12]

Who is an accomplice ?

In the well-known case in *R.* v. *Mullins*,[13] it was held that an accomplice acknowledges himself to be a criminal, in the case of spies they do not acknowledge anything of the kind. In *R.* v. *Dowling*,[14] Erle, J., held that if a witness merely lent himself to a scheme for the purpose of convicting the guilty, he was not an accomplice. In *Rex* v. *Despard*,[15] Lord Ellenborough in summing up to the jury said :

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1. A.I.R. 1944 F.C. 66 : 45 Cr. L.J. 755.
2. I.L.R. 38 Cal. 96 : 3 I.C. 119.
3. I.L.R. 26 Bom. 193 : 3 Bom. L.R. 694.
4. I.L.R. 27 Mad. 271 : 14 M.L.J. 226.
5. A.I.R. 1936 Nag. 245 : 38 Cr. L.J. 423.
6. A.I.R. 1931 Oudh 172 : 32 Cr. L.J. 860.
7. A.I.R. 1928 Lah. 647 : 22 I.C. 83 ; State of Vindhya Pradesh *v.* Shiv Bahadur Singh, A.I.R. 1951 V.P. 17 at pp. 22-23.
8. Cr. App. No. 454 of 1949, dated 11th January, 1950 (Bom.).
9. (1918) 3 Cox. C.C. 526 at p. 531 ; *see* also Mahadeo Daunappa Gunaki *v.* State, A.I.R. 1952 Bom. 435 at pp. 437-38 : 54 Bom. L.R. 153 : I.L.P. (1952) Bom. 900.
10. Ambalal Motibhai Patel *v.* State, A.I.R. 1961 Guj. 1 at p. 3.
11. A.I.R. 1954 S.C. 322 : 1954 S.C.A. 1316: 1954 S.C.J. 362 : 1954 S.C.R. 1098.
12. Ambalal Motibhai Patel *v.* State, A.I.R. 1961 Guj. 1 at p. 3.
13. (1848) 3 Cox. C.C. 526.
14. (1948) 3 Cox. C.C. 509.
15. (1803) 28 H. St. Tr. 346 at p. 489.

"But there is another class of persons which cannot properly be considered...as partaking of the criminal contamination of an accomplice, I mean persons entering into communication with the conspirators with an original purpose of discovering their secret designs and disclosing them for the benefit of the public..."

Trap-witnesses ; rule requiring corroboration.

The rule of prudence requiring corroboration for the testimony of a trap-witness has always been recognised. In *Huntley* v. *Emperor*,[1] such a witness was regarded as an accomplice.

In *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*,[2] the trap-witnesses were held to be partisan witnesses for whose testimony independent corroboration is required. The position was exhaustively discussed by Ramaswamy, J., in *Ambujammal* v. *State*,[3] the learned Judge pointed out that an accomplice, according to the accepted meaning is a guilty associate or partner in a crime and that spies, detectives and decoys who set a trap do not generally belong to the category of accomplices because they do not share the *mens rea*.

In *Breham* v. *Peak*,[4] while dealing with a case under the Betting Act Lord Goddard, C.J., remarked :

English law.

"The Court observes with concern and disapproval, the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence...It is not right that police authorities should instruct, allow or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person has committed an offence. It would have been just as much an offence for the police constable in the present case to make the bet in the public house as it would have been for the book-maker to take the bet if in doing so he had committed an offence...."

The decisions in the case was not based on the view that such evidence cannot be acted upon.

The decisions of a single Judge abstract of which is given in *In re Chandarsekhar Iyer*,[5] merely states that where officials laid a trap and incited bribery, their evidence requires corroboration in material particulars to establish the crime of bribe-taking. In *In re Jesudas Appadurai Pillai*,[6] testimony of the person giving the bribe is subjected to the test of corroboration. *Pandita Gangaram* v. *The Crown*[7] and *Province of Orissa* v. *Venkata Rangamma*,[8] lay down the need of corroboration. In none of the cases was the evidence excluded as being that of decoys or spies and the judgment in the last case quotes with approval the observations of Lord Alverstone in *King* v. *Mortimer*.[9]

In Halsbury's *Laws of England*, Vol. 9, p. 222, there is the statement—

English law.

"A police spy, for example, a woman who visits a suspected abortionist and pretends that she wishes him to procure her abortion is not an accomplice."

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1. A.I.R. 1944 P.C. 66 : 1944 M.W.N. 430.
2. A.I.R. 1954 S.C. 322 : 1954 S.C.A. 1316 : 1954 S.C.J. 362 : 1954 S.C.R. 1098.
3. A.I.R. 1954 Mad. 326 : 1953 M.W.N. 424.
4. (1947) 2 K.B. 372.
5. (1951) 1 M.L.J. (Notes) 45.
6. 1945 M.W.N. 114.
7. A.I.R. 1950 Nag. 1.
8. 1950 D.L.R. (Cut.) 26.
9. (1911) 1 K.B. 70.

Detectives.

In Vol. XVI, *Carpus Juris*, page 673, it is stated that "A detective who is engaged in attempts to discover violations of the law is not an accomplice of one charged with such a violation".

The question as to what is the test a person being an accomplice is considered in *Emperor* v. *Chaturbhuj Sahu*,[1] in detail.

Legitimate and illegitimate trap—Distinguished.

In some of the cases distinction has been drawn between two kinds of "traps", legitimate and illegitimate as *In re M.S. Mohiddin*[2] and in some other cases a distinction has been made between tainted evidence of an accomplice and interested testimony of a partisan witness and it has been said that the degree of corroboration necessary is higher in respect of tainted evidence than for partisan evidence.[3] Their Lordships think that such distinctions are somewhat artificial, and no rigid formula can or should be laid down.[4]

Evidence of witnesses of a raiding party.

If any of the witnesses of the raiding party are accomplices their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested. If a Magistrate puts himself in the position of partisan or interested witness, he cannot claim any higher status and must be treated as any other interested witness.[5]

Evidence of a *panch* witness.

Whether a *panch* acted as a *panch* witness after the raid is over or during the course of the raid, he cannot be treated as a partisan witness unless the idea to make a raid originated from him. It is not reasonable to stigmatise *panches* as not independent but interested witnesses.[6] As observed by the learned Judge of the Bombay High Court in *Ramchand Tolaram Khatri* v. *State*[7]:

Bombay High Court's view.

"*Panches* whom the police take with themselves before going for a raid cannot be called members of a raiding party. The *panches* have nothing to do with the raid or the operations of the raid. They are not participators in the act of raiding....They are taken merely to see and hear what takes place during the raid which is carried out by the police with the help of the informant.

In another case, *Jairamdas* v. *State*,[8] it was observed thus :

"....Whether or not a *panch* witness in a criminal case is a partisan witness would always depend upon the circumstances of each case..."

The observations of Beaumont, C.J., in *Papa Kamal Khan* v. *Emperor*,[9] are as follows :

"In cases where the payment of the bribe has not been voluntary, very slight corroboration would be sufficient to make the evidence of accomplice

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1. I.L.R. 38 Cal. 96 at p. 105.
2. 1952 Cr. L.J. 1245 : A.I.R. 1952 Mad. 561.
3. *See* Ramachand Tolaram Khatri *v.* State, 1956 Bom. L.R. 90 : I.L.R. (1956) Bom. 343 : A.I.R. 1956 Bom. 287.
4. State of Bihar *v.* Bagawan Singh, A.I.R. 1958 S.C. 500 at p. 506 : 1958 S.C.J. 856 : 1958 S.C.R. 195 : 1958 A.L.J. 608 : 1958 A.W.R. 609 : 1958 Mys. L.J. 713.
5. State of Bihar *v.* Bagawan Singh, *supra*.
6. Ambalal Motibhai Patel *v.* State, A.I.R. 1961 Guj. 1 at p. 3.
7. A.I.R. 1956 Bom. 287 at p. 294 : I.L.R. (1956) Bom. 343 at p. 348 : 1956 Bom. L.R. 90.
8. A.I.R. 1956 Bom. 426.
9. A.I.R. 1935 Bom. 230 at p. 232 : 37 Bom. L.R. 366 : 156 I.C. 615 : 59 Bom. 486.

admissible against the receiver of the bribe....The objections which usually arise to the evidence of an accomplice do not really apply where...the person who pays the bribe, is not a willing participant in the offence, but is really a victim of that offence."

In *Shiv Bahadur Singh's* case,[1] the Supreme Court took into consideration the reaction and confusion on the part of the appellant in that case, at the time when he was called upon by the police to explain his possession of the bribe money. In the case of *State of Madras* v. *Vaidyanath,*[2] also the Supreme Court took into consideration the evidence to the effect that when the accused was caught, he was seen to be trembiing. Hence an Executive Magistrate can be employed as a trap-witness.[3]

"The evidence of agents provocateur, police spies and informers may or may not require corroboration depending on facts of each case.. The credibility of the witness and the weight of his evidence may also be affected by other circumstances in the case."

Taylor on *Evidence* (10th Ed.) (1906), Vol. I, p. 691, Sec. 971, has the following to say :

Conspiracy; accomplice rule regarding corroborative evidence.

"To one class of persons, apparently accomplices, the rule requiring corroborative evidence does not apply; namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities under whose direction they continue to act till the matter can be so far matured as to insure their conviction."[4]

The Indian law is the same and it has been summarised in two decisions, *Ambujam Ammal* v. *State*[5] and *Sundaravadivelu Chetty* v. *State.*[6]

The Supreme Court decisions bearing on this subject are *Ramkrishanan and Gianchand* v. *State of Delhi*[7] and *Ram Janam* v. *State of Bihar.*[8]

The authorities indicate that if a man makes himself an agent for the prosecution before associating with the wrong-doer or before the offence is committed or if with a view to protect his own interest or that of others pretends to associate with such persons with the object of preventing the commission of an offence by giving timely information to the authorities, he is not an accomplice.

But however good the motive may be, if such a person or a spy or an informer in the exuberance of his enthusiasm actually instigates another to commit a crime even if it be for detection of offence or to get the credit of having him arrested, he is an abettor under the penal law and his position cannot be anything other than that of an acomplice.[9]

Motive of spy or an informer.

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1. A.I.R. 1954 S.C. 322 : 1954 S.C.A. 1316 : 1954 S.C.J. 362 : 1954 S.C.R. 1098 : 1954 Cr. L.J. 910.
2. 1958 S.C.J. 335 : 1958 S.C.R. 580 : 1958 A.W.R. 371 : 1958 Mys. L.J. 163 : 1958 M.W.N. (S.C.) 34 : A.I.R. 1958 S.C. 61 : 1958 Cr. L.J. 232.
3. M.M. Gandhi *v.* State of Mysore, A.I.R. 1960 Mys. 111 at p. 129 : 1960 Mys. L.J. 265 : 61 Cr. L.J. 934.
4. R. *v.* Despard, 28 How. St. Tr. 346 ; R. *v.* Mullins, (1848) 3 Cox. C.C. 526 ; R. *v.* Dewling, (1848) 3 Cox. C.C. 509 ; R. *v.* Bickley, (1909) 2 Cr. App. 53 ; Henser's case (1910) 6 Cr. App. 76 ; R. *v.* Mortimer, (1911) 1 K.B. 70.
5. A.I.R. 1954 Mad. 326 : 1953 M.W.N. (Cr.) 156.
6. 1955 M.W.N. (Cr.) 14.
7. Cr. Appeals No. 43 and 44 of 1954, dated 9th March, 1956 : 1956 S.C.A. 577 : 1956 S.C.J. 432 : 1956 S.C.R. 182 : 1956 Andh. L.T. 512 : A.I.R. 1956 S.C. 476.
8. A.I.R. 1956 S.C. 643.
9. Breham *v.* Peak, (1947) 2 All. E.R. 572.

This distinction between legitmate and illegitimate trap is brought out in : (*a*) the decisions of the Supreme Court in *Ram Janam* v. *State of Bihar*,[1] and (*b*) the American cases in the following extract from any decision in *Sundarawadivelu Chetty* v. *State*.[2]

Distinction between legitimate and illegitimate trap.

(*a*) Their Lordships of the Supreme Court held :

"*Held*, that this was not a case of laying a trap in the usual way, for a man who was demanding a bribe but of deliberately tempting a man to his own undoing after his suggestion about breaking the law had been finally and conclusively rejected with considerable emphasis and decision."

(*b*) The evidence of a trap-witness which normally cannot be treated as the evidence of an accomplice becomes so when the trap-witness is actually the instigator of the offence and this is well brought out in the following American decisions. The fact that an obscene paper was sent in response to a decoy letter is no defence to an indictment for mailing such publication.[3]

It is no defence sending a letter giving notice where obscene pictures may be obtained in violation of U.S. Rev. State, Sec. 3893, U.S.C., title 18-s 317, that the letter was an answer to an enquiry under an assumed name from a detective or government official.[4] The fact that a letter was a decoy is no defence to an indictment of a railway postal clerk for embezzling and stealing it when it contained money.[5]

Entrapment is the conception and planning of an offence by an officer, and is procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer. Separate opinion of Riberts, Brandies, Stone, JJ., in *Sorrells* v. *United States*. [6] It is not the duty of a government official to incite to and create crime for the purpose of prosecuting and punishing it.[7]

Entrapment.

15 *American Jurisprudence* (Am. Jr.), p. 25, Sec. 336, lucidly summarises the legal position of entrapment to commit crime as follows :

Legal position of entrapment.

"As a general rule, if the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of the offence charged in order to prosecute him therefor, no conviction may be had, though the criminality of the act is not affected by any question of consent."[8]

On the question how far the trap-witness is an accomplice and secondly whether the evidence that accomplice requires corroboration and to what extent the observations of Ramaswami, J., in *Ambujam Ammal, In re*,[9] are worthy of perusal :

"Accomplice" defined.

"....An accomplice is a person who has concurred in the commission of an offence.[10] When the witness sustains such a relation to the criminal act that he

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1. A.I.R. 1956 S.C. 643.
2. 1955 M.W.N. (Cr.) 14.
3. Rosen *v.* United States, (189) Law Ed. 606 ; Andrews *v.* United States, (1896) 40 Law Ed. 1023 ; Price *v.* United States, (1896) 41 Law Ed. 727.
4. Grimm *v.* United States, (1895) 39 Law Ed. 550.
5. Montgomery *v.* United States, (1896) 40 Law Ed. 1020.
6. (1932) 77 Law Ed. 413.
7. Butts *v.* United States, (1921) 278 Fed. 35 : 18 A.L.R. 143.
8. Cited *In re* M. Rangorajulu Naidu, A.I.R. 1958 Mad. 368 at pp. 372-75 : 1958 M.W.N. 54.
9. A.I.R. 1954 Mad. 326 at pp. 329, 334.
10. *Per* Maule, J., in R. *v.* Mullins, (1848) 3 Cox. C.C. 526 : 12 J.P. 776.

could be jointly indicted with the accused he is an accomplice.[1] This definition is based upon *U.S.* v. *Neverson*[2] and *White* v. *Com.*[3]

"The Patna case of *Kailash Missir* v. *Emperor*,[4] the Oudh case of *Jagannath* v. *Emperor*[5] and the Sind case of *Chetumal* v. *Emperor*,[6] have adopted this definition of accomplice. The word "accomplice" means a person who in some way or other is connected with the offence in question, or who makes admissions of facts showing that he had a conscious hand in the offence.[7]

"The word 'accomplice' has been held also as so wide enough as to include persons who are known to English law as accessories after the fact.[8]....There is one class of witnesses who go by the various names of informants, spies, detectives, decoys, 'agents provocateurs' and trap-witnesses who by general consensus of decision now do not fall under the category of accomplices.

"This position has been arrived at in a long series of decisions...the leading cases are those of the Privy Council, *Bhuboni Sahu* v. *King*[9] and *Mahadeo* v. *King*[10] and the Madras cases of *Ramaswami Gounden* v. *Emperor*,[11] *In re S.A. Sattar Khan*,[12] *In re Addanki Venkadu*,[13] *Venkatiah* v. *Emperor*,[14] *In re M.K. Thiagaraja Bhagavathar*,[15] *Vayasa Rao* v. *King*,[16] *Muthukumaraswami* v. *Emperor*,[17] *Emperor* v. *Nilakanta*,[18] *In re B.K. Rajagopal*,[19] *A.J.E.G. Caspersz* v. *King*,[20] the Calcutta case of *Hafizuddi* v. *Emperor*[21] *Narain Chandra* v. *Emperor*,[22] *Narul Amin* v. *Emperor*,[23] *Alimuddin* v. *Queen Empress*,[24] and *Dhanpati De* v. *Emperor*,[25] and the Bombay case of *Papa Kamal Khan* v. *Emperor*,[26] and the Nagpur case of *Ghudo* v. *Emperor*[27] and the Oudh case of *Jagannath* v. *Emperor*,[28] and the Lahore case of *Ismail* v. *Emperor*,[29] and the Patna case of *Kailash Missir* v. *Emperor*.[30]

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1. *Per* Subramania Ayyar, J., in Ramasami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 : 14 M.L.J. 226.
2. 14 Century Dig. Col. 1279.
3. 14 Century Dig. Col. 1280.
4. A.I.R. 1931 Pat. 105 : 32 Cr. L.J. 383.
5. A.I.R. 1942 Oudh 221 : 43 Cr. L.J. 416.
6. A.I.R. 1934 Sind. 185 : 36 Cr. L.J. 608.
7. Jagannath *v.* Emperor, A.I.R. 1942 Oudh 221 : 43 Cr. L.J. 416 ; Emperor *v.* Burn, 11 Bom. L.R. 1153 : 10 Cr. L.J. 530.
8. Ismail *v.* Emperor, A.I.R. 1947 Lah. 220 : 48 Cr. L.J. 708.
9. A.I.R. 1949 P.C. 257 : (1949) 2 M.L.J. 194 : 50 Cr. L.J. 872.
10. A.I.R. 1936 P.C. 242 : 37 Cr. L.J. 914.
11. I.L.R. 27 Mad. 271 : 14 M.L.J. 226.
12. A.I.R. 1939 Mad. 283 : 1938 M.W.N. 962 : 40 Cr. L.J. 483.
13. A.I.R. 1939 Mad. 266 : 40 Cr. L.J. 606.
14. 1937 Mad. Cr. C. 27.
15. A.I.R. 1946 Mad. 271 : (1946) 1 M.L.J. 42 : 47 Cr. L.J. 785.
16. 21 M.L.J. 283 : 12 Cr. L.J. 150.
17. I.L.R. 35 Mad. 397 : 13 Cr. L.J. 352.
18. 22 M.L.J. 490 : 13 Cr. L.J. 305.
19. A.I.R. 1944 Mad. 117 (F.B.) : (1943) 2 M.L.J. 634 : 45 L.J. 373 (F.B.).
20. A.I.R. 1949 P.C. 22 : 1949 M.W.N. 316 : 50 Cr. L.J. 25 (P.C.).
21. A.I.R. 1934 Cal. 678 : 35 Cr. L.J. 1357 (S.B.).
22. A.I.R. 1936 Cal. 101 : 37 Cr. L.J. 445.
23. A.I.R. 1939 Cal. 335 : 40 Cr. L.J. 667.
24. I.L.R. 23 Cal. 361.
25. A.I.R. 1946 Cal. 156 : 47 Cr. L.J. 695.
26. A.I.R. 1935 Bom. 230 : 36 Cr. L.J. 968.
27. A.I.R. 1945 Nag. 143 : 47 Cr. L.J. 196.
28. A.I.R. 1942 Oudh 221 : 43 Cr. L.J. 416 : I.L.R. 17 Luck. 516.
29. A.I.R. 1947 Lah. 220 : 48 Cr. L.J. 708.
30. A.I.R. 1931 Pat. 105 : 32 Cr. L.J. 383.

"The propositions which are deducible from these Indian cases are as pointed out by Mr. Y.H. Rao in his *The Law of Accomplices and Approvers* (1951) as follows : ....An accessory after the fact, pure and simple, who is not in any way concerned in the original offence cannot be classified as an accomplice under the Indian law, whatever be the position under the English law.

"There can be valid exceptions to the rule however as in the case of a subsequent possessor of a stolen property....The rule that an accomplice must sustain such a relation to the criminal act that he could be jointly indicted with the accused is subject to various modifications.

"It is not necessary that the accomplice...if he is tried for it, he could be convicted of if out of his own mouth. It is sufficient if he lays himself open to grave suspicion that he had a conscious hand in the offence or was at least a consenting party to it,...

"Nor is it necessary that the accomplice should be capable by law of committing the offence, and, if so capable, should be punishable at law for his or her complicity...

"There may be valid exceptions to the part of the rule requiring in effect a finding of suspect complicity before a witness could be treated as an accomplice such as in a case of rape. Paradoxical though it may sound, there may be an accomplice to an act which may ultimately be found to be no offence at law.

Exceptions.

"There may also be valid exceptions to the part to the rule requiring in effect the accomplice to be indictable jointly with the accused for the crime with which the latter is charged, such as in a case of theft or receipt of stolen property with knowledge,....

"Then where participation of an individual in a crime is not voluntary but is the result of pressure and the element of *mens rea* is entirely absent, he cannot be classified as an accomplice...

"....there is no justification to record a conviction on the uncorroborated testimony of an accomplice in the absence of special or exceptional facts of the nature of the two further illustrations to Illus. (*b*) of Sec. 114, Indian Evidence Act. The extent of the corroboration should be as laid down in *R.* v. *Baskerville*,[1] the Judge should scrutinize these evidences with great care...

"The well-settled law is that the evidence of spy, detective, decoy or 'agent provocateur' who sets a trap cannot be clubbed as that of an accomplice requiring corroboration. The position has not been arrived at without judicial protest now and then. The earliest decision is *Queen-Empress* v. *Javesharam*.[2].....

"This decisions was considered and sharply differed from in *Emperor* v. *Chaturbhuj Sahu*.[3] In that case...*B* in his evidence deposed to the purchase of cocaine from the accused under instructions from the Excise Deputy Collector. The accused was convicted upon the uncorroborated testimony of *B*. *Held* that *B* was not an accomplice and the conviction was good.

"The learned Judges, Holmwood and Doss, JJ., reviewed the following English decisions. In *Rex* v. *Despard*,[4] where an American Lord Ellenborough said :

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1. (1916) 2 K.B. 658 : 86 L.J.K.B. 28.
2. I.L.R. 19 Bom. 363.
3. I.L.R. 38 Cal. 96 : 11 Cr. L.J. 560.
4. (1803) 28 How. State Trials 346 at p. 489.

"But there is another class of persons which cannot properly be considered as accomplice; I mean persons entering into communication with the conspirators with an original purpose of discovering their secret designs and disclosing them for the benefit of the public.

"In *Reg.* v. *Dowling*,[1] in which the Central Criminal Court held that a person who enters into a conspiracy for the sole purpose of detecting and betraying it does not requie confirmation as an accomplice, although his evidence should be received by the jury with caution.

"In *R.* v. *Mullins*,[2] the Central Criminal Court held that a person employed by Government to mix with conspirators and pretend to aid their designs for the purpose of betraying them does not require corroboration as an accomplice....

"This case was followed by the Court of Criminal Appeal (Lord Alverstone, L.C.J., and Bigham and Walton, JJ.) in *Rex* v. *Vickley*,[3].....The Court held that—

'the fact that the woman was a police spy in no way invalidated her evidence, nor must her evidence be regarded as that of an accomplice'.

"And proceeded to affirm that—

'as the law stands at present, it seems established that a police spy does not need corroboration.'

"The rule laid down in *Rex.* v. *Despard*[4] had been followed in a long and uniform current of decisions in America where it has been held that one who as a spy or a detective associates with criminals solely for the purpose of discovering and making known their crimes, and who acts throughout with this purpose, and without any criminal intent, is not an accomplice, and it is immaterial that he encourages or aids in the commission of the crime.[5]

"In *In re Koganti, Appayya*,[6] it was held that—

'the motive of the person who instigates the commission of a crime is not the only determining factor to conclude whether the instigator is an accomplice or not.

'Even though such a person may not be regarded as an accomplice in the strict legal sense of the word, nevertheless the evidence of such person or persons should be viewed with caution....'

"The Nagpur cases of *Mohanlal Moolchand* v. *Emperor*,[7] and *Govinda Balaji* v. *Emperor*[8] are on the same lines as *Emperor* v. *Chaturbhuj Sahu*.[9] Similarly are the Oudh case of *Bhuneshwari Pershad* v. *Emperor*[10] and the Lahore case of

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1. (1848) 3 Cox. C.C. 509.
2. (1848) 3 Cox. C.C. 526 : 12 J.P. 776.
3. (1909) 2 Cr. App. Rep. 53 : 73 J.P. 239.
4. (1803) 28 How. State Trials 346 at p. 489.
5. *See* State *v.* McKean, 36 Iowa 343 : 14 Am. Rep. 530 ; State *v.* Brownlee, 84 Iowa 473 : 51 N.W. 25 ; Wright *v.* State, 7 Tex. Ct. App. 574 : 32 Am. Rep. 599 ; People *v.* Bolanger, 71 Col. 17 : 11 Pac. 799 ; People *v.* Farrel, 30 Col. 316 ; Commonwealth *v.* Downing, 4 Gray 29 ; Commonwealth *v.* Baker, 145 Mass 89 : 29 N.E. 512 ; State *v.* Baden, 37 Minn. 212 : 34 N.W. 24 ; People *v.* Noelker, 94 N.Y. 137 ; Campbell *v.* Commonwealth, 84 Penn. 187 ; O'Grady *v.* People, 42 Col. 312 : 95 Pac. 346 and Grimm *v.* United States, (1895) 156 U.S. 604 : 39 Law Ed. 550.
6. A.I.R. 1938 Mad. 893 : 40 Cr. L.J. 108.
7. A.I.R. 1947 Nag. 109 : 47 Cr. L.J. 873.
8. A.I.R. 1936 Nag. 245 : 38 Cr. L.J. 423.
9. I.L.R. 38 Cal. 96 : 11 Cr. L.J. 560.
10. A.I.R. 1931 Oudh 172 : 32 Cr. L.J. 860.

Mangat Rai v. *Emperor*.[1] Even in Madras Panchapakesa Ayyar, J., has struck the same note in *In re M.S. Mohiddin*,[2] wherein he has held that where traps are set not to initiate crimes,....the witnesses to the trap would in no sense be accomplices.

"The Mysore High Court has followed these decisions in *Basheeruddin Ahmed* v. *Government of Mysore*,[3] fully supporting this view-point of trap-witnesses not being accomplices.

"The Orrisa decision of *King* v. *S.N. Singh Rai*,[4] points out that the evidence of a spy does not stand in need of corroboration either as a principle of law or as a fundamental rule of practice.

"....as pointed out in *Harilal Gordhan* v. *Emperor*,[5] in a great many such cases the police agents are as a rule unreliable witnesses. Therefore, such evidence ought to be received with great caution and should be closely scrutnized. But...the evidence of such witnesses should not be disbelieved only because of their role but should be tested and should succeed or fail by reason of their own inherent strength or weakness.[6]

"In this connection owing to the increasing use of these decoy witnesses, owing to the multiplicity of special enactments, which are coming into force connected with controls and rationing, Magistrates and Judges are becoming more restive and tend to brush aside such evidence as *ipso facto* worthless. In fact in a recent decision—*Brannan* v. *Peak*,[7] Lord Goddard, C.J., made severe observations disapproving the practice of police officers themselves committing offences in order to obtain evidence of offences by other persons....

"So far as this country is concerned the employment of spies, 'agents provocateurs' and trap-witnesses is in accordance with the best traditions of Hindu and Muslim state craft. I have dealt elsewhere at length with this aspect of administration of justice in pre-British India.[8]

"The following is the extract from the early history of Bengal by F.J. Monahan, I.C.S. :

'For the prevention and detection of crime extensive use is made of spies, who in some cases act as "agents provocateurs".....These men should make inquiry as to the character of villagers and *adhyakasa* (i.e. private persons and officials of different departments)'"[9]

The appellant's general denunciation of investigating officers as a suspect species also ill-merits acceptance. The demanding degree of proof traditionally required in a criminal case and the devaluation suffered by a witness who is naturally involved in the fruits of his invesigative efforts suggest the legitimate search for corroboration from an independent or unfaltering source—human or circumstantial—to make judicial certitude doubly sure. Not that this approach casts any perjorative reflection on the police officer's integrity, but that the hazard of holding a man guilty on interested even if honest, evidence may impair confidence in the system of justice. The Court is aware of the exaggerated

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1. A.I.R. 1928 Lah. 647 : 29 Cr. L.J. 740.
2. A.I.R. 1952 Mad. 561 : 1952 Cr. L.J. 1245.
3. A.I.R. 1952 Mys. 42 : 1952 Cr. L.J. 919.
4. A.I.R. 1951 Orissa 297 : 52 Cr. L.J. 852.
5. A.I.R. 1937 Bom. 385 : 39 Bom. L.R. 613 : 58 Cr. L.J. 1047.
6. *In re* Ram Prasad, A.I.R. 1937 Nag. 251 : 38 Cr. L.J. 702.
7. (1948) 1 K.B. 68 : (1947) 2 All. E.R. 57.
8. *Magisterial and Police Guide*, Vol. 1.
9. *In re* Ambujam Ammal, A.I.R. 1954 Mad. 326 at pp. 329 to 349 : 1953 M.W.N. 424.

criticisms of the police force as a whole and of the reluctance of the framers of the Code of Criminal Procedure to trust statements recorded by police investigators but these are, partly at least, the hangover of the British Past. To-day, trust begets trust and the higher officer of the Indian Police, especially in the Special Police Establishment, deserve better credence.[1]

There is no rule of prudence which has crystallised into a rule of law, nor indeed any rule of prudence, which requires that the evidence of police officers who laid the trap should be treated on the same footing as evidence of accomplices and there should be insistence on corroboration. In the facts and circumstances of a particular case, a Court may be disinclined to act upon the evidence of such an officer without corroboration, but, equally, in the facts of circumstnaces of another case, the Court may unhesistatingly accept the evidence of such an officer. It is all a matter of appreciation of evidence and on such matters there can be no hard and fast rule, nor can there be any precedential guidance.[2]

36. District Magistrate not in the same position as police officer.—Merely because a District Magistrate has got certain powrs of control over the police, it cannot be said either that he is a police officer or is in the same position as a police officer.[3]

37. Magistrates not to be relegated to the position of partisan witnesses.—The Magistrates should not be relegated to the position of partisan witnesses and "required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever".[4]

The sharp castigation of traps as immoral, of trap witnesses as accomplices, of involving Magistrates in such dubious exercises as reprehensible, may have had some precedential support but time and circumstance, the complusions of public demand for arresting an insidious but expanding evil and a sense of judicial realism and appreciation of the specific facts of each case guide the pragmatic yet principled approach the Court has to make. It is not necessary that Executive Magistrates should always keep away from operations intended to catch the criminal red-handed. He is not so strongly motivated to get a suspect some how or other punished. He is professionally detached and has a public responsibility to help detect a bribe-taker if credible requests are made. Such a Magistrate is not a cloistered virtue unconcerned with social claims on his services. It is apathy of good citizens that induces police officers to go after the lesser bread of search witnesses in the enforcement of social welfare statutes. To condemn roundly every public official or man of the people as a *quasi* accomplice for participating in a raid is to harm the public cause. May be a judicial officer, unlike and Executive Magistrate, should hestiate to get involved in police trap experiments expose himself to charges of unveracity. However, there, is force in the censure made in *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh*,[5] when the police provide inducements and instruments to commit crimes and judicial personages willingly lend themselves to be enmeshed in such shady attempts, sullying the image of independence of the judiciary. But one cannot exaggerate these dicta into a total ban on public officers, even though Executive Magistrates, playing a socially

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1. Som Parkash *v.* State of Delhi, A.I.R. 1974 S.C. 989 at p. 992.
2. Hazari Lal *v.* State (Delhi Administration), A.I.R. 1980 S.C. 873 at p. 876.
3. M.M. Gandhi *v.* State of Mysore, A.I.R. 1960 Mys. 111 at p. 128 : 1960 Mys. L.J. 265.
4. State of Bihar *v.* Basawan Singh, A.I.R. 1958 S.C. 500 at p. 506 : 1958 S.C.J. 856 : 1958 S.C.R. 195 : 1958 A.L.J. 608 : 1958 A.W.R. 609 : 1958 Mys. L.J. 713 : (1958) 1 M.L.J. (S.C.) 136.
5. 1954 S.C.R. 1098 : A.I.R. 1954 S.C. 322 : 1954 Cr. L.J. 910.

useful role in checking public men's corruption when the situation needs it. This is best illustrated by the observations of Das, J. in *State of Bihar* v. *Baswan Singh*[1] where the learned Judge emphasised that a flexible, realistic approach is the sound course.[2]

38. Duty of police authorities.—It is the duty of the police authorities to prevent crimes being committed; but it is no part of their business to provide the instruments of the offence.[3]

39. Accomplices unworthy of credit.—The principle underlying the rule against the acceptance of an accomplice's evidence without corroboration proceeds upon certain reasons. Primarily an accomplice's evidence requires to be accepted with a great deal of caution and scrutiny, because he is likely to swear falsely in order to shift the guilt from himself. It is also supposed that an accomplice is a person of bad character and that his evidence is open to suspicion, and, thirdly, evidence given in expectation of any hope of pardon is sure to be based in favour of the prosecution. It is for these reasons, although the law declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, that the Court have held, that ordinarily speaking the evidence of an accomplice should be corroborated in material particulars. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Courts must look at all the surrounding circumstances in order to arrive at a conclusion whether the facts deposed to by an acomplice are borne out by those circumstances, or whether the circumstances should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice. That seems to be the general principle.[4]

As to the quantum of corroboration required in case of accomplice testimony.

40. Reasons for holding accomplice evidence untrustworthy.— In *Queen-Empress* v. *Magan Lal*,[5]—

"Accomplice evidence is held unstrustwrothy for three reasons..."[6]

The accomplices are dangerous for this reason : as they conspired to commit the crime, so they may have conspired to give false evidence.[7]

41. Is it open to Court to convict upon uncorroborated evidence of an accomplice?—As a matter of prudence, the evidence of an accomplice requires corroborations.[8] But as laid down in *Ram Sarup Charan Singh* v. *State*,[9] a conviction can be based on his testimony, provided the evidence is cogent and believable.[10] It has been pointed out in *Rattan Dhanuk* v. *Emperor*,[11] that there is no hard and fast rule that a conviction cannot be supported which proceeds on the uncorroborated testimony of an accomplice, and that a Court has to decide with reference to the facts of each case whether the presumption of unreliability arising from the suspicion which an accomplice's testimony invites has been retubtted. In

Conviction on uncorroborated testimony of accomplice.

1. 1959 S.C.R. 195 : A.I.R. 1958 Cr. L.J. 976.
2. Raghubir Singh *v.* State of Haryana, A.I.R. 1974 S.C. 1516 at p. 1520.
3. State of Bihar *v.* Basawan Singh A.I.R. 1958 S.C. 500 at p. 505.
4. Kamala Prasad *v.* Sital Prasad, I.L.R. 28 Cal. 339 at pp. 342-43.
5. *Per* Scott, J., I.L.R. 14 Bom. 115 at p. 119.
6. *See* also Mohammed Usaf Khan *v.* Emperor, A.I.R. 1929 Nag. 215 at p. 217.
7. Queen-Empress *v.* Maganlal and Motilal, I.L.R. 14 Bom. 115 at p. 137.
8. *Vide* K.V. Ayyaswamy, *In re* (1965) 1 Cr.L.J. 281 : A.I.R. 1965 A.P. 105 and Suba Rao *v.* Brahmananda Reddy, 1967 Cr. L.J. 691 : A.I.R. 1967 A.P. 155. .
9. A.I.R. 1967 Delhi 26.
10. Phani Bhushan Gupta *v.* State, A.I.R. 1968 Tripura 57 at pp. 61, 62.
11. A.I.R. 1928 Pat. 630 : 113 I.C. 329 : I.L.R. 8 Pat. 235.

King-Emperor v. *Mulhar*,[1] after referring to the leading case of *R.* v. *Elahee Buksh*,[2] the Judges observed :

"Illustration (*b*), Sec. 114, directs attention to the general principle that it is unsafe to conviction the evidence of accomplices unless corroborated in material particulars. But along with this principle must be borne in mind the qualifications,... contained in the further illustrations...The nature of the offence and the circumstances in which the accomplices make the statements must always be considered...."

Section 114, Illus (*b*), Evidence Act.

This decision was approved in *Deo Nandan Pershad* v. *Emperor*,[3] with the remark that all persons coming technically within the category of accomplices cannot be treated as precisely on the same footing and that no general rule on the subject can be laid down.[4]

No general rule on the subject.

It is impossible to hold that the evidence of an accomplice uncorroborated cannot be said to be evidence against an accused.[5]

In *Jagdish Narain* v. *Emperor*,[6] it was held that there can be no doubt that the statement of an accomplice should normally be corroborated. But the Court is not obliged to hold that an accomplice is unworthy of credit and must be corroborated. It is for the Court to consider after taking into consideraton all the circumstances, one of them being that he is an accomplice, whether it does not rely on the evidence.[7] In *King* v. *Nga Myo*,[8] it was held by the Full Bench that the Court should regard an accomplice as *prima facie* unworthy of credit, but this presumption may be displaced in the circumstances of a particular case.

In *Emperor* v. *Nirmal Jiban Ghose*,[9] it was held by a Special Bench, that an accused person can legally be convicted upon the uncorroboraed evidence of an approver; whether an accused person should or should not be convicted upon such evidence is left to the prudence and good sense of the Tribunal after considering all the circumstances of the case. If any corroboration is required its extent will, however, vary with the circumstances of each case. If the approver's evidence appears on the whole to be reliable and he has no motive for implicating an accused person falsely, it is difficult to see why he cannot be convicted on the statement of the approver.[10]

Conviction on uncorroborated testimony of an approver.

In any event, it is not illegal to base a conviction on the evidence of an accomplice alone.[11]

It is not imperative that in every case there should be corroboration of the evidence of an approver.[12]

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1. I.L.R. 26 Bom. 193 : 3 Bom. L.R. 694.
2. (1866) 5 W.R. (Cr.) 80 : B.L.R. Sup. Vol. 459.
3. I.L.R. 33 Cal. 649 : 3 Cr. L.J. 452 : 10 C.W.N. 662.
4. *See* Raghunath Pandey *v.* Emperor, A.I.R. 1933 Pat. 96 at pp. 99.
5. Bal Chand *v.* King-Emperor, A.I.R. 1927 All. 90 at p. 91 ; *see* also *In re* B.K. Rajagopal, A.I.R. 1944 Mad. 117. It may be taken that unless the case is a very exceptional one an accomplice's evidence should not be accepted as being sufficient for conviction; Daulat *v.* Emperor, A.I.R. 1930 Nag. 97.
6. A.I.R. 1942 Oudh 163 at p. 168 : 197 I.C. 277 : 43 Cr. L.J. 139 : 1941 O.W.N. 1225.
7. *See* also Jagannath *v.* Emperor, A.I.R. 1942 Oudh 221 at p. 224 ; Emperor *v.* C.B. Mathur, A.I.R. 1929 Cal. 822 at p. 824.
8. A.I.R. 1938 Rang. 177 : 175 I.C. 465 : 39 Cr. L.J. 581 : 1938 R.L.R. 90 (F.B.).
9. A.I.R. 1935 Cal. 513 : 157 I.C. 387 : 38 Cr. L.J. 1115 : 39 C.W.N. 744 (S.B.).
10. Debi Dayal *v.* Emperor, A.I.R. 1942 Oudh 435 at pp. 437-38.
11. State *v.* Anil Ranjan Dutta, A.I.R. 1952 Cal. 534 at p. 538.
12. Sarat Chandra Dhupi *v.* Emperor, A.I.R. 1934 C.I. 719 at p. 721 (F.B.) *obiter*, State *v.* Anil Ranjan Dutta, A.I.R. 1952 Cal. 534 at p. 538.

It is generally unsafe to convict a person on the evidence of accomplices unless corroboated in material particulars.[1] No doubt, the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of supicion which will attach to it must however vary according to the extent and nature of the complicity : sometimes as was said by Sir John Beaumont, C.J., in *Papa Kamal Khan* v. *Emperor*,[2] the accomplice is "not a willing participant in the offence but a victim to it".

Where there is ground for saying that the accomplices acted under a form of pressure which it would have required some firmness to resist; it cannot be urged that reliance had been placed on the uncorroborated evidence of accomplices.[3] The well-known rule in criminal law that an accomplice is unworthy of credit unless he is corroborated in material particulars is not absolute, but it is only in the exceptional cases that the corroboration can be dispensed with.[4]

Accomplice evidence—Law in India.

The law in India relating to the evidence of accomplices stands thus : The Courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is as a rule of prudence unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused. The law in India, therefore, is substantially the same on the subject as the law in England, in *B.K. Rajagopal, In re*,[5] the Court founded a conviction upon the evidence of an accomplice supported only by the confession of a co-accused. Their Lordships of the Privy Council in *Bhuboni Sahu* v. *King*,[6] observed that Courts should be slow to depart from the rule of prudence, which requires some independent evidence implicating the particular accused. The real danger of acting upon accomplice evidence is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people is an offence, and the story may be true in all its details as to eight to them, but untrue to the other two, whose names have been introduced because they are enemies of the approver. This tendency to include the innocent with the guilty is peculiarly prevalent in India. The only real safeguard against the risk of condeming the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused. This aspect of the matter was well expressed by Sir George Rankin in *Ambikacharan Roy* v. *Emperor*.[7]

Privy Council's view.

While considering the evidence of the approver the Court should also regard the rule of guidance contained in Illus. (*b*) to Sec. 114.[8]

42. What constitutes corroboration.—The second portion of Illus. (*b*) to Sec. 114 is in accordance with the language of Peacock, C.J., in the case of *Queen* v. *Elahee Buksh*.[9]

As to what constitutes corroboration, *see Queen* v. *Dwarka*.[10] The corroboration must be on matters directly connecting the prisoner with the

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1. Mohammad Usuf Khan *v.* Emperor, A.I.R. 1929 Nag. 215 at p. 217.
2. I.L.R. 59 Bom. 486 : A.I.R. 1935 Bom. 230 : 156 I.C. 615.
3. Srinivas Mall Bairoliya *v.* Emperor, A.I.R. 1947 P.C. 135 at p. 139.
4. Lale *v.* Emperor, A.I.R. 1929 Oudh 321 at p. 326.
5. I.L.R. (1944) Mad. 308 : A.I.R. 1944 Mad. 117 : 45 Cr. L.J. 373 (F.B.).
6. A.I.R. 1944 P.C. 257.
7. 35 C.W.N. 1270 at p. 1274 : A.I.R. 1931 Cal. 697 : 33 Cr. L.J. 19 (S.B.) ; Bhuboni Sahu *v.* King, A.I.R. 1949 P.C. 257 at pp. 258 and 261.
8. Musa *v.* Emperor, A.I.R. 1929 Nag. 233 at p. 234.
9. 5 W.R. (Cr.) 80.
10. 5 W.R. (Cr.) 18.

offence.[1] *Queen* v. *Chatterdhari Singh*,[2] ("Very unsafe to convict without some corroborative eivdence") ; *Queen* v. *Nawab Jan*,[3] *Queen* v. *Baikantho Nath Banarji*,[4] *Queen* v. *Khotab Sheikh*,[5] *Queen* v. *Shamsher Beg*,[6] *Queen* v. *Mahima Chandra Das*,[7] *Queen* v. *Mohesh Biswas*,[8] ("Evidence from sources independent of the approver should be forthcoming"), *Queen* v. *Chando Chandaline*,[9] ("Where a witness was cognizant of the crime and took no pains to prevent it or disclose it, his evidence must be considered as no better than that of an accomplice"); *Queen*, v. *Sristidhar Saha*,[10] *Queen* v. *Baiju Chaudhri*[11] *Queen-Empress* v. *Krishnabhat*,[12] *Queen-Empress* v. *Imdiad Khan*,[13] *Reg* v. *Malapabin Kapana*[14] (Neither previous statements of the same accomplice nor the confession of a co-prisoner, is sufficient corroboration); *Queen* v. *Jaffir Ali*,[15] *Queen* v. *Naga*,[16] *Reg* v. *Budhu Nanku*,[17] *Queen* v. *Udhian Bind*,[18] *Empress* v. *Mohan Lal*,[19] *Queen-Empress* v. *Bipin Biswas*,[20] (Confessions of co-prisoners insufficnet); In *R.* v. *Wilks*,[21] Alderson, B. said :

"By "corroborative evidence" what is contemplated is only supporting evidence making the other evidence more probable. Furthermore, the corroboration that is required is only of a general kind rendering it probable that the story of the accomplice is true and that it can safely be acted upon. It need not be confirmation of every material circumstance. It need not be direct evidence also. It may ever be circumstantial but as usual "working cumulatively, in geometrical progression and eliminating other possibilities."[22]

The views of the other school of thought are set out in another decision of the Rangoon High Court in *Nga Aung Pe* v. *Emperor*[23] where it was said that the English law makes the evidence of an accomplice unavailable for the corroboration of another accomplice and that—"there is nothing whatever in the Indian Evidence Act to suggest that the word 'corroboration' in India has a specialised and different meaning from that which it bears in other parts of the British Empire".

"Corroboration", as in India and England.

"Corroboration" means independent testimony. In the case of an accomplice the nature of the corroboration required is not mere evidence of a tainted kind but fresh evidence of an untainted kind. This

"Corroboration", meaning of.

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1. But *see* 2 Bom. L.R. 610.
2. 5 W.R. (Cr.) 59.
3. 8 W.R. (Cr.) 19.
4. 3 B.L.R. 2 (F.B.).
5. 6 W.R. (Cr.) 17.
6. 9 W.R. (Cr.) 51.
7. 6 B.L.R. App. 108.
8. 10 B.L.R. 455 note : 19 W.R. (Cr.) 16.
9. 24 W.R. 55.
10. 25 W.R. 42.
11. 25 W.R. (Cr.) 43.
12. I.L.R. 10 Bom. 319.
13. I.L.R. 8 All. 137.
14. 11 Bom. H.C. Rep. 196.
15. 19 W.R. (Cr.) 57.
16. 23 W.R. 24.
17. I.L.R. 1 Bom. 475.
18. 19 W.R. (Cr.) 68.
19. I.L.R. 4 All. 56.
20. I.L.R. 10 Cal. 970.
21. 7 C. & P. 278.
22. Kuruchiyan Kunhaman *v.* State of Kerala, 1974 K.L.T. 328 at p. 431.
23. A.I.R. 1937 Rang. 209 : 38 Cr. L.J. 785 : 1937 R.L.R. 110.

rule was not only laid down in *R.* v. *Baskerville*,[1] but was enunciated in *R.* v. *Noakes*[2] long before Evidence Act. Hence again in Edition 7 of Russel on *Crimes*, published in 1909 before *Baskerville's case*[3] in 1916, it is said at page 2292 :

> "The practice of requiring confirmation where the case for the prosecution is supported by one accompilce applies equally when two or more accomplices are brought forward against a prisoner."

Scope of this section.

Since Sec. 133, Evidence Act, lays down that a conviction is not illegal merely because it proceeds upon the uncorroborated tesimony of an accomplice, it follows that if there be three accomplices *A*, *B* and *C*, the Court may reject the evidence of *A* and convict upon the uncorroborated testimony of *B* and *C*, or reject *A*'s and *B*'s evidence and proceed to convict upon *C*'s evidence alone. But it is a misuse of words to say that the evidence of anyone of these witnesses can "corroborate" that of another; There is no corroboration between accomplices if the source of their evidence is tainted.

Evidence from an accomplice whose testimony is tainted is only corroborated by evidence from an untainted source, or from a source which though tainted corroborates the testimony of the first accomplice on matters implicating the accused with a criminal offence in such circumstances that the Court is satisfied that there can have been no collusion between the tainted witnesses, and that therefore the objection that the evidence is tainted has lost its force.[4]

Evidence to show that a quantity of mutton, corresponding with the parts of the stolen sheep, was found in the prisoner's house, was held sufficient corrobroation.[5] In *Reg.* v. *Farlar*,[6] Lord Abinger said that the corroboration ought to consist in some circumstance which *affects the identity of the accused person* :

An accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches.[7] Although the evidene of one accomplice is not sufficent corroboration of that another to justify a conviction, yet, there may by circumstances, in which the agreement in their stories must be taken into account.[8]

Where barring in consequential variations, the substratum of approver's evidence had throughout been consistent, the Court held that it did not think that his testimony, in the main was unreliable, or inherently improbable. It was also held that the evidence of the approver had been adequately corroborated from independent sources against both the appellants. They were therefore rightly convicted of the murder of the deceased and allied charges.[9]

Dacoity; approver's confession and evidence.

The confession, and sworn evidence of an approver in a criminal trial for dacoity, are admissible in evidence against him in a suit for damages brought against him by the complainant for having instigated the dacoity.[10]

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1. (1916) 2 K.B. 658 : 86 L.J.K.B. 28 : 115 L.T. 453 : 80 J.P. 446 : 25 Cox. C.C. 524 : 60 S.J. 696.
2. (1832) 5 C. & P. 326 : 172 E.R. 996.
3. (1916) 2 K.B. 658 : 86 L.J.K.B. 28 : 115 L.T. 453 : 80 J.P. 446 : 25 Cox. C.C. 524 : 60 S.J. 696.
4. Nga Aung *v.* Emperor, A.I.R. 1937 Rang. 209 at p. 212.
5. Reg. *v.* Birkett, 8 C. & P. 732.
6. 8 C. & P. 106.
7. Queen-Empress *v.* Krishna Bhatt, I.L.R. 10 Bom. 319 : 11 B.H.C.R. 196 ; Reg. *v.* Budhu Nanku, I.L.R. 1 Bom. 475.
8. 2 Bom. L.R. 610.
9. Subramanian *v.* State of Tamil Nadu, A.I.R. 1975 S.C. 139 at pp. 142, 145.
10. Keshab Nath Bhattacharjee *v.* Maniruddin Sarkar, 13 C.W.N. 501.

43. Accused's examination—Prosecution against whom withdrawn.—An accomplice, if he is not an accused under trial in the same case, is a competent witness and may be examined on oath. The law is thus briefly stated in Archbold's *Criminal Pleadings* (23rd Ed), 391 : "Where it is proposed to call an accomplice for the crown, it is the practice : (*a*) not to include him in the indictment, or (*b*) to take his plea of guilt, or before calling him either, (*c*) to offer no evidence and permit his acquittal, or (*d*) to enter a *nolle prosequi.*" *Winsor* v. *Queen*[1] and *Queen* v. *Payne*[2] contain the most recent exposition of these rules. They have also been adopted in this country; *Queen* v. *Behary Lall*,[3] *Mohesh* v. *Mohesh*,[4] *Queen-Empress* v. *Mona Puna*[5] and *Queen-Empress* v. *Tirbeni Sahai*.[6] Section 494 (Now Sec. 321) of the Code authorises the Public Prosecutor in this country to withdraw a prosecution against any one of a number of accused persons, and thus obtain a verdict of discharge as acuittal so far as such person is concerned. On such a discharge of acquittal he becomes a competent witness against other persons accused of the same offence.[7] He becomes a competent witness against his co-accused.[8]

Evidence of a witness who was accused and pardoned.

44. Accomplice to whom pardon has been tendered.—The order of the District Magistrate tendering pardon to Albert was passed on 28th August, 1952. It was argued on behalf of the appellant that before tendering the pardon to him he had not been discharged and consequently his evidence as an approver was not legally admissible.

Held, that there was no merit in this objection as the moment the pardon was tendered to the accused he must be presumed to have been discharged whereupon he ceased to be an accused and became a witness.[9]

Where the Sessions Judge tendered a pardon to an accused person and such person was examined as a witness against the other accused, *held*, that the evidence of the approver was properly taken.[10] Section 337 (now Sec. 306) of the Code does not suggest that the only method of obtaining the evidence of a co- accused against *another* is by tendering him a pardon.[11] In *Reg.* v. *Hanumanta*,[12] it has been held that the evidence given by a person to whom a pardon has not been lawfully granted is not relevant. In *Empress of India* v. *Ashgar Ali*,[13] the evidence of an accomplice, to whom a pardon had been irregularly tendered, was held to be irrelevant and inadmissible. The learned Judge in the latter case relied on *Reg.* v. *Hanumanta*[14] and *Reg.* v. *Remedios*.[15]

The co-accused against whom the charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon.[16]

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1. (1866) L.R. 1 Q.B. 289.
2. (1872) L.R. 1 C.C.R. 349.
3. (1867) 7 W.R. (Cr.) 44.
4. (1882) 10 C.L.R. 552.
5. I.L.R. 16 Bom. 661.
6. I.L.R. (1898) 90 All. 426.
7. Banu Singh *v.* Emperor, I.L.R. 33 Cal. 1353 at pp. 1357, 1358 : 10 C.W.N. 962 : 4 Cr. L.J. 145.
8. G.V. Raman *v.* Emperor, A.I.R. 1929 Cal. 319 at p. 320 : 33 C.W.N. 468 : I.L.R. 56 Cal. 1203.
9. A.J. Peiris *v.* State of Madras, A.I.R. 1954 S.C. 616 at pp. 619, 620.
10. Queen-Empress *v.* Kallu, I.L.R. 7 All. 160 at p. 163.
11. G.V. Raman *v.* Emperor, 33 C.W.N. 468 : I.L.R. 56 Cal. 1023 : A.I.R. 1929 Cal. 319 at p. 321.
12. I.L.R. 2 All. 260.
13. I.L.R. 1 Bom. 610.
14. I.L.R. 2 All. 260.
15. (1867) 3 Bom. H.C. (Cr.) 59.
16. *See* the case of Queen-Empress *v.* Hussein Haji, I.L.R. 25 Bom. 422 : 2 Bom. L.R. 1095 : Sudam Chandra Bag. *v.* Emperor, A.I.R. 1933 Cal. 148 at p. 149 : 114 I.C. 74.

The circumstance that after his conviction was set aside and the case was remanded pardon was tendered to the accused who was an approver in that very case alone is sufficient to discredit his evidence.[1]

45. One accomplice cannot corroborate another.—Opinion on this subject is very much divided in India. One school holds that there is nothing in the Evidence Act to indicate that one accomplice cannot corroborate another. Great authority has been given to this view by a Full Bench decision in *Aung Hla* v. *Emperor*,[2] *See* also *in re Sattu Khan*,[3] where all the decisions on this subject from *in re Elahee Bukhsh*[4] onwards were considered. Page, C.J., refers to *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*,[5] and holds that to construe the sections of the Indian Evidence Act in the light of the English law on the subject leads to pronouncements of the law inconsistent with the express provisions of the Act. The danger of applying English principles to questions arising under the Evidence Act was pointed out by a Full Bench of the Madras High Court in *Athappa Goundan* v. *Emperor*.[6]

Privy Council on accomplice cannot corroborate another.

Their Lordships of the Privy Council in *Mahadeo* v. *King*,[7] held that the evidence of one accomplice is not available as corroboration of another.

Rule of law.

In view of the decision of the Privy Council in *Mahadeo* v. *King*,[8] it must now be taken as settled that the evidence of one accomplice cannot be used as independent evidence to corroborate the evidence of another accomplice.[9]

It is the invariable practice of the Courts to require in the case of an approver's statement, evidence corroborating not only the approver's own part in the crime, but the fact that the accused has been truthfully implicated.[10]

Rule of corroboration.

To regard the testimony of one accomplice as corroborated by the testimony of another accomplice is to hold that there is corroboration where under law or fact there is none at all.[11] The evidence of one accomplice cannot be used to corroborate the evidence of another accomplice.[12]

The evidence of one accomplice is ordinarily not sufficient corroboation of that of another.[13] It is of no value and makes no difference if there are two accomplices giving evidence.[14] The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others.[15] With

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1. Angom Kala Singh *v.* Manipur State, A.I.R. 1953 Manipur 2 at p. 4.
2. A.I.R. 1931 Rang. 235 : 1931 Cr. C. 875 : 135 I.C. 849 : 33 Cr. L.J. 205 : I.L.R. 9 Rang. 404(F.B.).
3. A.I.R. 1939 Mad. 283 at pp. 285-86.
4. (1866) 5 W.R. (Cr.) 80 : Beng. L.R. Sup. Vol. 459.
5. A.I.R. 1916 P.C. 242 : 39 I.C. 401 : 43 I.A. 256 (P.C.).
6. A.I.R. 1937 Mad. 618 : 171 I.C. 245 : 38 Cr. L.J. 1027 : I.L.R. (1937) Mad. 695 : (1937) 2 M.L.J. 60 (F.B.).
7. A.I.R. 1936 P.C. 242 at p. 244 : 40 C.W.N. 1164 : 49 Punj. L.R.
8. A.I.R. 1936 P.C. 242 : 163 I.C. 681 : 1936 Cr. C. 757 : 73 Cr. L.J. 914 (P.C.).
9. *In re* Surajpal Singh, A.I.R. 1938 Nag. 328 at pp. 331-32 : I.L.R. (1938) Nag. 516 : 1938 N.L.J. 185.
10. Emperor *v.* Ram Singh, A.I.R. 1948 Lah. 24 at p. 26.
11. Mohammad Yusuf Khan *v.* Emperor, A.I.R. 1929 Nag. 215 at p. 218.
12. Gorakhnath *v.* Emperor, A.I.R. 1935 All. 86 ; Bacho Babu *v.* Emperor, A.I.R. 1935 All. 162.
13. 1 L.B.R. 29 at p. 32 ; *see* also Queen *v.* Dwarka, 5 W.R. (Cr.) 18 ; 1 Ind. Jur. N.S. 100.
14. Queen-Empress *v.* Dhundi, I.L.R. 8 All. 303 at p. 306.
15. 11 B.H.C.R. 196 ; Baijoo Chowdhree *v.* Babo Nilmadhya Bose, 25 W.R. (Cr.) 43.

regard to the evidence of an accomplice Bose, J., in *Kashmira Singh* v. *State of Madhya Pradesh*,[1] has taken the view that a conviction can be based on the uncorroborated testimony of an accomplice, provided the Judge has the rule of prudence laid down in illus. (*b*) to Sec. 114, in mind and gives reason why he thinks it would be safe in a given case to disregard it.

Supreme Court on conviction on uncorroborated testimony of an accomplice.

46. Custody in which approver is to be detained.—An accomplice is a competent witness, but such competency does not divest him of the character of an accused person. As the nature of the custody contemplated by law in the case of an accused person during the enquiry or trial is judicial custody or confinement in a "prison". an approver must be detained in similar custody.[2]

Does competency of an accomplice divest him of the character of an accused person?

47. What kind of persons require corroboration.— If the crime is a very deep one and the witness so far involved in it as to render him apparently unworthy of credit, he ought to be corroborated. On the other hand, if the offence be a light one,[3] and where the nature of the offence and the extent of the complicity is such as would not much shake his credit, it is otherwise.[4] There are more involuntary than voluntary accomplices, and, in that light, their evidence is not tainted as much as it would otherwise be.[5]

48. Prize fight.—The persons persent at, and sanctioning, a prize fight, are not such accomplices as to require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter.[6]

49. Adultery.—The defendant and *O* procured two rooms opening into each other. The defendant and one of the women occupied one of the rooms most of the night, and *O* and the other woman occupied the other room. It was held, that *O* was not an accomplice of the defendant.[7]

50. Witness cognizant of crime and not disclosing it.—Even though a witness be not an accomplice, yet he be cognizant of the crime and discloses it only when he has a cause of quarrel with the accused, it would be most unsafe to act upon his evidence, unless it was corroborated.[8] Witness keeping quiet for six days after becoming cognizant of the crime is necessity for corroboration.[9]

51. Youthful offender.—Where the witness was a "youthful tool in the hands of one who stood to him in *loco parantis*". The complicity in the crime is not such as to make it necessary to require corroboration.[10]

52. Extension of principle of corroboration to persons in the nature of accomplices.—A Magistrate should not convict a person, upon the uncorroborated evidence of the witnesses, who are no better than accomplices.[11] There is no

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1. A.I.R. 1952 S.C. 159 at p. 161 : 1952 S.C.A. 312 : 1952 S.C.J. 137.
2. Kundan Lal *v.* Emperor, A.I.R. 1931 Lah. 353 at p. 356 : I.L.R. 12 Lah. 604.
3. *See* Rex. *v.* Hargrave, 5 C. & P. 170.
4. *Per* Hill, J., in 1 B. & S. 322, cited in Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 278.
5. Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 279.
6. Rex. *v.* Hargrave, 5 C. & P. 170, cited in Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 278.
7. State *v.* Evan, *Century Digest*, Vol. 14, Col. 1780, cited in Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271.
8. Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 (*per* Boddam, J.).
9. *See* Ramchandra *v.* Modhu Padhi, I.L.R. 21 Cal. 326 at p. 328 (F.B.).
10. Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 279.
11. 2 C.W.N. 55 (56) ; but *see* also Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271.

authority which warrants the extension of this rule as to corroboration to person, who are not accomplices,[1] nor will it be in furtherance of justice to regard another class of witnesses as quasi-accomplices and to extend the maximum to them.[2]

53. Witness not open to the same charge as accused.—There is no law requiring corroboation of the evidence of witness, who is not open to the same charge as the accused.[3]

54. Mere presence of accused—Presumption.—The mere circumstance of a person being present on a lawful occasion does not raise a presumption of that person's complicity in an offence then commited.[4] The mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice.[5]

55. Accomplice by implication or in secondary sense.—When a person is only an accomplice by implication only, his evidence does not require the same amount of corroboration as that of the person who is an actual participator with the principal offender.[6]

56. Necessity of corroboration.—The Evidence Act nowhere requires corroboration.

Though an approver is a competent witness, he being a participant in the offence and an usually interested and infamous witness, his evidence requires to be corroboated by other evidence.[7]

A conviction may not be illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. As a rule of prudence, however, the evidence of an accomplice should be corroborated in material particulars. Being tainted evidence, the evidence of an accomplice is to satisfy a double test. The evidence must be reliable and if this test is satisifed, it must be sufficiently corroborated.[8]

Rule regarding the necessity of corroboration.

The rule as to the necessity of corroboration of the evidence of an accomplice rests on a rule of practice which is deserving of respect.[9] The rule to be deduced from this section and Sec. 114 is that, if the Court credits the evidence a conviction proceeding upon it is not illegal.[10]

Appreciation of evidence of accomplice.

It is well settled that the appreciation of approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all the witnesses. If this test is satisfied, the second test which still

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1. Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 290 ; Ramchandra *v.* Modhu Padhi, I.L.R. 21 Cal. 326 at p. 328 ; Alimuddin *v.* Queen Empress, I.L.R. 23 Cal. 361, diss.
2. Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 290.
3. *In the matter of* Rojoni Kant Bhoomick, 13 W.R. (Cr.) 24.
4. *Per* Jardine, J., in Queen-Empress *v.* Maganlal and Motilal, I.L.R. 14 Bom. 115.
5. Queen-Empress *v.* Deodhar Singh, I.L.R. 27 Cal. 144 ; Queen *v.* Chando Chandalini, 24 W.R. (Cr.) 55 ; Queen-Empress *v.* Maganlal and Motilal, I.L.R. 14 Bom. 115 ; Queen-Empress *v.* Chagan Dayaram, I.L.R. 14 Bom. 331 ; Queen-Empress *v.* O'Hara, I.L.R. 17 Cal. 642 ; Ishan Chandra *v.* Queen-Empress I.L.R. 21 Cal. 328 : 2 C.W.N. 55 : 2 C.W.N. 672 ; Alimuddin *v.* Queen-Empress, I.L.R. 23 Cal. 361.
6. Kamla Prasad *v.* Sital Prasad, I.L.R. 28 Cal. 399 : 5 C.W.N. 517.
7. *In re* Mukesh Rama Chandra Reddy, A.I.R. 1958 A.P. 165 at p. 168 : I.L.R. (1957) A.P. 742 : (1958) 1 Andh, W.R. 9 : 1957 Andh. L.T. 709.
8. B.K Kutty *v.* State, 1984 Cr. L.J. 1289 at p. 1296 (Orissa).
9. Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at pp. 289, 290 : 14 M.L.J. 226.
10. Reg. *v.* Ramaswami Padayachi, I.L.R. 1 Mad. 394 : 2 Weir 799 : 2 Ind. Jur. 600.

remains to be applied is that the approver's evidence must receive sufficient corroboration.[1]

Lord Reading, the Lord Chief Justice of England, in *King* v. *Baskerville*,[2] observed :

English-law.

"There is no doubt that the uncorroborated evidence of accomplice is admissible in law...But it has long been a rule of practice of common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices...."

This observation of his Lordship, the Chief Justice, has been approved in *Rameshwar Kalyan Singh* v. *State of Rajasthan*.[3]

An approver is undoubtedly a competent witness under the Evidence Act, but the appreciation of his evidence must show that he is a reliable witness. The Courts are naturally reluctant to act on such tainted evidence without material corroboration.[4]

It is true that the evidence of an approver must not merely be natural and credible, but that it must also be corroborated in material particulars connecting the accused with the crime, before it can be accepted by a Court of law.[5]

In *Sarwan Singh Rattan Singh* v. *State of Punjab*,[6] Gajendragadkar, J., speaking for the Court, observed :

Supreme Court's view.

"The appreciation of an approver's evidence has to satisfy a double test. It must show that he is a reliable witness and that his evidence receives sufficient corroboration and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corrobration. This test is special to the cases of weak or tainted evidence like that of the approver."

The Supreme Court went on to observe :

It is important to observe that the Supreme Court stated that the approver's evidence show that he is a reliable witness and that is that test which is common to all witnesses.[7]

The Supreme Court in *Swarwan Singh Rattan Singh* v. *State of Punjab*[8] could not have intended to lay down that the evidence of an approver and the corroborating pieces of evidence should be treated in two different compartments. The Supreme Court did not lay down any such proposition. In most of the cases the said two aspects would be so interconnected that it would not be possible to give a separate treatment.[9]

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1. *See* Sarwan Singh *v.* State of Punjab, A.I.R. 1957 S.C. 637 : Piara Singh *v.* State of Punjab, A.I.R. 1969 S.C. 961 at p. 965 : 1969 M.L.J. (Cr.) 871. *See* also Bharat Kumar Jayahari Shankar Mehta *v.* State of Gujrat, 1982 Cr. L.J 1319 (Guj.).
2. (1916) 2 K.B. 658 at p. 663.
3. A.I.R. 1952 S.C. 54 : 1952 S.C.A. 40 : 1952 S.C.J. 46 : 1952 S.C.R. 377 : (1952) 1 M.L.J. 440 : 65 L.W. 351 : 1952 M.W.N. 150.
4. *In re* Gundla Narayana, A.I.R. 1959 A.P. 381 at p. 385.
5. *In re* Chinnaswami, A.I.R. 1960 Mad. 462 at p. 466.
6. A.I.R. 1957 S.C. 637 at pp. 640-41 : 1957 S.C.R. 953 : 1957 Cr. L.J. 1014.
7. *See* Jnanendra Nath Ghose *v.* State of West Bengal, A.I.R. 1959 S.C. 1199 at p. 1201 : (1960) 2 S.C.A. 180 : (1960) 1 S.C.R. 126 : 1960 A.W.R. 8.
8. A.I.R. 1957 S.C. 637 : 1957 S.L.J. 699 : 1957 S.C.R. 953 : 1957 A.W.R. Sup. 99 : 1957 M.W.N. 88 : 1957 Mys. L.J. 255.
9. Major E.G. Barsay *v.* State of Bombay, A.I.R. 1961 S.C. 1762 at p. 1780.

The House of Lords also approved some of the views expressed in the earlier case of *R.* v. *Baskerville.*[1] There the Court of Criminal Appeal reached conclusions which may summarised as follows :

(*i*) There must be independent testimony which confirms the evidence of the accomplice as to a material circumstance of the crime.[2] The corroboration may be circumstantial.

(*ii*) There must be independent evidence of the identity of the accused in relation to the crime ; it must be evidence which implicates him.[3] When there are more prisoners than one, the corroboration must implicate them also.[4]

(*iii*) One accomplice cannot corroborate another.[5] This rule has nothing to do with corroboration of an accomplice by the admission of the accused, otherwise proved. The wife of an accomplice who himself gives evidence cannot corroborate her husband.[6] However, the evidence of the innocent wife of an accomplice, who himself does not give evidence, is treated as independent testimony.[7]

The Supreme Court in *Rameshwar Kalyan Singh* v. *State of Rajasthan,*[8] laid down that :

Supreme Court on necessity of corroboration.

(*a*) It is not necessary that there should be independent confirmation of every material circumstance,

(*b*) The independent evidence must in some way reasonably connect the accused with the crime,

(*c*) The testimony of one accomplice would not be sufficient to corroborate that of another, and

(*d*) The corroboration is sufficient if it is merely circumstantial evidence of connection of the accused with the crime.

In the later Supreme Court decision, i.e., *State of Bihar* v. *Basawan Singh,*[9] reference has been made to *Rameshwar Kalyan Singh* v. *State of Rajasthan,*[10] in regard to the question as to how the evidence of an accomplice has to be treated, and the nature and extent of corroboration required.[11]

Election petition.

In an election petition a finding of guilty on a charge of corrupt practice should not normally be based on the uncorroborated testimony of an accomplice and further, the evidence of one accomplice would not be sufficient, as a rule, to corroborate the evidence of another.

In this context, an observation of Lord Atkin in *W.C. Macdonald* v. *Latimer,*[12] in a civil action founded upon fraud, is opposite :

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1. (1916) 2 K.B. 658.
2. R. *v.* Mullins, (1848) 3 Cox. C.C. 526 at p. 531 ; *see* also R. *v.* Hodgett, (1957) N.I. 1 C.C.A.
3. R. *v.* Stubbs, (1855) 25 L.J.M.C. 16.
4. R. *v.* Jenkins, (1845) 1 Cox. C.C. 177 : R. *v.* Stubbs, *supra.*
5. R. *v.* Noakes, (1832) 5 C. & P. 326.
6. *See* R. *v.* Payne, (1913) 8 C.A.R. 171 : Archbold. 490 ; Wills. 353.
7. R. *v.* Willis, (1916) 1 K.B. 933 C.C. A ; *An Introduction to Evidence by* G.D. Nukes, 3rd Ed., pp. 502-3.
8. A.I.R. 1952 S.C. 54.
9. A.I.R. 1958 S.C. 500.
10. A.I.R. 1952 S.C. 54.
11. M.M. Gandhi *v.* State of Mysore, A.I.R. 1960 Mys. 111.
12. A.I.R. 1929 P.C. 15 at p. 18.

"By every Code of evidence the testimony of a professed accomplice requires to be carefully scrutinized with anxious search for possible corroboration."[1]

The evidence of an accomplice must, always be received with the greatest possible caution.[2]

Guiding rule.

The guiding rule in relation to testimony of an accomplice is furnished by Illus. (*b*) of Sec. 114 of the Indian Evidence Act.[3]

Corroboration is required to implicate the accused.

Corroboration is required in material respects so as to implicate the accused.[4] It is not necessary to have corroboration of all circumstances of the case of every detail of the crime. It would be sufficient if there was corroboration as to the material circumstances of the crime and of the identity of the accused in relation to the crime.[5] Whether the evidence of the approver should be accepted or not, will have to be determined by applying the usual tests. The Court has, in addition, to ascertain whether his evidence has been corroborated sufficiently in material particular.[6]

57. Conviction on accomplice evidence with corroboration.— Ordinarily a Court seeks for corroboration of the evidence of an approver before convicting an accused person on that evidence. After the Court is satisfied that the approver's statement is credible and his part in the crime is corroborated by other evidence, the Court seeks corroboration of the approver's evidence with respect to the part of the other accused persons in the crime, and this evidence has to be of such a nature as to connect the other accused with the crime.

Corroboration of approver's evidence.

Supreme Court on question of an approver's evidence.

The Supreme Court has occasion to consider the question of an approver's evidence in *Sarwan Singh Rattan Singh* v. *State of Punjab*.[7] After pointing out that an approver was a competent witness but that his evidence requires corroboration in material particulars, the Supreme Court observed at page 959 (of S.C.R.) : at page 641 (of A.I.R.) :

"But it must never be forgotten that before Court reaches the stage of considering the question of corroboration and its adequacy or otherwise the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered...."

This is not to say that the evidence of an approver has to be dealt within two water-tight compartments ; it must be considered as a whole along with the other evidence. Even so, the Court has to consider whether the approver's evidence is

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1. Kondaveti Gurunath Reddy *v.* V. Seshaiah, A.I.R. 1966 A.P. 331 at p. 333 : (1965) 2 Andh. L.T. 136.
2. Abdul Majid *v.* Emperor, A.I.R. 1935 Cal. 473 at p. 475 : 39 C.W.N. 1082 : 157 I.C. 840.
3. Manna Lal *v.* King-Emperor, A.I.R. 1925 Oudh 1 at p. 3.
4. Bhuboni Sahu *v.* King, A.I.R. 1949 P.C. 257.
5. R. *v.* Baskerville, (1916) 2 K.B. 658, relied on in Major E.G. Barsay *v.* State of Bombay, A.I.R. 1961 S.C. 1762 at p. 1781 and Bhiva Doulu Patil *v.* State of Maharashtra, A.I.R. 1963 S.C. 599 at p. 601.
6. State of Andhra Pradesh *v.* Cheemalapatti Ganeshwara Rao, A.I.R. 1963 S.C. 1850 at p. 1872 ; Sardul Singh *v.* State, (1967) 69 Punj. L.R. (Delhi Section) 168 at p. 187.
7. 1957 S.C.R. 953 : A.I.R. 1957 S.C. 637.

credible in itself and in doing so it may refer to such corroborative pieces of evidence as may be available.[1]

58. Nature and extent of corroboration.—A conviction ought not to be based on the testimony of the approver unless it is corroborated in material details not only with regard to the general story narrated by them but also with regard to the *corps delicti* and the identity of the accused. It is so even though his testimony does not suffer from inherent defect or improbabilities.

Accomplice statement needs great scrutiny.

The testimony of an approver who has resiled from his statement is worthy of little credit.[2]

Where the complainant is an accomplice the version given by him, unless corroborated is unworthy of credit.[3]

Independent corroboration does not mean that every detail of what the witnesses of the raiding party have said must be corroborated by independent witnesses. As was observed by Lord Reading in *King* v. *Baskerville,*[4] there must be "some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it". In *Rameshwar Kalyan Singh* v. *State of Rajasthan,*[5] the nature and extent of corroboration required when it is not considered safe to dispense with it have been clearly explained.[6]

"Independent corroboration"; meaning of.

The corroboration must come from independent sources, but it need not be direct evidence that the appellants committed the crime. It is sufficient if it is merely circumstantial evidence of their connection with the crime.[7] The corroboration need not be of a kind which proves the offence against the accused. It is sufficient if it connects the accused with the crime.[8]

In fact, Sec. 133 of the Evidence Act only says that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But it has become undoubtedly a rule of law or at least a rule of prudence that the testimony of accomplice could be accepted only if corroborated by independent evidence either direct or circumstantial. Therefore, held that the conviction of the accused in this case based on the evidence of P.W. 1 cannot be held to be illegal because there is corroboration regarding the connection of the accused with the crime and there is also corroboration in other material particulars including the motive for the offence.[9]

The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime as is clear from the decision of the Supreme Court in *Rameshwar Kalyan Singh* v. *State of Rajasthan.*[10]

Corroboration and direct evidence.

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1. *See* E.G. Barsay *v.* State of Bombay, (1962) 2 S.C.R. 195 : A.I.R. 1961 S.C. 1762 ; Saravanabhavan and Govindaswamy *v.* State of Madras, A.I.R. 1966 S.C. 1273 at p. 1279 : (1966) S.C.D. 561 : 1966 M.W.N. 200.
2. *In re* Kasaboyina Muttiga, A.I.R. 1958 A.P. 255 at pp. 257-58 : (1957) 2 Andh. W.R. 182.
3. Gopal Krishna *v.* State, A.I.R. 1964 All. 481 at p. 485.
4. (1916) 2 K.B. 658.
5. (1952) S.C.R. 377 at p. 385 : A.I.R. 1959 S.C. 54.
6. State of Bihar *v.* Basawan Singh, A.I.R. 1958 S.C. 500 at p. 507 : 1958 S.C.J. 856 : 1958 S.C.R. 195 : 1958 A.L.J. 608 : 1958 A.W.R. 609.
7. *In re* Gundla Narayana, A.I.R. 1959 A.P. 387 at p. 390 : 60 Cr. L.J. 947.
8. S. Swamirathnam *v.* State of Madras, A.I.R. 1957 S.C. 340 at p. 343 : 58 Cr. L.J. 422.
9. Mohan *v.* State, 1996 Cr. L.J. 48 at p. 53 (Mad.).
10. A.I.R. 1952 S.C. 54 ; *see* also L.S. Raju *v.* State of Mysore, A.I.R. 1953 Bom. 297 at p. 300 : 55 Bom. L.R. 191 : I.L.R. (1953) Bom. 670.

Nature of corroboration.

The nature of the corroboration required is not mere evidence of a tainted kind but fresh evidence of an untained kind.[1]

Approver's evidence.

Where the main crime charged is consipracy to defraud certain companies the corroboration should be sufficient to afford some sort of independent evidence to show that the approver is speaking the truth with regard to the accused person whom he seeks to implicate.[2]

In the course of his judgment, his Lordship quoted with approval the case in *Reg.* v. *Dyke*.[3]

The learned Chief Justice then referred to the well-known case in *Reg.* v. *David Birkett*,[4] in which the prisoner was indicted for receiving stolen sheep. His Lordship then went on to say at page 667 :

Evidence in corroboration be independent testimony.

"....It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."[5]

Rule of caution in delivering judgments.

It has long been a rule of practice, that it is dangerous and unsafe to base a conviction on the uncorroborated testimony of an accomplice. Indeed, if a Judge chooses to act upon uncorroborated evidence of an accomplice he must give some indication that he is conscious of this rule of caution and he must give reasons as to why in that particular case he considers it safe to convict in the absence of corroborative evidence and in disregard of the above rule of caution. The nature and the extent of corroboration must necessarily depend on the facts and circumstances of each case.

Certain rules are, however, clearly discernible from the decided cases. In *Dalip Singh Parja Singh* v. *Emperor*,[6] a Division Bench relying on *Rex* v. *Baskerville*,[7] observed that the corroborative evidence given by an accomplice must be such as implicates the accused. It is also by now very well settled that independent corroborative evidence need not come up to the standard of being sufficient by itslef to sustain conviction.

As observed by Bose, J., in *Kashmira Singh* v. *State of Madhya Pradesh*,[8] the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused. The degree of suspicion attaching to the evidence of an accomplice would also vary according to the extent and nature of his own complicity.[9]

Rule of caution— Conviction on uncorroborated testimony of an accomplice.

Ordinarily as a matter of caution conviction should not be based on the uncorroborated testimony of an accomplice and that this corrobration should be with regard to the actual factum of the crime and also to the identity of the accused. The amount of corroborative evidence varies with the facts and

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1. Nga Aung Pe *v.* Emperor, A.I.R. 1937 Rang. 209 at p. 212.
2. Bishnu Pada Chaterjee *v.* Emperor, A.I.R. 1945 Cal. 441 at p. 446 : I.L.R. (1944) 2 Col. 337.
3. (1837) 8 Car. & P. 261 : 173 E.R. 486.
4. (1837) 8 Car. & P. 732 : 173 E.R. 694.
5. *See* also Bishnu Pada Chatterjee *v.* Emperor, A.I.R. 1945 Cal. 441 at p. 446 : I.L.R. (1944) 2 Cal. 327 : 221 I.C. 446.
6. A.I.R. 1933 Lah. 291.
7. (1916) 2 K.B. 638.
8. A.I.R. 1925 S.C. 158.
9. Autar Singh *v.* State, A.I.R. 1960 Punj. 364 at pp. 364-68.

circumstances of each particular case. Where deep impression of veracity is made by the deposition of the approver upon the mind of the Judge, the minimum of corroboration is necessary. Much or little, the purpose of corroborative evidence is to satisfy the Court that when the approver implicates a particular individual, he does so truly.[1]

Usual tests.

Whether the evidence of the approver should in any given case be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether his evidence is merely self-exculpatory and so on and so forth. The Court has, in addition, to ascertain whether his evidence has been corroborated sufficiently in material particulars.[2]

Appraisal of evidence of accomplice.

Evidence of persons each to whom had in one way or the other helped the accused in furthering their objectives may be to hold as accomplice evidence. The duty of the Court appraising the evidence clearly is first to see whether the evidence of an accomplice is reliable, and secondly even if it is so, whether it is corroborated in material particulars by other independent evidence, direct or circumstantial. It does not mean that an accomplice's evidence cannot be relied upon unless it is totally and absolutely blemishless. In spite of some discrepancies and other such infirmities Courts may find it safe to act on the evidence of such witnesses. Regarding the necessity of corroboration, such corroboration need not on the one hand be of every particular given by an accomplice, and on the other hand, of only minor particulars. The corroboration must be adequate enough to afford the necessary assurance that the main story testified by the accomplice can be reasonably and safely accepted as true.[3]

Section 133 of the Evidence Act and the Illus. (*b*) of Sec. 114 contain the statutory rule governing the appraisal of the approver's evidence. It is well known

Rule regarding the appraisal of approver's evidence.

that an approver's evidence is admitted on the ground of necessity as otherwise the worst offenders will go unpunished. Accomplices are interested witnesses anxious to purchase their immunity, but there is no doubt as to the competency of their evidence. Whether corroboration is at all required and the nature and extent of confirmation have been the subject of judicial decision in numerous cases. The Court of Criminal Appeal in England decided in the case of *Rex* v. *Baskerville*,[4] the nature and extent of corroboration required of accomplice evidence.[5]

59. Amount of corroboration necessary—Practice.—The Court must look at all the surrounding circumstances, in order to arrive at a conclusion, whether the evidence should be supported in essential and material particulars by

No general rule laid down.

evidence *aliunde* as to the facts deposed to by that accomplice.[6] All persons coming technically within the category of accomplices cannot be treated on precisely the same footing. No general rule can be laid down on the subject.[7] The fact that there

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1. Gopaldas Shivalomal *v.* Emperor, A.I.R. 1945 Sind. 132 at p. 140.
2. State of Andhra Pradesh *v.* Cheemalapati Ganeswara Rao, A.I.R. 1963 S.C. 1850 at p. 1872.
3. Tribhuvan Nath *v.* State of Maharashtra, A.I.R. 1973 S.C. 450 at p. 459.
4. (1916) 2 K.B. 958.
5. Samudder Singh *v.* State, A.I.R. 1965 Cal. 598 at p. 609.
6. 5 C.W.N. 517 ; Kamala Prasad *v.* Sital Prasad, I.L.R. 28 Cal. 339.
7. King-Emperor *v.* Malhar Martand Kulkarni, I.L.R. 26 Bom. 193 : Bom. L.R. 694.

is no corroborative evidence is not conclusive in favour of the accused.[1] The Courts of this country should follow the English practice as to the amount of corroboration required to support the evidence of an accomplice.[2] His testimony should be confirmed, not only as to the circumstances of the case, but also to the identity of the person.[3]

Minimum corroboration.

The minimum corroboration of the evidence of an accomplice is evidence of at least one material fact pointing to the guilt of the accused person.[4]

Standard of proof.

It is very difficult to vary the standard of proof required in the case of various approvers.[5]

When approver changes his previous statement.

Where an approver changes his statement some very strong corroboration would be necessary to accept his previous version as true.[6]

When the accomplice was acting under constraint, the corroboration necessary to establish his credit will be less than if his complicity in the offence had been voluntary and spontaneous.[7] The law has been laid down in this sense by *Deo Nandan Prasad* v. *Emperor*,[8] and *Emperor* v. *C.E. Ring*.[9]

Rule.

60. Corroboration on what particulars needed—Identity of accused.—The corroborative evidence must be such as to lend assurance to the mind of the Court that the evidence of the approver could be safely relied on.[10]

The corroboration should extend to the identity of the accused person.[11] The English cases have been reviewed in *Rex* v. *Baskerville*.[12]

Identity of person and corroboration.

The corroboration must be in some material particular implicating the accused. As was said in *R.* v. *Farler*[13] and *R. Elashee Buksh*,[14] if the confirmation without identifying the persons, is no corroboration at all.

An accomplice must be corroborated by independent evidence as to the identify of every person whom he impeaches.[15] Corroboration of his evidence as to one prisoner would not

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1. *Per* Cave, J., in Mennier's case, L.R. (1894) 2 Q.B. 418, cited in 2 Bom. L.R. 610 at p. 611.
2. 3 B.H.C.R. 57.
3. *Ibid.* at p. 58 ; *see* also R. Stubbs, 25 Law J. Mag. Cas. 16, cited in 3 B.H.C.R. 57 at p. 58.
4. Emperor *v.* Jamuna Singh, A.I.R. 1947 Pat. 305 at p. 313.
5. Wazir Chand *v.* Emperor, A.I.R. 1928 Lah. 30 at p. 32 ; *see* also Kailsah Missir *v.* Emperor, A.I.R. 1931 Pat. 105 at p. 106.
6. Faqir Singh *v.* Emperor, A.I.R. 1939 Lah. 429 at p. 431.
7. Muhammad Panch *v.* Emperor, A.I.R. 1934 Sindh 78 (2) at p. 81.
8. I.L.R. 33 Cal. 649.
9. A.I.R. 1929 Bom. 296.
10. *See* Sarwan Singh Rattan Singh *v.* State of Punjab, A.I.R. 1957 S.C. 637 and State of Bihar *v.* Basawan Singh, A.I.R. 1958 S.C. 500 ; V. Govindrajalu *v.* State of Mysore, A.I.R. 1962 Mys. 275 at p. 276.
11. R. *v.* Ram Saran, I.L.R. 8 All. 306 ; *see* Nitai Chandra Janna *v.* Emperor, A.I.R. 1937 Cal. 438; Rebati Mohan *v.* Emperor, A.I.R. 1929 Cal. 57 ; Daulat *v.* Emperor, A.I.R. 1930 Nag. 97 at p. 107 ; Ratta Dhanuk *v.* Emperor, A.I.R. 1938 Pat. 630 at p. 631 ; Khadim *v.* Emperor, A.I.R. 1937 Sind 162.
12. (1916) 2 K.B. 658 : 86 L.J.K.B. 28 : 60 S.J. 696 : 24 Cox. C.C. 524 : 80 J.P. 446 : 115 : L.T. 453.
13. 8 C. & P. 106.
14. (1866) 5 W.R. (Cr.) 80 : B.L.R. Sup., Vol. 459 (F.B.).
15. Queen-Empress *v.* Krishnabhat, I.L.R. 10 Bom. 320 : 11 B.H.C. 196 ; Reg. *v.* Budhu Nanku, 1 Bom. 475 : 1 A.L.J. 110.

justify his evidence against another being accepted without corroboration.[1] "There must be a corroboration as to the particular prisoner".[2] It is when the accomplice comes to implicate a particular person that his evidence should be accepted with the greatest caution.[3]

One accomplice cannot corroborate another.

One accomplice cannot corroborate another. The case of the each of the accused must be taken on its merits and independent corroborative testimony must be sought for in every instance.

Supreme Court on corroborative evidence relating to identity of an accused.

The moment there is corroborative evidence which connects or tends to connect an accused with the crime such corroborative evidence relates to the identity of the accused in connexion with that crime. It is the approver's evidence which is the direct evidence of the crime.[4]

Corroboration of accomplice evidence in material particulars.

In practice, an accomplice must be corroborated in material particulars before the accused can be convicted. The most authoritative case is *Rex* v. *Baskerville*,[5] wherein Lord Reading quoted with approval the dictum of Mulla, J., in *Reg.* v. *Mullins*.[6]

Rex v. *Baskerville*[7] has been repeatedly followed in India.[8]

It is upon the question of the identity of the accused persons as participators in the occurrence that the corrboration of the approver's story requires most careful investigation.[9]

So far as cases of individual accused are concerned, it is settled law that corroboration is required connecting them individually with the actual commission of the offence.[10]

61. Departmental enquiry.—Technical rules relating to the sufficiency of evidence do not apply to departmental enquiry ; the enquiry officers, if they so choose, can act on the basis of uncorroborated testimony of accomplices or partisan witnesses.[11]

Duty of the Judge in criminal trials.

Conviction based on sole evidence of approver.

It is for the Judge to determine whether there is any evidence that does not corroborate the story of the approver so far as the complicity of the accused is concerned. There is no rule of law in India which prevents a Court convicting on the sole evidence of an approver, but adopting the practice which has for many years been followed in England no Court in this country will convict an accused person upon such evidence unless it is corroborated by some independent testimony. This rule of practice has now become in India, though possibly not in England, as binding upon the Courts as rule of law.

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1. Queen-Empress *v.* Baldeo, I.L.R. 8 All. 509 at p. 512.
2. Dicta of Lord Abinger, cited in Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306 at p. 311.
3. Queen-Empress *v.* Bepin Biswas, I.L.R. 10 Cal. 970 at p. 973.
4. Jnanendra Nath Ghose *v.* State of West Bengal, A.I.R. 1959 S.C. 1199 at p. 1202 : (1960) 2 S.C.A. 180 : (1960) 1 S.C.R. 126 : (1960) A.W.R. 8.
5. (1916) 2 K.B. 658 : 86 L.J.K.B. 28 : 115 L.T. 453 ; 80 J.P. 446 : 25 Cox. C.C. 524 : 60 S.J. 996.
6. (1848) 3 Cox. C.C. 526.
7. (1916) 2 K.B. 658 : 86 L.J.K.B. 28 : 115 L.T. 458 : 80 J.P. 446 : 25 Cox. C.C. 524 : 60 S.J. 696.
8. Safdar Ali Shah *v.* Emperor, A.I.R. 1941 Lah. 82 at p. 85.
9. Manohar Mandal *v.* Emperor, A.I.R. 1930 Cal. 430 at p. 432.
10. Ranbir Singh *v.* Emperor, A.I.R. 1932 Lah. 204 at p. 207.
11. Amar Nath *v.* Emperor, A.I.R. 1931 Lah. 406 at p. 407.

Rules to accomplice evidence.

The rule as to accomplice evidence is the same here as in England. Such evidence must be confirmed not only as to the circumstances of the crime but also as to the indentity of the prisoners. This corroboration need not be by direct evidence that an accused committed the crime and it is sufficient if there is circumstantial evidence of his connexion with the crime.[1]

What then is required of the Judge in a case in which accomplice testimony is corroboated in respect of one or some accused but not in respect of all? This question was considered in *Rex* v. *Baskerville*,[2] and the learned Judges signified at page 669 their agreement with the following statement of law by Alderson, B., in *Regina* v. *Jenkin*[3] :

> "Where there is one witness of bad character giving evidence against both prisoners a confrmation of his testimony with regard to one, is no confirmation of his testimony as to the other..."

Corroboration ought to consist of some circumstance that affects the identity of the person accused. One has always to be careful lest the names of the individual accused are introduced into the texture of a story the outline of which is true enough.

Corroboration need not even prove accused's guilt.

It is not a question of asking for corroboration of every act ascribed to the conspirator. It is sufficient if in some circumstance there is independent implication.[4]

Danger in acting on accomplice's evidence.

It is also established by authority that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The real danger of acting upon an accomplice's evidence is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused. The principle has been clearly stated by the Judicial Committee in *Bhubani Sahu* v. *King*.[5] To the same effect is the decision of the Judicial Committee in *Tumahale Berang* v. *King*.[6]

Safeguard against risk of condemning the innocent.

Corroboration must bring the crime home to the accused.

"You must show something that goes to bring the matter home to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation of him as will entitle his evidence to credit, so as to affect other person".[7] The corroborating evidence must go to fix the guilt on the particular person.[8]

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1. D. Made Gowd *v.* State of Mysore, A.I.R. 1966 Mys. 220 at p. 224 : (1965) 2 Mys. L.J. 490.
2. (1916) 2 K.B. 658 : 86 L.J.K.B. 28 : 80 J.P. 446 : 60 S.J. 696 : 115 L.T. 453.
3. (1843) 1 Cox. C.C. 177.
4. Ambica Charan Roy *v.* Emperor, A.I.R. 1931 Cal. 697 at p. 702 (S.B.).
5. A.I.R. 1949 P.C. 257 : 50 Cr. L.J. 872 : 76 I.A. 147 : 1949 A.L.J. 283 : 51 Bom. L.R. 955 : 84 C.L.J. 146 : 53 C.W.N. 609.
6. (1949) A.C. 253 ; *see* also Kunj Behari Banka *v.* State, A.I.R. 1951 Pat. 84 at pp. 85-86.
7. *Per* Williams, J., in Rex *v.* Weeb, 6 C. & P. 595 cited in Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at pp. 286, 287.
8. Rex. *v.* Wilkins, 7 C. & P. 272 cited in King-Emperor *v.* Mohiuddin Sahib, I.L.R. 25 Mad. 143 at p. 147.

62. Corroboration on what particulars needed—Existence of crime.—Not only must there be corroboration as to the persons spoken of by an accomplice, but, what is more important still is, that there must be, as to the *corpus delicti*, some *prima facie* evidence pointing the same way to make the evidence of an accomplice satisfactory.[1]

Corroboration merely as to manner of committing offence.

The confirmation should be as to some matter which goes to connect the prisoner with the charge.[2] "A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without indentifying the persons, that is, really no confirmation at all."[3]

All facts should be taken together.

It is impossible to deal with the point by taking separately each single fact stated. The whole of the facts taken together form a strong body of circumstantial evidence in confirmation.[4]

63. Corroboration must proceed from independent source.—The evidence requisite for the corroboration of the testimony of an accomplice must proceed from an independent and reliable source; and previous statements made by the accomplice himself, are insufficient for such corroboration.[5] There must be some corroboration independent of the accomplice, or of the accomplice and the co-confessing prisoner.[6]

On independent corroboration.

It is, however, clear (*i*) that it is not necessary that there should be independent confirmation of every material circumstances ; (*ii*) the independent evidence must in some way reasonably connect the accused with the crime ; (*iii*) the corroboration must come from independent sources ; (*iv*) the corroboration need not be direct evidence that the accused committed the crime.[7] The corroborative evidence shall implicate the prisoner in the same way as the story of the approver does.[8]

Independent corroboration does not mean a corroboration of every detail of what the witnesses of the raiding party have stated and all that is required even in respect of evidence of an accomplice is that there must be some additional evidence rendering it probable that the story of the accomplice is true and it is reasonably safe to act upon it. Corroboration need not be direct evidence and even circumstantial evidence in that regard would be sufficient.[9]

64. Correspondence, if corroboration.— Exact correspondence, of several statements made by an approver is not corroborative evidence.[10]

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1. Trial of Colonel Despard (28 State Trials, 346), cited in Reg. *v.* Budhu Nanku, I.L.R. 1 Bom. 471 at p. 476 (*note*) ; *see* also Bijoy Kumar Mahapatra *v.* State, 1982 Cr. L.J. 2162 (Orissa).
2. R. *v.* Dyke, 8 C. & P. 261 ; R. *v.* Addis 6 C. & P. 388, cited in Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306 at p. 311.
3. *Per* Lord Abinger, cited in Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306 at pp. 311-12.
4. Monnier's case, L.R. (1894) 2 Q.B. 418, cited in 2 Bom. L.R. 610 at p. 611.
5. 11 B.H.C.R. 196 ; Queen *v.* Baijoo Chowdhree, 25 W.R. (Cr.) 43 ; but *see* Muthumara Swami Pillai *v.* King-Emperor, I.L.R. 35 Mad. 397 : 141 I.C. 896 : 1912 M.W.N. 549 : 12 M.L.T. 1.
6. Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306 ; *see* also Checko Thomas *v.* State, A.I.R. 1952 T.C. 155 at p. 157 : A.L.J. 110.
7. Shamsher Bahadur Saxena *v.* State of Bihar, A.I.R. 1956 Pat. 404 at p. 412 ; Ramanlal Mohanlal Pandya *v.* State of Bombay, A.I.R. 1960 S.C. 916 ; Jnanendra Nath Ghose *v.* State of West Bengal, A.I.R. 1959 S.C. 1199; *In re* Chinnasami, A.I.R. 1960 Mad. 462 ; Autar Singh *v.* State, A.I.R. 960 Punj. 364 ; State of Bihar *v.* Basawan Singh, A.I.R. 1958 S.C. 500 ; Kesar Singh *v.* State, A.I.R. 1954 Punj. 286 ; Padmaraja Shetty, *In re*, A.I.R. 1951 Mad. 746.
8. Queen *v.* Bykunt Nath Banerjee, 10 W.R. (Cr.) 17.
9. Ramnarayan Patnaik *v.* State, 1988 Cr. L.J. 172 at pp. 173, 174 (Orissa).
10. Queen-Empress *v.* Bepin Biswas, I.L.R. 10 Cal. 970 : 9 Ind. Jur. 115.

65. What amounts to sufficient corroboration or not.—In a trial for murder, it was held that there was not sufficient corroboration of the statements of the accomplice or of the co-confessing prisoner.[1] In a case where certain persons were charged with the murder of a certain person it was held that there was sufficient corroboration of the approver's evidence.[2] As to the corroboration of the evidence of an approover, laid down in a case of dacoity under Sec. 400 of the Penal Code.[3]

66. Previous statements of an accomplice.—In *Reg.* v. *Malapabin Kapana*,[4] it was held that previous statements of an accomplice cannot be regarded as corroborative of evidence given by him at the trial.[5] There are also other decisions,[6] and statements in text-books to the same effect. The majority of the Madras High Court did not acceede to this proposition of law.[7]

There can be no doubt that under Sec. 157, Evidence Act previous statement is legally admissible in India as corroboration. The weight to be attached to it is, of course another matter, there is no rule of thumb in these cases. It all depends on the facts of the case.[8]

67. Evidence of person charged with offence and discharged for want of evidence.—There is no law or principle which prevents a person, who has been discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution on the ground that he is an accomplice.[9]

68. Evidence of a witness illegally pardoned by the police.—During the course of a police investigation the police discharged one of the arrested persons and made him a witness. At the trial he gave evidence against his accomplices. *Held* that such evidence was admissible, though he had been illegally discharged by the police.[10]

69. Police telling accused that he would get a pardon if he would make a confession.—The confession of an accused made before a Magistrate cannot be used in evidence against him at his trial, when the police told him that he would get a pardon if he would make a confession and he made that confession under the hope of obtaining pardon.[11]

Immunity from prosecution guaranteed under police assurance not recognized.

Neither the Criminal Procedure Code nor the Prevention of Corruption Act recognizes the immunity from prosectuion guaranteed under these assurances. The grant of pardon is not in the discretion of police authorities ; it is a judicial function. Section 337 (Sec. 306 new) of the Code provides for tender of pardon to accomplices in certain cases. Section 8 of the Prevention of Corruption Act provides the only statutory immunity outside judicial pardon.

It cannot be gainsaid that assurances outside the law which cannot grant immunity under the law are likely to interfere in the proper discharge of duties

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1. Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306.
2. King- Emperor *v.* Mohiuddin Sahib, I.L.R. 25 Mad. 143.
3. *See* Queen *v.* Kalla Chand Doss, 11 W.R. (Cr.) 21.
4. (1874) 11 B.—C.R. 196.
5. *See* Queen-Empress *v.* Bepin Biswas, I.L.R. 10 Cal. 970.
6. *In re* S. Jasudas Appadurai Pillai, A.I.R. 1945 Mad. 358. Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306 ; Baji Krishna, *In re*. 6 Bom. L.R. 481.
7. King-Emperor *v.* Nilakanth, I.L.R. 35 Mad. 247 at p. 271.
8. Rameshwar *v.* State of Rajasthan, A.I.R. 1952 S.C. 54 at p. 58.
9. Queen *v.* Behary Lall Bose, 7 W.R. (Cr.) 44.
10. Queen-Empress *v.* Mona Puna, I.L.R. 16 Bom. 661.
11. Chacko Thomas *v.* State, 1 A.L.J. 110.

by public servants. The danger of self-inclupatory statements they might have made is that the man getting fixed and pinned to a statement may readily seek further immunity by voluntarily accusing others if cornered. A statement so obtained can also vitiate any subsequent statement recorded under Sec. 164, Cr. P.C. In *Zahiruddin* v. *Emperor*,[1] the Judicial Committee marked that the value of giving evidence may be seriously impaired as a consequence of the contravention of the statutory safeguard under Sec. 162 Cr. P.C.

Irregularities and illegalities in the proceedings.

Of course, irregularities and illegalities during an investigation do not necessarily vitiate the entire proceedings. If without any judicially recognized amnesty a person comes forward and gives evidence, no doubt it is his look out. He is an accomplice and his evidence will be looked with suspicion as tainted.[2]

70. Magistrate erroneously treating witness as an accomplice—Effect.—Where a Magistrate erroneously treated a witness as an accomplice, his evidence would not require corroboration.[3]

71. Accomplice to whom Local Government has made a promise not to prosecute.—An accomplice to whom Local Government has made a promise not to prosecute and by whom the promise was accepted, after the commencement of the trial, is not a competent witness.[4]

72. Co-accused not tendered pardon, not a competent witness.—It is undisputed that no pardon was tendered to Chetsingh (PW 1) before examining him as a witness. Chetsingh (PW 1) was not examined as an approver. In this view (PW 1) a co-accused who was committed along with the accused-appellant was not a competent witness in the trial. In this respect the Court can do no better than referring to the observations of their Lordships of the Supreme Court in *Lt. Commander Pascal Fernandes* v. *State of Maharashtra*.[5]

> "The English law and practice is (*a*) to omit the proposed approver from the indictment, or (*b*) to take his plea of guilty or arraignment, or (*c*) to offer no evidence and permit his acquittal, or (*d*) to enter a *nolle prosequi*. In our criminal jurisdiction there is a tender of a pardon on condition of full disclosure. Section 8 (2) of the Criminal Law Amendment Act is enabling. Without recourse to it an accused person cannot be examined as a witness in the same case against another accused."[6]

73. Confessions, admissibility of corroboration.—Where the statements ascribed to the accused are in general terms they should not be accepted as sufficient to corroborate the evidence of the approver.[7] Confessions of co-prisoners cannot be held to be sufficient corroboration of the testimony of an approver.[8]

74. Co-accused's confession.—As pointed out by the Supreme Court in *Nathu* v. *State of Uttar Pradesh*,[9] confessions of co-accused are not evidence but they can be referred to as lending some assurance to the verdict.[10]

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1. 74 I.A. 80 at pp. 86, 87 : A.I.R. 1947 P.C. 75.
2. P. Sirajuddin *v.* Government of Madras, A.I.R. 1968 Mad. 117 at pp. 130-31 : 1968 M.L.J. (Cr.) 313 : I.L.R. (1967) 3 Mad. 659.
3. 5 Bom. H.C.r. (Cr.) 85.
4. 9 P.R. 1906.
5. A.I.R. 1968 S.C. 594.
6. Chhotelal Mehgu Dhimar *v.* State of Madhya Pradesh, 1978 M.P.L.J. 547 at pp. 552-53.
7. Empress of India *v.* Mohan Lal, I.L.R. 4 All. 46.
8. Reg. *v.* Budhu Nanku, I.L.R. 1 Bom. 475.
9. A.I.R. 1956 S.C. 56.
10. Haroom Haji Abdulla *v.* State of Maharashtra, A.I.R. 1968 S.C. 832 at pp. 836-37 : 70 Bom. L.J. 540 ; State of Orissa, *v.* Susanta Kumar Dey, (1978) 46 C.L.T. 496 at p. 502.

Confession of co-accused cannot be used to corroborate the evidence of an accomplice.[1] That proposition was laid down in *King* v. *Baskerville*[2] and approved in *Mahadeo* v. *King*.[3] The confession of a co-accused could be taken into consideration under Sec. 30, Evidence Act.[4]

In the case of *Rajagopal, In re*,[5] a Full Bench held that the confession of a co-accused can be accepted as corroboration of the approver's evidence. In *Padmaraja Shetty In re*.[6] The learned Judge observed :

On confessional statement.

"We do not think that the learned Judges in *Rajagopal, In re*,[7] meant to lay down that....as a point of law, a confession of a co-accused must be accepted as corroborative evidence of the approver's evidence. It does not affect the rule of practice that the Courts should be loath to accept tainted evidence as a corroboration of an approver's evidence...The same principle should apply even in the case of a confessional statement."

The value of a co-accused's confession as corroborative evidence has been considered by the Lahore High Court in the decision reported in *Sharif* v. *Emperor*.[8]

There will be very many circumstances when the co-accused's confession could be and should be taken into consideration by a Court in finding out the guilt of the accused. In *Emperor* v. *Laxman Jairam*,[9] some of such circumstances have been narrated.

Dealing with the case *In re B.K. Rajagopal*,[10] in which the Court founded a conviction, upon the evidence of an accomplice supported by the confession of a co-accused, it was observed by the Board in *Bhuboni Sahu* v. *King*[11] :

Privy Council's view.

Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused."

Bhuboni's case[12] was referred to in *Kashmira Singh* v. *State of Madhya Pradesh*[13] with approval by the Supreme Court, Bose, J., observed as follows :

".....It follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed."

75. Co-accused turned an approver about 20 months after the occurrence—Value of evidence.—Testimony of the approver requires to be viewed with great caution inasmuch as he is a self-confessed traitor and his earlier

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1. Provincial Government, Central Provinces and Berar *v.* Raghuram Rodaji Maratha, A.I.R. 1942 Nag. 127 at p. 132.
2. 2 K.B. 658 : 86 L.J.K.B. 28 : 115 L.T. 453 : 60 S.J. 696 : 80 J.P. 446 : 25 Cox. C.C. 524.
3. A.I.R. 1936 P.C. 242 : 163 I.C. 681 : 37 Cr. L.J. 914 (P.C.).
4. *See* also Nazir *v.* Emperor, A.I.R. 1933 All. 31 ; Mahadeo *v.* King-Emperor, A.I.R. 1924 Oudh 65 ; Emperor *v.* Maqbool Ahmad Khan, A.I.R. 1932 Oudh 317 ; Daulat *v.* Emperor, A.I.R. 1930 Nag. 97 ; Faquir Singh Sudh Singh *v.* Emperor, A.I.R. 1939 Lah. 429 ; Latafat Hossain Biswas *v.* Emperor, A.I.R. 1928 Cal. 745 ; *In re* Kasaboyina Muttiga, A.I.R. 1958 A.P. 255 ; Bhuboni Sahu *v.* King, A.I.R. 1949 P.C. 257 ; Dhanpati De *v.* Emperor, A.I.R. 1946 Cal. 156.
5. I.L.R. (1944) Mad. 308 : A.I.R. 1944 Mad. 117.
6. A.I.R. 1951 Mad. 746 at pp. 750, 751.
7. A.I.R. 1944 Mad. 117.
8. A.I.R. 1944 Lah. 472 : 46 Cr. L.J. 152.
9. 38 Bom. L.R. 1122.: A.I.R. 1937 Bom. 31.
10. I.L.R. 1944 Mad. 308 : A.I.R. 1944 Mad. 117.
11. A.I.R. 1949 P.C. 257.
12. *Ibid.*
13. A.I.R. 1952 S.C. 159 at p. 161.

statements have been kept back by the prosecution which gives rise to the adverse inference that the earlier statements did not support the prosecution. What is more he has turned an approver about 20 months after the occurence. If therefore, he has implicated appellant for the first time in his statement 20 months later, no reliance can be placed on his evidence.[1]

76. Confessions of co-prisoners when others were absent.—Confessions of co-prisoners are not, as against their fellow prisoners who were not present when the confessions were made, such corroborative evidence of the statement of an approver as would justify the conviction of the other prisoners thereon.[2]

77. Co-accused tried separately.—An accomplice is a competent witness against a co-accused tried separately.[3]

78. Confession of one pleading guilty.—On the trial of more person than one jointly where one of them pleads guilty, he cannot be treated as being jointly tried with the others. A confession by that person cannot, therefore, be taken into consideraton as against such others under Sec. 30, Evidence Act.[4]

79. Self-incriminating statements—Evidence of accomplice, how far binds the witness himself.—There is no rule of law or practice that the self-incriminating portion of the evidence of an accomplice is unworthy of belief unless corroborated.[5] Where an officer was charged with the offence of attempting to receive a bribe from certain persons, who gave evidence for the proseuction and the officer was convicted, in a subsequent charge of those persons with having conspired to bribe the officer, their depositions in the previous case would be admissible against them.[6]

80. Corroboration need not be direct evidence.—It is not necessary that the evidence corroborating the story of an approver or an accomplice should be evidence which directly connects the accused with the offence. But there must be some evidence which tends to show that the story of the approver of accomplice is true in so far as it relates to the accused. A circumstance cannot furnish corroboration of the story of an accomplice against an individual accused if either it has no criminal significance or the circumstance is susceptible of an innocent explanation which the Court accepts as probable.[7] It was laid down in *Rex* v. *Baskerville*,[8] that the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is a merely circumstantial evidence of his connexion with the crime. In the case of *Reg.* v. *Birkett*,[9] the prisoner was indicted for receiving stolen sheep. The presence of the mutton in the prisoner's house was held by the Judge to be a confirmation of the accomplice's evidence.[10] Were the law otherwise "many crimes which are usually committed between accomplices in secret.....could never be brought to justice."[11]

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1. Lalchand *v.* State of Haryana, 1984 Cr. L.J. 164 at p. 168 (S.C.) : A.I.R. 1984 S.C. 226.
2. Queen-Empress *v.* Bepin Biswas, I.L.R. 10 Cal. 970.
3. U.B.R. (1906), Evidence, 3 ; Nga Po Yin *v.* Emperor, 5 Cr. L.J. 300.
4. Queen-Empress *v.* Lakshmayya Pandaram, I.L.R. 22 Mad. 491 : 2 Weir 746.
5. 6 Bom. L.R. 443 at p. 450.
6. Queen-Empress *v.* Samiappa, I.L.R. 15 Mad. 63 : 2 Weir 794.
7. Shankarshet Ramshet Uravane *v.* Emperor, A.I.R. 1933 Bom. 482 at p. 483 : 37 C.W.N. 13.
8. (1916) 2 K.B. 658 : 86 L.J.K.B. 28 : 115 L.T. 453 : 80 J.P. 446 : 60 S.J. 696.
9. (1873) 8 C. & P. 732.
10. Sher Singh *v.* Emperor, A.I.R. 1932 Lah. 621 at p. 623 ; Autar Singh *v.* State, A.I.R. 1960 Punj. 364.
11. Rameshwar *v.* State of Rajasthan, A.I.R. 1952 S.C. 54 at p. 58.

Where corroboration is by circumstantial evidence, it should sufficiently implicate the accused, though it may not be itself sufficient for conviction. A circumstance which has no criminal significance or which is susceptible of explanation is not sufficient corroboration against the accused.[1]

Corroboration by circumstantial evidence.

Corroboration must point indubitably to the identification of the person charged with the particular act which which the direct evidence connects him.[2]

Now, the rule of law is firmly established that in order to sustain the conviction there must be independent corroboration of the testimony of the approver. His testimony ought to be corroborated in some material circumstances, such circumstances connecting and indentifying the accused with the offence with which he is charged.[3] It cannot be held that merely because the approver tells a probable story it is corroborated and that it is corroborated also by mere evidence of motive.[4]

Rule of law.

81. Corroboration by accused person's conduct.—The evidence of an accused person's conduct may be used as corroboration of an approver's story. Authority is found in *R.* v. *Feigenbaum*.[5]

Silence on the part of an accused person which is tantamount to an admission by conduct may, on occasion, amount to corroboration.[6]

82. Rule as to corroboration not of law but a practice.—There are, no doubt, cases in which it has been laid down that an approver's statement need not be corroborated. *See* for instance the *Delhi Conspiracy Case*.[7] On the other hand, in the great majority of cases it has been held that an approver's evidence requires corroboration.[8]

The law of India is the same in this respect as the law of England, and a recent authoritative pronouncement is found in *R.* v. *Baskerville*.[9]

If special circumstances exist whcih render it safe, in an exceptional case to act upon the uncorroborated testimony of an accomplice and upon that alone, the Court will not merely for the reason that the conviction proceeds upon such uncorroborated testimony say that the conviction is illegal. This is the plain meaning of Sec. 133.[10]

It has been rule of the Court not to base a conviction upon the evidence of an accomplice and that evidence alone.

To support a conviction the approver's evidence must be corroborated in material particulars.[11] The rule of practice requiring corroboration of the evidence of an approver is as binding upon the Courts as a rule of law.[12]

Allahabad High Court view.

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1. Debi Dayal *v.* Emperor, A.I.R. 1942 Oudh 435 at p. 437.
2. Kalwa *v.* Emperor, A.I.R. 1926 All. 377 at p. 378 : 24 A.L.J. 410 : 95 I.C. 74.
3. Jiwan Singh *v.* Emperor, A.I.R. 1934 Lah. 23 (2) at p. 24.
4. *In re* Talayari Thota Balija Maddi Subbanna, A.I.R. 1939 Mad. 469 at p. 469 : 49 M.L.W. 544 (1) : 1939 M.W.N. 410.
5. (1919) 1 K.B. 431 : 88 L.J.K.B. 551 : 120 L.T. 572 : 26 Cox. C.C. 387 : 14 Cr. App. R. 1 ; *see* also Chatru Malik *v.* Emperor, *see* a 1928 Lah. 681 at p. 685 : 111 I.C. 435.
6. Tumahole Bereng *v.* King, A.I.R. 1949 P.C. 172 at p. 177 ; Kunj Behari *v.* State; A.I.R. 1951 Pat. 84 at p. 86.
7. Balmokand *v.* Emperor, (1915) 17 P.R. 1915 (Cr.) : 246 Punj. L.R. 1915 ; 28 I.C. 738 : 11 P.W.R. (Cr.) 1915.
8. *See* for instance the Nankana Sahib's case Mahant Narain Das *v.* Emperor, A.I.R. 1922 Lah. 1 : I.L.R. 3 Lah. 144.
9. (1916) 2 K.B. 658 : 86 L.J.K.B. 28 : 60 S.J. 696 : 115 L.T. 453 : 80 J.P. 446 : 25 Cox. C.C. 524; *see* also Wazir Chand *v.* Emperor, A.I.R. 1928 Lah. 30 at p. 31.
10. Nga Aung Pe *v.* Emperor, A.I.R. 1937 Rang. 209 at p. 210.
11. Emperor *v.* Mathuri, A.I.R. 1936 All. 337 at pp. 353-54 : 1936 A.L.J. 518 : I.L.R. 58 All. 695.
12. Bacha Babu *v.* Emperor, A.I.R. 1935 All. 162 at pp. 167 : 155 I.C. 369.

The rule of practice requiring corroboration of approver's testimony cannot be departed from on the ground that the approver had no enmity against the accused.[1]

Neither the personal conduct and antecedents of the principal approver nor absence of the motive on his part to implicate individual accused make the rule as to corroboration inapplicable.[2]

To use the language of the Privy Council in *Mahadeo* v. *King*,[3] it is now virtually a rule of law that corroboration is required and that one accomplice cannot corroborate another.[4]

Corroboration of testimony of an accomplice in material particulars connecting each of the individual accused with the crime is necessary to justify his conviction.[5]

Rule requiring independent corroboration.

The reason underlying the rule of corroboration is, that the testimony of an accomplice is regarded as tainted evidence and it is therefore, considered unsafe to base a conviction on it unless there is independent corroboration forthcoming. On the same principle, corroboration is insited upon the case of the evidence of informers.[6]

83. Mode of weighing accomplice evidence.— In weighing accomplice evidence the Judge should not overlook the position in which the accomplice may stand, and the motives which he may have for stating what is false.[7] If the evidence of the accomplice, although uncorroborated, is true, and establishes the guilt of the prisoner, it is duty of the Judge to commit.[8] Every case as it arises must be decided not on supposed analogies to other cases.[9] There may be cases of an exceptional character in which the accomplice evidence alone convinces a Judge; and if he acts on that conviction a revisional Court ought not to interfere, in the absence of other circumstances showing a want of judicial discretion.[10]

Exceptional cases.

Where an accomplice was confirmed as to the accessories but not as to the principal, the jury were directed to acquit the prisoners.[11]

84. Value of evidence of accomplice.—The evidence of a person who allows himself to be convicted upon his confession made in the hope of being made an approver must be viewed with all the suspicion which ordinarily attaches to the evidence of an accomplice.[12]

Necessity of utmost caution.

The utmost caution is necessary in admitting or using the evidence of an approver. Its evidentiary value depends considerably upon the circumstances under which his evidence is tendered. In *Winsor* v. *Queen*,[13] Blackburn, Mellor and Lush JJ., were of

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1. A.I.R. 1933 Lah. 838.
2. Bimal Pershad *v.* Emperor, A.I.R. 1934 Lah. 583 at p. 585.
3. A.I.R. 1936 P.C. 242 : 163 I.C. 681 : 44 M.L.W. 253 (P.C.).
4. *In re* M.K.T. Bhagavathar, A.I.R. 1946 Mad. 271 at p. 274 : I.L.R. (1946) Mad. 389 : (1946) 1 M.L.J. 42 : 59 L.W. 22 : 1946 M.W.N. 49.
5. Hakam Singh *v.* Emperor, A.I.R. 1929 Lah. 850 at p. 853.
6. Emperor *v.* Kallu, A.I.R. 1937 Oudh 259 at p. 261.
7. Queen-Empress *v.* Gobardhan, I.L.R. 9 All. 528.
8. *Ibid* ; Reg. *v.* Ramaswami Padayachi, I.L.R. 1 Mad. 394 ; (1884) A.W.N. 286 ; Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306.
9. Queen-Empress *v.* Gobardhan, I.L.R. 9 All. 528.
10. *Per* Scott, J., in Queen-Empress *v.* Maganlal and Motilal, I.T.R. 14 Bom. 115.
11. R. *v.* Wells, 1 M. & M. 316 ; Rex *v.* Moores, 7 C. & P. 270, cited in Ramaswami Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at p. 283.
12. Emperor *v.* Komoruddin Sheikh, A.I.R. 1928 Cal. 233 at p. 234.
13. (1866) L.R. 1 Q.B. 289.

opinion that the evidence of an accomplice not tried under the same indictment was admissible, but that the evidence though admissible was tainted and subject to strong observations as to its weight. In *Queen* v. *Payne*,[1] Lord Cockburn stated that it was inconvenient to admit evidence of accomplice.

Where a person is admittedly an accessory after the fact his evidence cannot be put on a higher level than that of an approver.[2]

Testimony of one accomplice as corroborated by the testimony of another accomplice.

To regard the testimony of one accomplice as corroborated by the testimony of another accomplice is to hold that there is corroboration where under law or fact there is none at all.[3]

85. Principal and receiver—Corroboration.— If *A* is charged as a principal and *B* as a receiver a confirmation of accomplice as to the guilt of *A* does not advance the case against *B*.[4]

86. Trial supplemental to that of others—Procedure.—A prisoner, whose trial is supplemental to that of others, is entitled to full and complete investigation of all the facts of the occurrences upon which the charge depends.[5]

87. Evidence of possession of property—Value of.—The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging the person in possession with participation in the murder.[6]

88. Evidence of accessories—Corroboration.—An accessory must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it.[7]

The evidence of accessories after the crime cannot be accepted without corroboration in material particulars by independent witnesses.[8]

It would be very unsafe to accept the solitary evidence of an accessory after the event as proving the guilt of the accused without independent corroboration in material particulars.[9]

89. Value of evidence of a witness not charge-sheeted by the police.—In *Queen-Empress* v. *Mona Puna*[10] it was held that the evidenc of an accomplice who was illegally discharged by the police was admissible. This principle was later affirmed in *Keshav Vasudeo Kortikar* v. *Emperor*,[11] *Narayandas* v. *State*[12] and *Lakshmipat Chorasia* v. *State*.[13] Both in *Banusingh* v. *Emperor*,[14] and *Keshav Vasudeo Kortikar* v. *Emperor*[15] it was said that the value of the evidence of a witness not charge-sheeted by the police was practically nil. It may be said that such evidence

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1. (1872) 1 C.C.R. 349.
2. Kr. Shyam Kumaraw Singh *v.* Emperor, 1941 Oudh 130 at p. 143.
3. Muhammad Usuf Khan *v.* Emperor, A.I.R. 1929 Nag. 215 at p. 218.
4. Rex. *v.* Moores, 7 C. & P. 270.
5. Queen *v.* Mohan Banfar, 22 W.R. (Cr.) at pp. 38, 39.
6. Queen-Empress *v.* Ram Saran, I.L.R. 8 All. 306.
7. Mahadeo *v.* King, A.I.R. 1946 P.C. 242 at p. 246.
8. Brijpal Singh *v.* Emperor, A.I.R. 1936 Oudh 413 at p. 416.
9. Emperor *v.* Kallu, A.I.R. 1937 Oudh 259 at p. 261.
10. I.L.R. 16 Bom. 661.
11. 37 Bom. L.R. 179 : A.I.R. 1935 Bom. 186.
12. (1964) 66 Bom. L.R. 17.
13. (1965) 67 Bom. L.R. 618.
14. I.L.R. 33 Cal. 1353.
15. 37 Bom. L.R. 197 : A.I.R. 1935 Bom. 186.

ought to be received with great caution and may be given more or less weight according to the facts and circumstances of each case.[1]

90. Citing of judicial decisions undesirable.—It is undesirable and indeed improper for the Judge who is charging a jury to invite their attention to the decision of cases reported in law reports. It is the duty of the Judge to the best of his ability to explain to them what the law in his opinion is.[2]

As a matter of principle, it is undesirable that judicial decisions should be cited to a jury. It is the duty of the Judge to lay down to the jury, in words that they can clearly understand, what the law really is.[3]

Where summing up to the jury is *verbatim* reporduction of language used in text books it is indirect misdirection.[4]

91. Judge's charge to jury—Form of charge in case of murder.—In case of murder, it was held that the Judge ought to have gone through the history of the crime as detailed by the accomplice, to point out any independent evidence proving facts showing that the prisoners were or must have been present at, or cognizant of, the murder.[5]

92. Charge in case of dacoity.—For a case where that the Judge omitted to point out to the jury[6] the danger of relying upon the uncorroborated testimony of accomplices, see *Queen* v. *Khotub Sheikh.*[7]

93. Judge's duty to scrutinise accomplice evidence.—A Judge is bound to consider whether there is any corroborating evidence, when the main evidence is of an accomplice character.[8]

94. Omission of Judge to caution jury,* if misdirection.—The omission of the Judge to caution the jury not to accept the evidence of an approver unless corroborated amounts to a misdirection.[9] For a case where the conviction was set aside on the ground of misdirection to jury see *Queen* v. *Nawab Jan.*[10]

95. What amounts to misdirection or not.—Mere misunderstanding, on the part of by-standers in Court, or counsel engaged in a case of expressions used by a Judge in charging a jury*, will not constitute misdirection.[11]

96. Misdirection to jury*—Jurisdiction of High Court to enter into evidence.—When a misdirection by the Sessions Judge is established, the High Court can go into the evidence to satisfy itself whether a different verdict is possible on any view of the case.[12]

97. Necessary for corroboration—Judge's charge to jury.*—It is a rule of prudence and practice that the evidence of an accomplice ought not to be acted

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1. Lakshmandas Chaganblal Bhatia *v.* State, A.I.R. 1968 Bom. 400 at p. 412, 69 Bom. L.R. 808.
2. Janak Singh *v.* Emperor, A.I.R. 1964 Pat. 444 at p. 445. Jury trial has been abolished by Cr. P.C. 1973.
3. Government of Bombay *v.* Sakur, A.I.R. 1947 Bom. 38 at p. 40 (S.B.) : 48 Bom. L.R. 746 : 228 I.C. 251.
4. Anilesh Chandra *v.* State, A.I.R. 1951 Assam 122 at p. 123.
5. Queen *v.* Karoo, Rumnee and Nandoo Khattree, 6 W.R. (Cr.) 44.
6. Jury trial has been omitted in Cr. P.C. 1973.
7. 6 W.R. (Cr.) 17.
8. Ramaswamy Gounden *v.* Emperor, I.L.R. 27 Mad. 271 at pp. 283, 284.
9. Queen-Empress *v.* Arumuga, I.L.R. 12 Mad. 196 at p. 197 ; Lokhono Saha *v.* Emperor, A.I.R. 1943 Pat. 163 at p. 167.
10. 8 W.R. (Cr.) 19.
11. Queen-Empress *v.* Shiv Chunder Mitter, I.L.R. 10 Cal. 1079.
12. Emperor *v.* Edward William Smither, I.L.R. 26 Mad. 1 ; Elahee Buksh, 5 W.R. (Cr.) 80, appr. Ghasiti *v.* Umrao Jan, I.L.R. 21 Cal. 155 ; Ali Fakir *v.* Queen-Empress, I.L.R. 25 Cal. 230.

* Jury trial has been omitted in Cr.P.C. 1973.

upon unless it is corroborated; the Bombay High Court[1] acting upon this rule set aside a conviction which was based on the uncorroborated evidence of accomplices.[2] The uncorroborated testimony of one or more accomplices is sufficient in law to support a conviction.[3] The evidence of accomplices should not be left to the jury without directions and observations from the Judge pointed out to them the danger of trusting of such evidence when it is not corroborated by other evidence.[4] The omission to do so is a ground for setting aside the conviction, when there has been a failure of justice.[5]

Accomplice evidence and direction to jury

A jury must be warned expressly of the danger in accepting the uncorroborated evidence of an accomplice and if the warning is omitted a conviction based upon such uncorroborated evidence must be set aside.[6] It is open to a Judge in charging the jury to express his opinion as to the effect of a certain portion of the evidence.[7]

In a jury trial it is the duty of Judge to point out to the jury the position in law affecting the evidence of an accomplice and to tell them that they may convict, if they choose, on his evidence alone; but that owing to the circumstances in which the evidence is given, it is, generally speaking, very dangerous to act upon it, unless they find corroborative evidence which implicates the accused person. If such a warning has been given and nevertheless the jury choose to convict the accused in the absence of such corroborative evidence, the conviction will not generally be quashed. In case a Judge is sitting without a jury, he must apply the same rule by treating himself as a jury. As was stated by Lord Reading, C.J., in *Rex* v. *Baskerville*,[8] this rule of practice has become virtually equivalent to a rule of law. If the corroborative evidence against an accused is not sufficient to eliminate the danger of a conviction upon the evidence of an approver his conviction must be set aside.[9]

Duty of the Judge to tell the jury about the evidence of an accomplice.

A direction to the jury to rely upon the evidence of the approver only if after considering the other evidence on the record there is sufficient to corroborate his evidence and to satisfy them that they can rely upon his evidence as the basis of their verdict does not amount to misdirection.[10]

The *locus classicus* of the law of approver's evidence is the case in *Rex* v. *Baskerville*,[11] in which Lord Reading, C.J., delivered the considered judgment of the Court of Criminal Appeal, and it would be helpful to quote at length from that case because of the distinguished nature of the authority :

Law of approver's evidence.

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law.[12] But it has long been a rule of practice at common law for

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1. Emperor *v.* Ailisab, A.I.R. 1933 Bom. 24 : 141 I.C. 347 : 34 Cr. L.J. 136 : 34 Bom. L.R. 1453.
2. Mataprasad Shivharak *v.* Emperor, A.I.R. 1943 Bom. 74 at p. 75 : 45 L.R. 64 : 205 I.C. 411.
3. Elahee Buksh, B.L.R. (Sup. Vol.) 459 ; 5 W.R. (Cr.) 80 ; 3 B.L.R. (F.B.) 2 (note) ; Queen *v.* Chutterdharee Singh, 5 W.R. (Cr.) 59.
4. *Ibid.*
5. *Ibid;* but; *see* also 6 B.H.C. (Cr.) 57.
6. Rattan Dhanuk *v.* Emperor, A.I.R. 1928 Pat. 630 at p. 631.
7. Queen-Empress *v.* Bepin Biswas, I.L.R. 10 Cal. 970 : 9 Ind. Jur. 115.
8. (1916) 2 K.B. 658 : 86 L.J.K.B. 28.
9. Shibadas Daw *v.* Emperor, A.I.R. 1934 Cal. 114 at p. 116 : 37 C.W.N. 934.
10. Khadim *v.* Emperor, A.I.R. 1937 Sind 162 at p. 166.
11. (1916) 2 K.B. 658 : 86 L.J. K.B. 28 : 115 L.T. 453 : 80 J.P. 446 : 60 S.J. 696 : 25 Cox. C.C. 524.
12. *See* Rex *v.* Atwood, (1788) 1 Leach 464.

the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the Judge, to advice them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence.[1] In the absence of such a warning by the Judge, the conviction must be quashed.[2] If after the proper caution by the Judge the jury nevertheless convicted the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. But this Court in the exercise of its powers, will quash a conviction if in this Court thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence."[3]

The learned Lord Chief Justice then deals with the question as to the nature of the corroborative evidence required. He says :

".....What is required is some additoinal evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon...it". In *Rex* v. *Birkett*,[4] the Judges were of opinion that an accomplice did not require confirmation as to the person he charged if he was confirmed as to the particulars of his story. There are other cases where it has been held that a conviction on such evidence could not be quashed by the Court.[5] There are other cases where it has been held that on such evidence the case cannot be withdrawn from the Jury[6]. The better opinion of the law upon this point is that stated in *Rex* v. *Francis Stubbs*[7] by Parke, B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner....In *Rex* v. *Wilkes*,[8] Alderson, B., said : "The confirmation which I always advice juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged...In *Rex* v. *Farler*,[9] Lord Abinger, C.B., said : ...corroboration ought to consist in some circumstance that affects the identity of the party accused...In *Rex* v. *Dyke*[10] Gurney, B., said : ...the confirmation should be as to some matter which goes to connect the prisoner with the transaction." In *Reg.* v. *Birkett*,[11] the prisoner was indicted for receiving stolen sheep. The evidence consisted of the statement of an accomplice, and to confirm it, it was proved that a quantity of mutton corresponding in size with the sheep stolen was found in prisoner's house. Patterson, J., said : 'that I think is such a confirmation of the accomplice's evidence as I must leave to the jury.' These cases lead to the view, expressed later by Parke, B., in *Reg.* v. *Francis Stubbs*.[12]

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1. Reg. *v.* Francis Stubbs, (1855) Dears 555 : 25 L.J.M.C. 16 : 1 Jur. (N.S.) 1115 : 4 W.R. 85 : 7 Cox. C.C. 48 and *In re* Meunier, (1894) 2 Q.B. 415 : 63 L.J.M.C. 198 : 10 R. 400 : 71 L.T. 403 : 42 W.R. 637 : 18 Cox. C.C. 15.
2. Rex *v.* Tate, (1808) 2 K.B. 680 : 77 L.J. K.B. 1043 : 99 L.T. 620 : 72 J.P. 391 : 21 Cox. C.C. 693 : 52 S.J. 699.
3. Court of Criminal Appeal Act, 1907, Sec. 4, sub-section (1).
4. (1813) R. & R. 251.
5. Rex. *v.* Atwood, (1788) 1 Leach 464 ; Rex. *v.* Jones, (1809) 2 Camp. 131 : 11 R.R. 680.
6. Rex. *v.* Hastings, (1835) 7 C. & P. 152 ; Reg. *v.* Andrews, (1843) 1 Cox. C.C. 183 ; Reg. *v.* Avery, (1843) 1 Cox. C.C. 206.
7. (1855) Dears 555 : 25 L.J.M.C. 16 : 1 Jur. (N.S.) 1115 : 4 W.R 85 : 7 Cox. C.C. 48.
8. (1836) 7 C. & P. 272.
9. (1837) 8 C. & P. 106 at p. 107.
10. (1837) 8 C. & P. 261.
11. (1837) 8 C. & P. 732.
12. (1855) Dears 555 : 25 L.J.M.C. 16 : 1 Jur. (N.S.) 1115 : 4 W.R. 85 : Cox. C.C. 48.

..."It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg.* v. *Birkett*.[1]

134. Number of witnesses.—No particular number of witnesses shall in any case be required for the proof of any fact.

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1. Principle and scope of the section.—In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Sec. 134. The section enshrines the well-recognized maxim that "evidence has to be weighed and not counted". If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime would go unpunished. It is here that the discretion of the presiding Judge comes into play. It is a sound and well established rule of law that the Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact.

Evidence to be weighed and not counted.

Discretion of Judge.

Court concerned with quality not quantity of evidence.

The provisions contained in Sec. 134 of the Indian Evidence Act are founded on the principle that evidence has to be weighed and not counted. It should be remembered that plurality of evidence is only a rule of prudence and not an inflexible requirement of law. The necessity of plurality crops up, in those cases where evidence of a solitary witness is not wholly reliable and where it is, as is the case here, then in view of the provisions contained in Sec. 134 of the Indian Evidence Act, the testimony of a solitary witness is sufficient to convict an accused.[2]

The law does not want over-burdening of the record by producing evidence. If the witnesses who have already been examined can be believed, the case cannot be thrown out on the ground that some other witnesses who were on the spot and witnessed the incident were not examined.[3]

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1. (1837)) 8 C. & P. 732.
2. **State of Maharashtra** *v.* **Raju Dadaba Borge, 2001 Cr.L.J. 3638 at p. 3643 (Bom.).**
3. Ram Gulam *v.* State, 1988 All. L.J. 698 at p. 699.

It is not the quantity of the evidence, but the quality of the same, which is to be looked into and the evidence has to be read as a whole.[1]

For proving a particular fact, in view of the provisions of Sec. 134 of the Evidence Act, plurality of evidence is not required. It is the quality of evidence that counts and not the number of witnesses examined in a particular case.[2]

Exceptions to the reliance of single testimony.

Law does not require a plurality of witnesses and a conviction can undoubtedly be based on the testimony of a single witness, provided that the evidence of that witness is trustworthy. Furthermore, Sec. 134 of the Indian Evidence Act itself clearly states that no particular number of witnesses shall in any case be required for the proof of any fact. In *Public Prosecutor* v. *Subban Chettiar*,[3] it was observed as follows :

> "Section 134 of the Evidence Act makes it clear that any fact could be proved even by a single witness. There is a recent trend in case of this type [offence under Secs. 7 (1) and 16(1) read with Sec. 2 (1) (*a*) and (*b*) of the Prevention of Food Adulteration Act] and similar cases that the attesting witnesses always turn hostile and by reason of the attesting witnesses turning hostile, there is a tendency on the part of the Courts below to disbelieve the evidence of the Food Inspector. This trend is really deplorable and the Courts below would do well to keep Sec. 134 in view and then appreciate the evidence of the Food Inspector by that standard laid down in Sec. 134 of the Evidence Act."

The Court is in respectful agreement with those observations.[4]

Section 134 of the Evidence Act, says that no particular number of witness shall, in any case, be required for the proof of any fact. The Apex Court in the case of *Vadivelu Thewar* v. *State of Madras*,[5] has held that there is no bar for covicting the accused person on the evidence of sole witness, if the evidence of the sole witness is wholly trustworthy. The Apex Court has categorised such evidence in three categories *i.e.* (*i*) wholly reliable (*ii*) wholly unrealiable and (*iii*) neither wholly reliable nor wholly unreliable and has held that in case of category one, there is no difficulty in convicting the accused person. Similarly there is no difficulty in acquitting the accused in case of second category or evidence. The difficulty in case of evidence of third category. In case of evidence of third category, there would be need of corroboration of such evidence.[6]

There is no rule of law that the uncorroborated testimony of one witness cannot be accepted. If there is any such rule, it is a rule of prudence, and whether that such evidence should be accepted or not will depend on the circumstances of each case.[7] The evidence of one witness if believed, is sufficient, according to the law of this country, to establish any fact to which the witness speaks directly.[8]

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1. Ramakant Rajmangal Yadav *v.* Rammilan Vijay, 1988 Lab. I.C. 296 at p. 301 (Bom.).
2. Gotilal Runwa Satnami *v.* State of Madhya Pradesh, 1988 M.P.L.J. 89 at p. 92.
3. (1970) M.L.J. (Cri.) 281.
4. State *v.* Marappan, (1980) 24 M.L.J. 256 at pp. 257-258.
5. A.I.R. 1957 S.C. 614 : 1957 S.C.A. 798 : 1957 S.C.J. 527 : 1957 S.C.R. 981 : 1957 A.L.J. 898 : 1957 A.W.R. 640 : (1957) 2 M.L.J. (S.C.) 69.
6. **State of Bihar *v.* Kali Das Manjhi, (2001) 2 B.L.J.R. 1090 at pp. 1092-93 (Pat.).**
7. Bankim Chandra Mukherji *v.* State of Bihar, A.I.R. 1956 Pat. 384 at p. 397.
8. Rajah Prosonuo Narain Deb *v.* Romonee Dossee, 10 W.R. 236; *see* also Pravakar Behma *v.* State of Orissa, (1984) 58 C.L.T. 42.

Thus evidence of a single witness is sufficient to sustain and may legally be made the sole basis for a conviction, the relevant Sec. 134 having enshrined the well-recognized maxim that "evidence has to be weighed and not counted." Though the Legislature has placed no jurisdictional limitation on the power of a Judge to act on the sole testimony of a single witness, even though uncorroborated, the Judges themselves have from time to time evolved some rules and guidelines of circumspection as to when such evidence can be or cannot be acted upon without corroboration.[1]

Application of *unus nullus* rule of English law.

The *unus nullus* rule of English law to the effect that one is equal to none, has been done away with by Sec. 134, Indian Evidence Act, which lays down the general rule applicable to all cases. Despite the universal nature of the provisions of Sec. 134, Indian Evidence Act, there are certain classes of cases in which from the very nature of those cases Courts in India have followed the said English rule as a rule of caution and prudence, e.g. in cases of prejury and in sexual cases. Even in sexual cases it has been held that the said rule of caution and prudence is not of general application.[2] The general rule, based on Sec. 134, Indian Evidence Act, therefore holds good oral evidence be of a tainted character it cannot be believed e. g. where the witness himself was suspected of the crime,[3] or he is bitter enemy of the accused or has apparently a grudge against him[4] or has been demonstrably shown to be a liar.[5]

Court may act on testimony of single witness.

As a general rule, Courts in England also may act on the testimony of a single witness, even though uncorroborated; or upon duly proved documentary evidence without such testimony at all.[6] And where that testimony is unimpeached they should act on it[7] and need not leave its credit to the jury.[8] One credible witness outweighs any number of other witnesses.[9]

The evidence in a criminal trial is to be weighed and not counted and the evidence of a solitary witness can form the basis of an order of conviction, it must be kept in mind that in order that the sole testimony of a witness is made the foundation and the basis for finding a person guilty of the charge, the evidence must be clear, cogent and consistent and should be of an unimpeachable character.[10]

There is a recent trend, in cases of Food Adulteration, on the part of the Courts below to disbelieve the evidence of the Food Inspector. This trend is really deplorable and the Courts below would do well to keep Sec. 134 of the Evidence Act in view and then appreciate the evidence of the Food Inspector by that standard laid in Sec. 134 of the Evidence Act.[11]

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1. Pema Dukpa *v.* State of Sikkim, 1981 Cr.L.J. 276 at p. 278.
2. Budhu Mian *v.* Emperor, A.I.R. 1947 Pat. 416.
3. Narayana Mudaly *v.* Emperor, 12 Cr.L.J. 488.
4. Dalip Singh *v.* Emperor, A.I.R. 1927 Lah. 874 and Ramphal Das *v.* Emperor, A.I.R. 1929 Pat. 705.
5. Puran Singh *v.* Emperor, A.I.R. 1934 Lah. 743 and Hari Krishna *v.* Emperor, I.L.R. 42 Cal. 784 ; Raj Lal Datta *v.* State, A.I.R. 1952 H.P. 1 at p. 2.
6. Wright *v.* Tatham, 5 C. & F. 670; *see* also Ramji Surjya *v.* State of Maharashtra, 1983 Cr.L.J. 1105 (S.C.); contra *see* Sidha Dihury *v.* State, 1982 Cr.L.J. 500 (Orissa).
7. Morrow *v.* Morrow, (1914) A.I.R. 1834 ; Contra *see* Mudhan Payeng *v.* State of Assam, 1982 Cr.L.J. 241 (Gau.)
8. Davis *v.* Hardy, 2 B. & C. 225.
9. The Wega, (1895) P. 156 at p. 159 ; Phipson on *Evidence*, 10th Ed., para. 156 ; *see* also Balvantappa *v.* State of Karnataka, (1982), 1 K.L.C. 108.
10. V. Prabhakar Rao *v.* State of Orissa, (1982) 53 Cut. L.T. 368 at p. 370.
11. Public Prosecutor *v.* Subban Chettiar, (1970) 1 M.L.J. 492 at p. 403.

2. Elementary principle.—It is an elementary principle that a person who is required to answer a charge must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him.[1]

Accused entitled to know testimony supporting accusation.

3. English and Indian law—Difference.—In England two witnesses are required in case of certain treason.[2] In England, corroborative evidence is required in the following cases:

(*i*) cases of perjury where there is only a single opposing witness;[3]

(*ii*) bastardy cases, where the mother is the only witness;[4] and

(*iii*) suits for breaches of promise of marriage.[5]

There is no such rule in this country.[6]

4. Effect of the section.—The effect of this section is that the evidence of a single witness is sufficient proof of any fact,[7] if the Court believes him. The rule of the statute law, which requires two witnesses in a case of treasons, does not in England apply to those treasons which consist in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding of the Queen, where the overt act or acts alleged shall be the assassination of Her Majesty or any attempt to injure in any manner whatsoever her royal person; or to the misprisons of any such treasons; but in all these cases the accused shall be indicted, arraigned, tried and attainted, in the same manner and according to the same course and order of trial, and upon the like evidence as if he stood charged with murder.[8] The offence of "treason" is unknown in the phraseology of Indian law.

Evidence of single witness may be sufficient.

Offence of treason unknown to Indian law.

Section 134 of the Evidence Act, 1872 does not make any clean sweep in adjudging the guilt in a criminal trial. Its application is irresistible only when the evidence does not suffer from any rents and fissures excepting some minor wear and tear. The evidence of prosecution witnesses cannot be treated to be an exception where corroboration could be safely excluded. The non-examination of some of the witnesses in the trial who were examined by one of the prosecution witnesses in course of investigation could not be expelled from consideration. It is passing strange about the non-examination of shop owners, residents of the premises and the persons living in and around the place of occurrence or working for gain. Thus, it was held, that such non-examination of other witnesses had affected the prosecution case beyond repair.[9]

5. No particular number of witnesses are required to prove the case—Quality and not quantity is to be seen.—Section 134 of the Evidence Act provides that no particular number of witnesses shall, in any case be required for

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1. Meenglas Tea Estate *v.* The Workmen, A.I.R. 1963 S.C. 1719 at p. 1720 : (1963) 2 Lah. L.J. 392.
2. *See* Taylor's *Evidence*, Sec. 952.
3. Taylor's *Evidence*, Sec. 959.
4. *Ibid.*, Sec. 964.
5. Taylor's *Evidence*, Sec. 964-A ; 1353.
6. Whitley Stokes, Vol. II, p. 832.
7. A conviction upon the statement of a complainant alone is lawful; Kalam Manda *v.* Bhawani Prasad, 22 W.R. (Cr.) 32 ; Contra *see* Gofur Sheikh *v.* State, 1984 Cr.L.J. 559.
8. *See* 39 & 40 Geo. III, cap. 93; 1 & 2 Geo. IV, cap. 24 ; 5 & 6 Vict., cap. 51.
9. Sambhunath Adhikari *v.* State of W.B., 1993 East. Cr.C. 425 at p. 431 (Cal.); *see* also Marwadi Kishore Paramanand *v.* State of Gujarat, 1994 S.C.C. (Cr.) 1294.

the proof of any fact. This section lays down in clear terms that no particular number, of the witnesses is necessary for proof or disproof of a fact. In any case, the testimony of a single witness, if believed is sufficient to establish a fact. The section follows the maxim that evidence is to be weighed and not counted. There is no rule of law that the uncorroborated testimony of a witness cannot be accepted. The rule, if any, is a rule of prudence and its adoption or not depends on the circumstances of each case. In *Karunakaran* v. *State of Tamil Nadu*,[1] while considering the testimony of solitary witness, their Lordships held :

> When the accused is going to lose his life in such a serious charge it is only necessary that the Court should be circumspect and closely scrutinise the evidence to come to an unhesitating conclusion that he is absolutely reliable.[2]

It is not necessary that all the witnesses should be produced. It the statement of the witnesses examined are believable there is no reason to draw any adverse inference against a party for non-production of any other remaining witness. If there are a large number of witnesses who witnessed an ocurrence a selection of witnesses may always be made.[3]

Solitary witness.

Plurality of evidence is only a rule of prudence, imperative in a given case because the evidence of a solitary witness may not inspire confidence but, it is far from being an inflexible requirement of law. It is not the number of witnesses which is material but, it is the quality of their evidence which is crucial there may be cases where in spite of the ocular account being in the form of a large number of witnesses, the same may not be acceptable to Courts because of the infirmities vitiating it. On the converse, there may be cases and the prevent case is certainly one of them, where the ocular account is of a solitary witness, but it is of such a sterling quality that by itself, is sufficient to sustain the conviction.[4]

Evidentiary value of single eye witness.

Conviction can be recorded on the basis of the statement of single eye witness provided his credibility is not shaken by any adverse circumstances appearing on the record against him and the Court, at the same time, is convinced that he is a truthful witness. The Court will not then insist on corroboration by any other eye-witness particularly as the incident might have occured at a time or place when there was no possibility of any other eye-witness being present. Indeed, the Court insist on the quality, and, not on the quantity of evidence.[5]

6. In order to base a conviction on the evidence of a solitary witness, the evidence must be true and trustworthy.—As provided in Sec. 134 of the Evidence Act, what is important is the quality of the evidence and not its quantity and an order of conviction can, in appropriate cases, be recorded on the evidence of a solitary witness. But it has been a settled principle of appreciation of such evidence that in order to base a conviction thereon, the evidence must be true and trustworthy acceptable and unimpeachable.[6]

There is no doubt that even where there is only a sole eye-witness of a crime, a conviction may be recorded against the accused concerned provided the Court which hears such witness regards him as honest and truthful. But prudence

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1. (1976) 1 S.C.C. 434 : 1976 Cr.L.J. 331.
2. Malik Abdul Salem *v.* State of Orissa, 1985 Cr.L.J. 1871 at p. 1873 ; *see* also Kewala Shankar *v.* State of Uttar Pradesh, 1985 All. L.J. 1216 at p. 1219.
3. Mahipalpur Co-operative Society Ltd. *v.* Smt. Parabhati, A.I.R. 1986 Delhi 94 at pp. 98, 99.
4. Shyamrao Vishnu Patil *v.* State of Maharashtra, 1998 Cr.L.J. 3446 at p. 3449 (Bom.).
5. Kartik Malhar *v.* State of Bihar, 1996 Cr.L.J. 889 at p. 891 (S.C.) : (1996) 1 S.C.C. 614.
6. Dhruba Charan Lenka *v.* State, 1984 Cr.L.J. 769 at p. 771 (Orissa).

required that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly where such witness also happens to be closely related to the deceased and the accused are those against whom some motive or ill will is suggested.[1]

Absence of the investigating officer cannot prejudice the case of the respondents.[2]

It is not necessary in law that more than on witness should be examined to prove a fact but unless the witness is very reliable, the Court would ordinarily look for corroboration.[3]

The Court will not be justified in insisting upon the plurality of witnesses to prove certain fact of the prosecution case when the evidence of one witness is satisfactory and acceptable and free from infirmity for the conviction of the accused.[4]

7. A Public Prosecutor may give up witnesses during trial of avert proliferation.—A Public Prosecutor may give up witnesses during trial to avert proliferation of evidence which could save much time of the Court unless examination of such a witness would achieve some material use. Randeep Rana, if examined, would only have helped in duplication of the same category of evidence as the other two eye-witnesses. The Public Prosecutor, therefore, cannot be blamed for adopting the course of not examining him. If the accused thought that Randeep Rana's evidence would help the defence, it was open to the accused to examine him as a defence witness.[5]

8. Quantity of evidence.—It is not the number of witnesses examined, nor the quantity of evidence adduced by the prosecution that counts. It is the quality that counts. In the instant case, it was contended that the prosecution has not examined all the witnesses named in the first information report except one, nor has the prosecution examined any of the neighbour, but it was not pointed out that any witness better or more creditable has been omitted by the prosecution. The eye-witnesses examined in this case were the best and natural witnesses.[6]

Section 134 of the Evidence Act clearly lays down that no particular number of witnesses shall in any case be required for the proof of any fact. In *Vadivelu Thevar* v. *State of Madras*.[7] their Lordships laid down certain propositions as having been firmly established. Those are :

(1) As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(2) Unless corroboration is insisted upon by statute, Courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon.

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1. Ramji Surjya *v.* State of Maharashtra, 1983 (2) Crimes 237 at pp. 241, 242 (S.C.) : A.I.R. 1983 S.C. 810.
2. Mahipalpur Co-operative Society *v.* Prabhati, A.I.R. 1986 Delhi 94 at p. 98.
3. State of Uttar Pradesh *v.* Satish Chandra, A.I.R. 1986 S.C. 313 at p. 315.
4. S.G. Gundegowda *v.* State, 1996 Cr.L.J. 852 at p. 863 (Kant.).
5. Harpal Singh *v.* Devinder Singh, A.I.R. 1997 S.C. 2914 at p. 2918 : 1997 Cr.L.J. 3561 : (1997) 6 S.C.C. 660 : 1997 S.C.C. (Cr.) 981 : 1997 (2) Crimes 23.
6. Maqsoodan *v.* State of Uttar Pradesh, (1983) 27 M.L.J. (Cr.) 405 at p. 407 : A.I.R. 1983 S.C. 126 : 1982 All. L.J. 1524.
7. A.I.R. 1957 S.C. 614.

(3) Whethere corroboration of the testimony of a single witness is or is not necessary, must depend upon the judicial discretion of the Judge before whom the case comes.[1]

General Rule.

As a general rule a Court can and may act on the testimony of a single witness though uncorroborated. It is left to the discretion of the learned Judge in each case to scan the evidence with great care and caution and find out whether it is wholly reliable. If such a testimony is found by the Court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof.[2]

Judge to scan the evidence in each case.

Testimony of interested partisan and inimical witnesses.

The testimony of interested partisan and inimical witnesses cannot be discarded altogether. The testimony of such witnesses has to pass the test of close and severe scrutiny before such testimony can be safely acted upon.[3]

In case concerning marriage, corroboration is not a matter of law, but a matter of precaution.[4]

Accused legally liable to be convicted on single testimony.

There is no doubt that a person can legally be convicted on the evidence of a solitary witness. The question, however, is whether, in the circumstances of a particular case it would be safe to do so.[5]

Where a criminal Court has to deal with an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable.[6]

Court empowered to convict on single testimony.

Court may convict or may acquit on the testimony of a single witness if it is found to be above reproach or suspicion of interestedness, incompetence or subordination.[7]

Quality of evidence to matter.

It is not the number of witnesses who matter but the quality of evidence. The testimony of a single witness, if believed, is sufficient to establish any fact.[8]

There is no law that to prove a fact any particular number of witnesses should be examined. Evidence has to be weighed and not to be counted. The evidence of a single reliable witness if believed is sufficient to establish any fact. It is the quality of the evidence and not the quantity that matters. It is only when the evidence of the solitary witness is, of suspicious and doubtful character, the Court will insist upon corroboration. However, there is no rule of law that

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1. Rupa Shura *v.* State, 35 Cut. L.T. 175 at pp. 178-79.
2. Kunharu *v.* State of Kerala, 1963 Ker. L.T. 325 at p. 328.
3. Magoar Singh *v.* State of Rajasthan, 1982 Raj. L.W. 513 at p. 516.
4. Lawson *v.* Lawson, (1955) 1 All. E.R. 341 at p. 342 quoted with approval in Bipinchandra *v.* Prabhavati, A.I.R. 1957 S.C. 178 at p. 184 ; Sm. Saptami Sarkar *v.* Jadish Sarkar, 73 C.W.N. 502 at p. 511.
5. State *v.* Karansingh, A.I.R. 1960 M.P. 31 at p. 35.
6. Masalti *v.* State of Uttar Pradesh, A.I.R. 1965 S.C. 202 at p. 210 : 1964 S.C.D. 980 : (1965) 1 S.C.J. 605 : (1964) 1 Andh. L.T. 19.
7. Satya Vir *v.* State, A.I.R. 1958 All. 746 at p. 754.
8. Nemai Mondal *v.* State of West Bengal, A.I.R. 1966 Cal. 194 at p. 197 ; *see* also Food Inspector, Mangalore Municipality *v.* K.S. Raphael, 1981 F.A.J. 657.

uncorroborated testimony of a witness cannot be accepted, it is only a rule of prudence. If any corroboration is necessary, not as a requirement of law, but as a matter of prudence.[1]

Single credible testimony whether or not sufficient to convict person of perjury.

The law before the present Evidence Act was contained in Sec. 28 of Act II of 1855, which declared that the testimony of one witness, if thoroughly credible, is sufficient in proof of a fact, except in cases of treason.[2] In *Queen* v. *Lal Chand Kowrah*,[3] it was laid down with reference to this section of the Old Act, that the uncorroborated evidence of a single witness in a case of perjury was insufficient.[4] But it was held, under the old Act, that the comparison of signatures is one kind of corroboration, which would justify a conviction on the testimony of a single witness in a case of false evidence.[5]

Conviction upon testimony of complainant lawful.

Section 134 of the present Act has taken the place of Act II of 1855, Sec. 28.[6] Hence a conviction upon the statement of a complainant is lawful.[7]

Number of witnesses not fixed.

No fixed number of witnesses is needed to prove a fact.[8] Simply because the statement is of one witness that cannot by itself be a ground for not acting upon that testimony.[9] The Magistrates are fully justified in believing one witness in preference to three others.[10]

The conviction of the accused can be based on the single testimony of a witness provided he is reliable.[11]

Proof of fact to depend on the character of witness.

Proof of a fact would depend upon the character of the witnesses, their competency to speak to that fact.[12]

The contention that it is illegal to convict a man on the evidence of only one witness cannot be supported.[13]

Court to consider weight not quantity of evidence.

It was held in *Sital Din* v. *Emperor*[14], that the opinion of the Court of first instance in respect of sufficiency or insufficiency of evidence will not be questions in revision. It was also held in *Kewal Kishore* v. *Emperor*[15], that it was the weight of the evidence and not the number of witnesses which the Court has to consider. Mere absence of some likely witnesses may not always be looked upon with suspicion particularly

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1. Balavantappa *v.* State of Karnataka, (1982) 1 Kant. L.C. 108 at p. 119.
2. Kulum Mundal *v.* Bhowoni Prosad, 22 W.R. (Cr.) 32 at p. 33.
3. 5 W.R. (Cr.) 23.
4. Queen *v.* Lal Chand Kowrah, 5 W.R. (Cr.) 23, cited in 22 W.R. (Cr.) 32 at p. 33.
5. Queen *v.* Bakhoree Chowbey, 5 W.R. (Cr.) 98.
6. Rajah Prosonno Narain Deb *v.* Romonee Dossee, 10 W.R. 236 at p. 236.
7. Kulum Mundal *v.* Bhowoni Prosad, 22 W.R. (Cr.) 32 at p. 33.
8. Bombay Agarwal Co., Akola *v.* Ramchand Diwanchand, A.I.R. 1953 Nag. 154 at p. 159 : I.L.R. 1952 Nag. 700 ; Hara Lal Das *v.* Pasupati Charan Biswas, A.I.R. 1955 Cal. 226 at p. 228 : 58 C.W.N. 696.
9. Ramnath *v.* Extra Assistant Commissioner, A.I.R. 1952 Nag. 313 at p. 314 : 1952 M.L.J. 417.
10. Gobind Suain *v.* Narain Raoot, 24 W.R. (Cr.) 18.
11. Mahto *v.* State of Madhya Pradesh, 1979 Cr.L.J. 1149 at p. 1151.
12. Madhabananda Mohapatra *v.* Rabindranath Misra, A.I.R. 1954 Orissa 40 at p. 43.
13. Veerappa Goundan *v.* Emperor, A.I.R. 1928 Mad. 1186 at p. 1190 : I.L.R. 51 Mad. 956 : 55 M.L.J. 591 : 28 M.L.W. 575 : (1929) M.W.N. 185.
14. A.I.R. 1925 Oudh 49 : 77 I.C. 302 : 25 Cr.L.J. 366.
15. A.I.R. 1925 Oudh 473 : 89 I.C. 147 : 26 Cr.L.J. 1283 : 29 O.C. 44.

when the evidence on record is by itself sufficient to bring home the charge. In the instant case, it is true that only one such witness namely P.W. 6 was examined Experience tell us that witnesses, even those who have witnessed an occurrence are some times reluctant to get involved and thereby incur the wrath of the assailant or his associates. Thus the charge has been well established by cogent and reliable evidence.[1]

The case of solitary witness who is neither an accomplice nor anything analogous to an accomplice was considered by the Supreme Court in *Vadivelu Thevar* v. *State of Madras*,[2] and it was held that as a general rule a Court may act on the testimony of a single witness, though uncorroborated. It was further held that Courts should not insist on corroboration except in cases where the nature of testimony of the single witness itself requires, as a rule of prudence, that corroboration should be insisted upon.[3]

Supreme Court's view regarding the value of single testimony.

Since under the Evidence Act no particular number of witnesses are required for the proof of any fact, it is a sound and well-established rule of law that quality and not quantity of evidence matters. In each case the Court has to consider whether it can be reasonably satisfied to act even upon the testimony of a single witness for the purpose of convicting a person.[4]

9. Perjury.—In cases of perjury, two witnesses were formerly held necessary in England. But this rule is not now law, though something more than the evidence of a single opposing witness is required; for otherwise there would be only oath against oath, and nothing to turn the scale. The single witness must be corroborated by material and independent circumstances. "But", says Mr. Taylor, "...the corroborative circumstances....need not be such that proof of them, standing alone, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose..."[5] Without any witness directly to disprove what is sworn, circumstances alone, when they exist in a documentary shape, may be sufficient for conviction without further proof. This rule of English law has been followed in India. The most important decision on the subject is that of a Full Bench of the Calcutta High Court in the case of *Queen* v. *Lal Chand Kowrah*.[6] In the case of *Queen* v. *Bakhoree Chowbey*,[7] the accused was charged with giving false evidence and it was held that the corroboration derived from a comparison of signatures, was sufficient to sustain a conviction.

Testimony in cases of perjury.

Corroboration derived from comparison of signature sufficient for conviction.

"If the evidence adduced in proof of the crime of perjury consists," says Mr. Taylor, *"of two opposing statements by the prisoner* and nothing more, he cannot be convicted. For cases may well be conceived in which a person might very honestly swear to a particular fact from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time". The latter portion of the above quotation consists of the remarks of Holroyd, J., in *R.* v. *Jackson*,[8] and may well be borne in mind in India where the law on the subject of contradictory statements is not the same as in

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1. Santosh Mandal *v.* State, 1983 Cr.L.J. 773 at pp. 777 (Cal.).
2. A.I.R. 1957 S.C. 614 : 1957 S.C.R. 981.
3. Ramratan *v.* State of Rajasthan, A.I.R. 1962 S.C. 424 at p. 428.
4. Badri *v.* State of Rajasthan, A.I.R. 1976 S.C. 560 at p. 563.
5. Section 876 ; Sec. 859, 8th Ed.
6. B.L.R. Sup., Vol. 417 (F.B.) : 5 W.R. (Cr.) 23.
7. 5 W.R. (Cr.) 98.
8. 1 Lew. C.C. 270.

England. Two Full Benches of the Calcutta High Court have at different times decided that, where no evidence for the prosecution is offered corroborative of either statement, and the giving intentionally of false evidence is charged on two contradictory depositions a finding in the alternative is sufficient to maintain a conviction,"[1] see to the same effect, *Queen* v. *Palani Chetty*[2] and *Queen* v. *Ross*.[3] The same rule has been laid down by the Allahabad High Court in *Queen Empress* v. *Ghulet*,[4] in which a previous decision of the same Court to the contrary effect[5] was expressly overruled. The Calcutta High Court[6] has adhered to rule laid down in *Queen* v. *Zamiran*[7] and *Queen* v. *Mohammad Hamayun Shah*.[8] The following cases will supply instances of convictions on alternative charges, some of which have been upheld, and others which have been reversed.[9] In *Queen* v. *Nomal*,[10] Norman, J., said: I firmly believe that if a witness could be convicted upon alternative charges of giving false evidence on contradictions of such a character as those supposed to exist in the present case, no native witness of the lower classes, subjected to cross-examination by an adroit and perhaps not over-scrupulous advocate, would be safe.

Finding in alternative sufficient for conviction.

Conviction upon alternative charge of giving false evidence whether lawful.

In *E.* v. *Bal Gangadhar Tilak*,[11] Jenkins, C.J., observed : "According to the Criminal Law of England from which our system is so largely drawn the assignment of perjury must be proved by two witnesses or by one witness and the proof of other material and relevant facts confirming his testimony. The Indian Evidence Act, it is true, does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to the Indian law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law of India."

Corroboration to be necessary to sustain conviction not provided by Sec. 134.

The law of England as to the necessity of calling at least two witnesses to support an assignment of perjury, is not law in India.[12] In the interpretation of the law of India relating to the offence of perjury, the English cases upon it are irrelevant.[13]

English law of two witnesses in perjury not law in India.

10. Dacoity cases.—No hard and fast rule can be laid down that in every dacoity case, if there is identification by only one witness, that identification should never be accepted. Every instance of identification has to be judged on the facts of that particular case and, if there was possibility of a mistaken identification or the statement of the role witness was influenced by some other cause, the accused is entitled, to the benefit of a reasonable doubt.[14]

Identification by one witness.

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1. Queen *v.* Zamiran, 76 W.R. (Cr.) 65 : B.L.R. 521 (F.B.) ; Queen *v.* Mohammad Humayun Shah, 21 W.R. (Cr.) 72 : 13 B.L.R. 324 (F.B.)
2. 4 Mad. H.C.R. 51.
3. 6 Mad. H.C. Rep. 342.
4. I.L.R. 7 All. 44.
5. Queen *v.* Niaz Ali, I.L.R. 5 All. 17.
6. Habibullah *v.* Queen-Empress, I.L.R. 10 Cal. 937.
7. 6 W.R. (Cr.) 65.
8. 21 W.R. (Cr.) 72.
9. Empress *v.* Nathu Sheikh, I.L.R. 10 Cal. 405 ; Queen *v.* Uttar Narain Singh, 8 W.R. (Cr.) 79.
10. 4 B.L.R.A. Cr. 9.
11. I.L.R. 28 Bom. 479.
12. Queen-Empress *v.* Ghulet, I.L.R. 7 All. 44 at p. 50 ; R. *v.* Harris, 5 Barn & Ald. 926 ; Mary Jackson's case, 1 Lewin C.C. 270 ; R. *v.* Wheatland, 8 C. & P. 238 ; R. Hook, D. & R. 606.
13. Queen-Empress *v.* Ghulet, I.L.R. 7 All. 44.
14. Nebi Dasudh *v.* State, A.I.R. 1956 Pat. 39 at p. 40 : 1955 B.L.J.R. 428.

In the instant case, when four witnesses were examined to speak to the occurrence normally non-examination of one more witness is not a serious flaw. But in this case non-examination of Ram Lakhan Yadav cannot be sidelined with such a reasoning. This is because it was Ram Lakhan Yadav who set fire to the haystack, in the light of which flames the culprits were identified; and it was Ram Lakhan Yadav who was first attacked by the dacoits, and it was Ram Lakhan Yadav who had seen the dacoits earlier then any other person connected with the victim's house. What he would have said about the identity of the dacoits cannot now be left in surmise. If he also had said that all the dacoits were unknown persons it would have had a very deleterious impact on the veracity of the four witnesses who pointed to the three appellants as the dacoits.[1]

In the instant case, none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks *viz.* stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for the Supreme Court to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded.[2]

Identification of the accused in Court.

The identification of the petitioner in Court without any thing else should not be taken into consideration in order to convict him.[3]

11. Murder cases.—In the case of *Mahammed Sugal Esa Mamasan Rer Alalah* v. *King*,[4] the Privy Council had to look for and found corroboration of the testimony of the single witness in support of the murder charge, but the testimony of that witness suffered from two infirmities, namely :

(1) The witness was a girl of about 10 or 11 years at the time of occurrence.

(2) The girl witness had not been administered oath.

Their Lordships upheld the conviction and sentence of death, holding that the evidence, such as it was, was admissible. In the course of their judgment, they made the following observations (at page 5-6) :

Unsworn evidence to be corroborated.

"...In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not..."

Propositions regarding Court acting on single testimony.

On a consideration of the relevant authorities and the provision of the Evidence Act, the following propositions may be safely stated as firmly established :

Established propositions.

(1) As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated.

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1. **Rang Bahadur Singh *v.* State of U.P., (2000) 3 S.C.C. 454 at p. 459.**
2. Wakil Singh *v.* State of Bihar, 1981 Cr.L.J. 1014 at p. 1015.
3. Laxmidhar Rout *v.* State, (1982) 53 Cut. L.T. 342 at p. 344.
4. A.I.R. 1946 P.C. 3.

(2) Unless corroboration is insisted upon by statute, Courts should not insist on corroboration.

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and the judicial discretion of the Judge.[1]

It is not necessary for the prosecution to examine all the witnesses who were the neighbours of the deceased and/or the appellant or whose names have been taken by other witnesses although they do not have much role to play in the matter. Non-examination of such witnesses, in our opinion, is wholly immaterial. It is not a case where the prosecution deliberately and intentionally did not examine any material witness. Nothing has been shown that non-examination of such witnessses had in any way prejudiced the appellant in his defence.[2] In this case, the evidence adduced by the prosecution has been found to be reliable by High Court. *Held*, by while judging a case of this nature the quality of the evidence matters, and not the quantity.

In the instant case, according to counsel for the accused appellants, though PW 3 has deposed that 10-15 persons were in the vicinity at the time of occurrence, no independent witness was examined by the prosecution. There is nothing on evidence to show that there was any other eye witness to the occurrence. Having examined all the eye witnesses even if other persons present nearby were not examined, the evidence of the eye-witnesses cannot be discarded. Courts are concerned with quality and not with quantity of evidence and in a criminal trial, conviction can be based on the sole evidence of a witness if it inspires confidence.[3]

The law in our country does not prescribe the minimum number of witnesses for the conviction of any person; the uncorroborated evidence of a single witness is not on that ground alone insufficient to sustain a conviction; that would depend on the facts and the circumstances of each case.

Witness when to be disbelieved.

Where the witness is not speaking with a clean heart, or the pure mind to the best of his knowledge; such a witness has to be disbelieved.[4] There is no doubt that a person can legally be convicted on the evidence of a solitary witness. The question, however, is whether in the circumstances of the case, it would be safe to do so.[5]

Effect of the absence independent witnesses from the list of witnesses.

Where a large number of independent witnesses could have deposed about the incident, their absence from the list of witnesses and the presence of only partisan witnesses does create a doubt whether the version, which is being given by them, is to be believed.[6]

12. Communal riot cases.—In communal riot cases it is unsafe to convict on the evidence of one witness alone, unless there is satisfactory circumstantial evidence in addition.[7]

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1. Vadivelu Thevar *v.* State of Madras, A.I.R. 1957 S.C. 614 at pp. 618-19; Ramratan *v.* State of Rajasthan, A.I.R. 1962 S.C. 624.
2. Poolin Haldar *v.* State, 1996 Cr.L.J. 513 at p. 522 (Cal.).
3. **Sheelam Ramesh *v.* State of A.P., (1999) 8 S.C.C. 369 at p. 374.**
4. *Per* H.R. Krishnan, J., in State *v.* Karan Singh, A.I.R. 1960 M.P. 31 at p. 34 : 1959 M.P.L.J. 98: 1958 J.L.J. 699.
5. *Per* G.P. Bhutt, J., *Ibid.*
6. Thakur *v.* State, A.I.R. 1955 All. 189 at p. 191 : 56 Cr.L.J. 473.
7. Ujagar *v.* Emperor, A.I.R. 1933 All. 834 at p. 835 : 1933 A.L.J. 1597 : 146 I.C. 957.

13. Other cases.—The Court may convict a person if it implicitly believes a solitary witness. Ordinarily the Courts have often held that the statement of one witness is not enough for the conviction of a person. No hard and fast rule can be laid down as to how many witnesses would be sufficient for the purpose.[1]

Court to convict if believes solitary witness.

The principle that a conviction is possible on the testimony of the sole eye-witness cannot be applied to a case where the evidence of that sole witness is not of that quality which can compel acceptance.[2]

Corroboration is a must where the witness is not wholly reliable.

In *Mahadeo* v. *State of Maharashtra*,[3] the High Court based the conviction of the appellants on the uncorroborated testimony of a single witness.

On appeal by special leave the Supreme Court held that having regard to the number of infirmities appearing in his evidence, it was wholly unsafe to found conviction on his single testimony.

Therefore, no reliance can be placed on the sole uncorroborated testimony of a witness where, the conviction of certain accused persons under Sec. 323, IPC, was based on his solitary statement and other eye-witnesses did not implicate these accused persons as the assailants.[4]

There is no doubt that even where there is only a sole eye-witness of a crime, a conviction may be recorded against the accused concerned provided the Court which hears such witness regards him as honest and truthful. But prudence requires that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly where such witness also happens to be closely related to the deceased and the accused are those against whom some motive or ill-will is suggested. Now in the instant case a careful analysis of the evidence relating to the inordinate delay involved in the giving of the first information to the police and the other inherent inconsistencies in the evidence of the sole eye-witness shows that her evidence cannot be considered as sufficient to find the accused guilty. The first information itself appears to be one prepared after some deliberation. The role attributed to the former Police Patil in the prosecution evidence compels the Court to look for corroboration from the other prosecution evidence before accepting the evidence of the wife of the deceased.[5]

Sole eye-witness of a crime—Corroboration—Necessity of.

In bastardy cases, it is the rule of English law that, before an order of affiliation can be made, the evidence of the mother must be corroborated in some material particular by other testimony. Although corroboration is not required in India in any of the above cases, it may be well to bear in mind that the Legislature in England has not thought it safe in such cases to accept the testimony of single witness without some corroboration.

Value of single testimony in bastardy cases.

It is the established principle and rule on which the Court of Divorce and Matrimonial Causes must act that the evidence of the husband or wife alone is never to be accepted without corroboration.[6]

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1. State *v.* Rambali, A.I.R. 1953 All. 163 at p. 165.
2. Manik Malakar *v.* State of Assam, 1976 Cr.L.J. 1921 at p. 1923 (Gau.).
3. A.I.R. 1980 S.C. 102 at p. 102.
4. Maheswar Gouda *v.* State, (1983) 55, Cut. L.T. 275 at pp. 280-281.
5. Ramji Surjya *v.* State of Maharashtra, 1983 Cr.L.J. 1105 at p. 1109 (S.C.).
6. Pendurti Joseph *v.* Pendurti Ramamma, I.L.R. 45 Mad. 982; Payne *v.* Payne, 42 M.L.J. 562 : 70 I.C. 43 (F.B.); Prem Chand Hira *v.* Bai Golal, A.I.R. 1927 Bom., 594 ; 29 Bom. L.R. 1336 : I.L.R. 51 Bom. 1026.

Evidence of injured witness.

It is well settled that the evidence of an injured witness can be the sole basis; in fact the best basis, for either recording or sustaining a conviction. This is because injuries ensure the presence of a witness. And once that is ensured the limited question which remains is that of his credibility and truthfulness.[1]

The time honoured principle is that evidence has to be weighed and not counted. On this principle are based the provisions contained in Sec. 134 of the Indian Evidence Act.[2]

Court when to act upon the admission of adultery by wife.

Where there is no reason to doubt the genuineness of the admission made by the wife as to adultery it is duty of Court to act upon such admissions although there might be a total absence of all other evidence to support them.

In *Robinson* v. *Robinson and Lane*,[3] Cockburn, C.J., observed—

Admission of wife without corroboration to be received with caution.

"...No doubt the admissions of a wife, unsupported by corroborative proof, should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind...."[4]

Admission of party a conclusive proof.

"Nevertheless, if after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the Court should come to the conclusion, *first*, that the evidence is trustworthy; *secondly*, that it amounts to a clear, distinct and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence, and afford to the injured party the redress sought for..."

In *Williams* v. *Williams and Padfield*,[5] with reference to the case, it is pointed out (page 31) :

> "The case cited is an authority for the proposition that the Court may act on the admissions of the wife although they are not supported by any other evidence....In each case the question will be whether all reasonable ground for suspicion is removed."

These obervations of the Lord Chief Justice have been referred to in *Arnold* v. *Arnold*.[6]

The question whether in a given case the Court should consider the admissions of the wife as to adultery sufficient must necessarily depend upon the circumstances of that case.[7]

The uncorroborated testimony of the wife coming to the Court by way of petition for nullity of marriage on the ground of impotency would be sufficient if it inspires confidence and is believed.[8]

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1. Ramesh Bhagwan Manjrekar *v.* State of Maharashtra, 1997 Cr.L.J. 796 at p. 800 (Bom.).
2. *Ibid.*
3. (1858) I.S.W. & Tr. 362 : 27 L.J. Mat. 91 : 5 Jur. (N.S.) 392.
4. *Ibid.*
5. (1965) L.R. I.P. & D. 29 : 13 L.T. 610 : 35 L.J.P. & M. 8.
6. I.L.R. 38 Cal. 907 : 13 I.C. 491.
7. John Over *v.* Muriel A.I. Over, A.I.R. 1925 Bom. 231 at p. 233 : 27 Bom. L.R. 251 : I.L.R.40 Bom. 368.
8. Suvarnabahen *v.* Rashmikant Chinabhai Shah, A.I.R. 1970 Guj. 43 at p. 47 : 10 Guj. L.R. 661.

In the case of *Bahadur Naik* v. *State of Bihar*,[1] it was held that non-examination of an investigating officer was of no consequence when it could not be shown as to what prejudice had been caused to the appellant by such non-examination.

In the instant case also non-examination of the investigating officer has caused no prejudice at all. All that could submitted was that the examination of the investigating officer would have shown that the occurrence had taken place not in the court yard but outside on the road. The investigating officer was not an eyewitness. The body had already been removed by the appellants. The investigating officer, therefore, could not have given any evidence as to the actual place of occurrence. There were witnesses who have given credible and believable evidence as to the place of occurrence. Their evidence cannot be discarded merely because the investigating officer was not examined. The non-examination of the investigating officer has not led to any prejudice to the appellants.[2]

14. *Talabe istishhad*.—No particular number of witnesses are now required for the proof of the fact that on the occasion of *talabe istishhad* the pre-emptor had called upon two persons to be witnesses to his acts.[3]

Evidence Act superseded Mohammedan law of evidence.

15. Claim against deceased person's estate.—When an attempt is made to charge the estate of a dead person in a matter, in which if he were alive he might have answered the charge, the Court will examine the evidence with great care and even with suspicion.[4]

The whole law on the point was clearly laid down by Lord Russell, C.J., in *Rawalinson* v. *Schooles*,[5] that there is no rule that the Court must necessarily reject a claim against a deceased person's estate merely because it is supported only by the uncorroborated evidence of the claimant. *In re Finch, Finch* v. *Finch*,[6] it is said to be a rule of prudence and not a rule of law. Sir James Hannen expressed the same view in *In re Hodgson Beckett* v. *Ramsdale*.[7]

Court when not to reject claim against deceased person's estate.

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1. **(2000) 9 S.C.C. 153 : 2000 S.C.C. (Cr.) 1186.**
2. **Ram Gulam Chaudhary *v.* State of Bihar, (2001) 8 S.C.C. 311 at p. 321.**
3. Imamuddin *v.* Mohd. Rasul Islam Hashmi, A.I.R. 1931 All. 736 at p. 739 : 1931 A.L.J. 32 : I.L.R. 52 All. 1005 : 133 I.C. 304.
4. Rup Chand Mullick *v.* Madan Mohan Dutt, A.I.R. 1960 Cal. 351 at p. 354.
5. (1898) 79 L.T. 350.
6. (1883) 23 Ch.D. 267.
7. (1885) 31 Ch.D. 177 at 183.

CHAPTER X

OF THE EXAMINATION OF WITNESSES

135. Order of production and examination of witnesses.—The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

SYNOPSIS

1. Civil Procedure Code ... 4800
2. Criminal Procedure Code ... 4800
3. Order in which witnesses shall be examined ... 4801
4. Parties examining each other as a witness on his own behalf ... 4802
5. Power of Court to exclude from Court witnesses during trial ... 4802
6. Evidence taken by a Judge or Magistrate who is prevented from deciding the case ... 4803
7. Consequences of non-attendance of persons as witnesses ... 4803
8. Persons exempted from personal attendance in Court ... 4803
9. Protection of witnesses from arrest ... 4804

1. Civil Procedure Code.—According to the provisions of the Code of Civil Procedure the evidence of the witnesses upon the trial of a civil case is to be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge (Sec. 181). The order in which the witnesses are to be produced and examined at the trial of an original case is regulated by Secs. 179 and 180 of the Code. The right to begin and the right to reply upon the hearing of a civil appeal are regulated by Sec. 555. When the respondent objects that no appeal lies upon the preliminary point the appellant has the right to begin.[1]

Modes of taking evidence.

Sections 179 to 181 of the Code of 1882 now correspond to Order- XVIII, rules 1 to 4 of the present Code of 1908 and Sec. 555 of Order XLI, rule 16.

While counsel has discretion the Court has also power under this section to direct the order in which witnesses cited by a party shall be examined.[2]

2. Criminal Procedure Code.—According to the provisions of the Code of Criminal Procedure the witnesses upon a criminal trial must be examined in the presence of the accused person, or when his personal attendance is dispensed with, in presence of his pleader, a permission which may be granted in cases before Magistrates, but not in cases before the Court of Sessions.[3] It will not be a sufficient compliance with this requirement of the law to read over to the witnesses, in the presence of the accused, depositions given by them on a former trial or in a previous stage of the same trial when the accused was not present and inquire if these depositions are correct, requiring the witnesses at the same time to identify the prisoner.[4] In a trial before the Court of Sessions the prosecutor opens his case [Sec. 286 (now Sec. 226) of the Code of Criminal Procedure][5]. After this the trial has to proceed in accordance with provisons of Secs. 227 to 237 of the

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1. Rustomji Burjorji *v.* Kessowji Naik, L.R. 8 Bom. 287.
2. Gopessur Dutta *v.* Bissessur Dutta, I.L.R. 35 Cal. 245 : 16 C.W.N. 265.
3. *See* Secs. 116, 205 and 353 (now Secs. 115, 205 and 273) of the Code of Criminal Procedure, As to a *pardanashin* woman appearing by pleader, *see* the case of Rahim Bibi, I.L.R. 6 All. 59.
4. Queen *v.* Kanai, (1864) W.R. (Cr.) 38 ; Queen *v.* Kiyamat (1864) W.R. (Cr.) 1 ; Queen *v.* Afazuddin, (1864) W.R. (Cr.) 13 ; Queen *v.* Math Niushya, (1864) W.R. (Cr.) 18 ; Queen *v.* Mohan Banfor, 22 W.R. (Cr.) 38 ; Queen *v.* Raj Krishna Mitra, 1 B.L.R.O. Cr. 37 ; Subba *v.* Queen-Empress, I.L.R. 9 Mad. 83.
5. As to the duty of the prosecution in this respect, *see* Empress *v.* Grish Chunder Talukdar, I.L.R. 5 Cal. 614 ; Empress *v.* Dhandu Kazi, I.L.R. 8 Cal. 121 : 10 C.L.R. 151.

Cr.P.C. 1973 which have replaced the provision of the repealed Cr. P.C., 1898 relating to trial before a Court of Sessions.

The Code of Criminal Procedure makes no express provision for counsel, pleaders or other persons addressing the Court in Magistrate's cases; but Sec. 340 (now Sec. 303) provides generally that any person accused before any Criminal Court or against whom proceedings are instituted under the Code in any such Court may of right be defended by a pleader. No party has any right to be heard either personally or by pleader before any Court exercising its powers of revision, but the Court may, if it thinks fit, hear any party either personally or by pleader [Sec. 440 now Sec. 403] but no order can be made to the prejudice of an accused person, unless he has had an opportunity of being heard either personally or by pleader (Sec. 439) now Sec. 401.

3. **Order in which witnesses shall be examined.**—Section 135 of the Evidence Act clearly prescribes two conditions for its applicability. In the first place the regulation of evidence must be according to the law or practice which is for the time being in force. *Secondly* this provision will apply only in the absence of any law to the contrary. The general practice in criminal courts is that the evidence is taken in the order in which it is produced by the prosecutor and seldom the Court interferes with this order. That this practice should be adhered to in criminal cases is even more important for the reason that in a criminal case the entire brunt of proving a prosecution case falls on the prosecutor and it is therefore for him to choose and devise ways and means of proving a case against an accused beyond any doubt. If the Court starts dictating a change in the order, it may lead to serious prejudice and thereby to a serious miscarriage of justice. For instance a prosecutor wants to examine himself as the last witness, but if he is compelled to depose first and depose to all those facts, then it may give an opportunity to the accused to try to gain over witnesses who have been referred to in the statement of the complainant and in the statement which he has made in his deposition. In these circumstances it is not for the Court to play the role of the prosecutor or of the defence.[1] The Court has always power to direct the order in which witnesses of a party shall be examined under Sec. 135, Evidence Act.[2] Where prosecution witnesses who had already been examined- in-chief are summoned at the instance of defence pleader for cross-examination the Court should permit the defence to cross-examine the prosecution witnesses in the order it wishes. In *Moosa Haji Abdul Shakoor* v. *Emperor*,[3] certain prosecution witnesses had been recalled for examination on a certain day at the request of the defence. The complainant himself was not one of those so recalled but was present in Court and the defence had desired to recall him for cross-examination after the completion of the cross-examination of the other witnesses. If was held that the defence were entitled to cross-examine the witnesses who were summoned for the purpose and to postpone the cross-examination of one who was not so summoned.[4]

Ordinarily it is for the prosecution to decide for itself as to in which order it will examine its witnesses for proving its case. Since it is the burden of the prosecution to prove its case ordinarily it should be for the prosecution to decide in which manner and in what order it will produce its evidence before the Court subject to the control of the substantive and procedural law. Section 135 of the Evidence Act provides that the order in which the witnesses are produced and examined shall be regulated by the law and practice for the time being relating to

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1. Prithvi Nath *v.* R.C. Kaul, (1975) 1 Cr.L.J. 216 at p. 220.
2. Jarat Kumari Dassi *v.* Bissessar Datt, I.L.R. 39 Cal. 245 at p. 263.
3. A.I.R. 1933 Cal. 189 at p. 190 : 37 C.W.N. 288 : 124 I.C. 479.
4. Sheikh Ibrahim *v.* Emperor, A.I.R. 1934 Nag. 209 at p. 211.

Civil and Criminal Procedure respectively, and, in the absence of any such law, by the discretion of the Court. There is no doubt that if the exigency of the circumstances so requires in an appropriate case the Court has always the discretion to direct that the witnesses be examined in a particular order, but in the absence of any exigency or compelling reason it should be for the party to decide in which order it will produce and examine its witnesses.[1]

Where the plaintiffs did not lead any evidence in the first instance nor had they reserved any right to produce any evidence in rebuttal after the defendant's evidence had been closed, they cannot be allowed to produce oral evidence in rebuttal.[2]

On examination of witnesses by public prosecutor.

In a trial, the Public Prosecutor should be required, as far as possible, to examine his witnesses so as to bring out the facts in their logical sequence, and particularly the expert witnesses, such as the medical witnesses, ought not to be examined at an early stage of the trial.[3]

4. Parties examining each other as a witness on his own behalf.—

If party not going into the witness box.

Sometimes a counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him. This is thought to be clever, but it is a bad and degrading practice.[4] Lord Atkinson dealt with the subject in *Lal Kunwar* v. *Chiranji Lal*,[5] calling it "a vicious practice.[6] If a party appears as a witness on behalf of the opposing party, the Court should, before proceeding to record his statement, question him or his counsel as to whether he does not propose to appear as his own witness. It that party then declares that he does not propose

On refusal of a party to enter witness-box.

to appear as his own witness, the Court should point out to the party producing him that ordinarily speaking the matter should be left as it is and the Court be left to draw any adverse inference which may justifiably be drawn from such refusal. If the party, however, insists on examining the opposite-party as his own witness, the Court should not allow him to cross-examine his own witness.[7]

5. Power of Court to exclude from Court witnesses during trial.—To ensure a fair trial the Court has inherent power to order that no witness who has to give evidence should be present when the deposition of the other witnesses are being taken.

In *Lalmani* v. *Bejai Ram*,[8] Bennet, J., held that the universal practice in the courts in India is that witnesses should be called in one by one and that no witness

Witnesses should be called one by one.

who is to give evidence should be present when the deposition of a previous witness is being taken by the Court and the Court can order that such witness should not be heard as a witness. In *Subh Karan Singh* v. *Kedar Nath*,[9] a Division Bench of the same High Court held that neither Sec. 135 of the Evidence Act nor Sec. 151, C.P.C., should justify the refusal to examine the witness even though it might effect the credibility of the witness.[10]

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1. **Md. Sanjoy** *v.* **State of West Bengal, (2000) 1 Cal.L.T. 230 at p. 232.**
2. Rashidunnissa *v.* Ata Rasool, A.I.R. 1958 All. 67 at p. 70.
3. Shwe Pru *v.* King, A.I.R. 1941 Rang. 209 at p. 210.
4. Sardar Gurbaksh Singh *v.* Gurdial Singh, A.I.R. 1927 P.C. 230 at p. 233.
5. I.L.R. 32 All. 104 : 5 I.C. 549 : 37 I.A. 1 (P.C.).
6. Binam Das *v.* Mangal Singh, A.I.R. 1929 Lah. 868 (2) at p. 871.
7. Puran Singh Relu Singh *v.* Mathra Das, A.I.R. 1934 Lah. 126 at p. 12.
8. A.I.R. 1934 All. 840.
9. A.I.R. 1941 All. 314.
10. Dr. Kasi Iyer *v.* State of Kerala, A.I.R. 1966 Ker. 316 at p. 317 : (1966) Ker. L.T. 452.

6. Evidence taken by a Judge or Magistrate who is prevented from deciding the case.—It frequently happens in India that a Judge or Magistrate, who has partly heard a case, is unable to decide it in consequence of being transferred to another district or from some other cause. The Legislature has thought proper to provide for this contingency, thus Sec. 191 (now Order XVIII, rule 15) of the Code of the Civil Procedure. Similar provisions are found in the Code of Criminal Procedure in respect of Magistrate cases. Vide Sec. 350 (now Sec. 326). There is no similar provision as to cases tried by the Court of Sessions, and the sections of the Code applicable to Sessions trials clearly contemplate the whole trial taking place before the same Judge.[1]

Section 42 (now Secs. 385, 386), Cr. P.C., prescribes the procedure for hearing a criminal appeal. It has been held that where it is enacted that the appellant or his pleader should have a reasonable opportunity of being heard in support of an appeal[2] (Sec. 421—now Sec. 384, Cr.P.C.), this must be taken to include the possible right to reply, if necessary.[3]

Oath or affirmation.

Witnesses are examined upon oath or affirmation, according to the provisions of the Oaths Act, 1969 (44 of 1969).[4]

7. Consequences of non-attendance of persons as witnesses.—The Codes of Civil and Criminal Procedure provide for procuring the attendance of witnesses before the Civil and Criminal Courts, respectively. The attendance of witnesses before coroners is provided for by "The Coroner's Act, IV of 1871". If a person, upon whom a summons, to give evidence or produce a document before a Civil Court has been served, without lawful excuse fails to comply with such summons, the Court may sentence him to pay a fine not exceeding five hundred rupees.[5] He is further liable to a civil action for damages[6] under the provisions of Sec. 26 of Act XIX of 1853 which is in force in the Bengal Presidency, or of Sec. 10 of Act X of 1855, which is in force in the Madras and Bombay Presidencies. Persons failing to attend to give evidence or produce documents before the Court of Justice, Civil or Criminal, may also be punished under the provisions of Secs. 174 and 175 of the Indian Penal Code.

It is true that important witnesses should be examined if available but sometimes prosecution may not examine all the witnesses just to avoid repetition of narration of the same fact. If evidence avilable on record are sufficient to prove the case beyond any doubt then non-examination of one or some of the witnesses may not result in discarding the whole prosecution story which is otherwise found proved from available materials on record.[7]

8. Persons exempted from personal attendance in Court.—The Code of Civil Procedure exempts from pesonal attendance in Court, women, who

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1. Queen *v.* Charru, (1864) W.R. (Cr.) 32 ; *See* also Queen *v.* Gopi Noshyo, 21 W.R. (Cr.) 47 ; Queen *v.* Raghunath Das, 23 W.R. (Cr.) 59.
2. But in the High Court as well as in the Lower Courts the appellant is now allowed to reply.
3. Amanant Sardar *v.* Nogendra Biswas, I.L.R. 38 Cal. 307.
4. Published in the *Gazette of India, Extraordinary*, Pt. II, Sec. 1, No. 57, dated the 26th December, 1969.
5. Order XVI, rule 12 of the Code of Civil Procedure.
6. The action will not lie unless personal service has been affected—Dhanpat Singh *v.* Prem Bibi, 14 W.R. 72. Witnesses, who have given evidence, cannot be sued for damages in respect of such evidence.—Bishonath Rakhit *v.* Ramdhan Sirkar, 11 W.R. 42 ; Gonesh Dutt Singh *v.* Magniram Chaudhuri, 11 B.L.R. 823; Bhikambar Singh *v.* Becharam Sarkar, I.L.R. 15 Cal. 265; Dawan Singh *v.* Mahip Singh, I.L.R. 10 All. 425; Chidambara *v.* Thirumani, I.L.R. 10 Mad. 87; Manjaya *v.* Sesha Shetti, I.L.R. 11 Mad. 477 ; Templeton *v.* Lauri, I.L.R. 25 Bom. 230.
7. Niranjan Shil *v.* State of Tripura, 1999 Cr.L.J. 4498 at p. 4503 (Gau.).

according to the customs and manners of the country, ought not to be compelled to appear in public (Secs. 132).

Section 133 enumerates other persons entitled to exemption from personal appearance in Court.

Persons exempted from personal attendance under the above provisions can be examined by commission, (Sec. 133). There is no similar exemption from attendance before the Criminal Courts; but it has been held that a female not accustomed to appear in public may claim to give evidence sitting in a palanquin, having been previously identified to the satisfaction of the Court.[1]

9. Protection of witnesses from arrest.—According to English Law, witnesses are protected from arrest upon any civil process while going to Court to give evidence, while attending there for the purpose of the case, and while returning home. Under Sec. 135(2) of the Code of Civil Procedure, where any matter is pending before a tribunal having jurisdiction therein the parties thereto, their pleaders, *mukhtears*, revenue agents, and recognized agents and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal. It has been held in England that this privilege is that of the Court and not of the person arrested. The making of an arrest in violation of the privilege affords no ground for an action for damages.[2] There is no similar protection against criminal process.

136. Judge to decide as to admissibility of evidence.—When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged facts, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under Sec. 32.

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1. Rukia Banu *v.* Roberts, 1 B.L.R. short notes V, or on commission ; *In re* Haro Sundari Chaudhurani, I.L.R. 4 Cal. 20 ; *In re* Din Tarini Debi, I.L.R. 15 Cal. 775, or special arrangements should be made for her examination in private; *In the matter of the petition of* Basant Bibi, I.L.R. 12 All. 69. All this, however, does not apply to a *pardanashin* lady who is a complainant ; *In re* Faridunnissa, I.L.R. 5 All. 92. As to the case of an accused *pardanashin*, *see* Kowsulliah Sundari Dasi *v.* Mukta Sundari Dasi, I.L.R. 11 Cal. 588.
2. Taylor's *Evidence*, 8th Ed., para 1340 p. 1135.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(*c*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(*d*) It is proposed to prove a fact (*A*) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (*B*, *C* and *D*) which must be shown to exist before the fact (*A*) can be regarded as the cause or effect of the fact in issue. The Court may either permit *A* to be proved before *B*, *C* or *D* is proved, or may require proof of *B*, *C* and *D* before permitting proof of *A*.

SYNOPSIS

1. Judge to decide on evidence recorded by himself and not his predecessor ... 4805
2. Judge himself to conduct *"de bene"* examination of witness ... 4805
3. Judge to decide questions of admissibility ... 4805
4. Admissibility of evidence should be decided upon before admitting it ... 4806
5. In each Sessions trial, witnesses should be examined *"de novo"* ... 4806
6. Conviction based on evidence recorded behind accused is bad ... 4806
7. Appreciation of evidence ... 4807

1. Judge to decide on evidence recorded by himself and not his predecessor.—A Sessions Judge must form his opinion on the evidence taken before him and cannot act on depositions recorded before his predecessor. He must re-commerce the trial *de novo*.[1] In a case the Judge, after considering the evidence, which had been taken before his predecessor, convicted and passed sentence on the prisoners. *Held*, the conviction was not valid.[2] It is a general principle that judgment must be delivered by the Judge, who has heard the evidence.[3]

Judge when to re-commence fresh trial.

Conviction on the basis of evidence recorded by predecessor is illegal.

2. Judge himself to conduct *"de bene"* examination of witness.—A *de bene esse* examination of a witness, about to leave the jurisdiction of the Court, must be taken by the Court, unless the parties consent to the evidence being taken under a commission.[4]

3. Judge to decide questions of admissibility.—It is most desirable that the question of admissibility should be finally decided when the objection to questions is taken.[5] It is, in any case, the Judge's duty to exercise a careful discretion and considering the possibility of error on his part, he may in his discretion allow evidence to be placed

Admissibility of evidence to be decided then and there.

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1. (1864) W.R. 32 (Cr.)
2. Queen *v.* Gopy Noshyo, 21 W.R. 47 (Cr.).
3. Queen *v.* Rughoonath Dass, 23 W.R. (Cr.) 59.
4. 5 B.L.R. 252.
5. *Per* Petheram, C.J., in Jadu Rai *v.* Bhubotaran Nundy, I.L.R. 17 Cal. 173 at p. 186 ; *see* also Emperor *v.* Panchkari Dutt, I.L.R. 52 Cal. 67 : 29. C.W.N. 300 : 86 I.C. 414 : A.I.R. 1925 Cal. 587 ; Seikh Abdul *v.* Emperor, A.I.R. 1925 Cal. 887 at p. 888 : 85 I.C. 830.

on the record provisionally, and subject to objection, in cases where that course would ultimately save time.[1]

Objection to the admissibility of a document.

If a document is inadmissible on account of a defect which could be cured by the person relying on it if an objection had been taken at the proper time, it is obvious that no objection as to its admissibility should be allowed at a later stage. The omission to object to the admission of irrelevant evidence cannot possibly make it irrelevant.[2] In *A.B. Miller* v. *Madho Das*,[3] their Lordships of the Privy Council held that an enormous omission to object to the admission of such testimony did not make it available as a ground of judgment.

Privy Council's view as to admissibility of evidence.

Examination of material witness when not to be received in evidence.

The examination of a material witness of the plaintiff, in the absence of the defendant is such an irregularity that if objected to at the proper time, would be fatal to the reception of such evidence. But, where no objection was urged during the trial, or until an appeal was interposed the Privy Council held, that the objection[4] could not be sustained. Where decision on an issue is based entirely upon a refusal to believe the evidence of the defendant, on whom onus of issue has been wrongly placed, and in disbelieving the defendant's evidence the learned District Judge has acted to some extent upon inadmissible evidence it will be necessary to send the suit back for re-trial on proper issues.[5]

Sending the suit back for re-trial on proper issues.

Allahabad High Court's view.

In the case reported as *Raj Bahadur Lal* v. *Government of Uttar Pradesh*,[6] the question was sought to be put with a view to obtaining the opinion of the witnesses and not to elicit any fact or information.

Held that the hearing authority was perfectly justified in disallowing the question.

4. Admissibility of evidence should be decided upon before admitting it.—The practice of admitting evidence and reserving the question of its admissibility for further consideration is bad.[7] Questions regarding the admissibility of documents in evidence must be decided at the time when those documents are tendered, and not left over till the judgment in the case.[8]

5. In each Sessions trial witnesses should be examined *"de novo"*.—In every Sessions trial no matter how often the case has been before the Court, the witnesses must be examined *de novo*.[9] A prisoner, whose trial is supplemental to that of others is entitled to full and complete investigation of all the facts of the occurrences upon which the charge depends.[10]

6. Conviction based on evidence recorded behind accused is bad.—It is irregular and illegal to base a conviction, on evidence not recorded in the presence

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1. Bal Rajaram Padval *v.* Maneklal Mansukhbhai, A.I.R. 1932 Bom. 136 at p. 150 : 34 Bom. L.R. 55.
2. Nanak Chand *v.* Mian Mohammad Shahbaz Khan, A.I.R. 1936 Lah. 114 at p. 115.
3. I.L.R. 19 All. 76 : 23 I.A. 106 (P.C.).
4. 6 M.I.A. 232.
5. Sohan Singh *v.* Santa Singh, A.I.R. 1923 Lah. 491 at p. 492.
6. A.I.R. 1972 All. 308 at p. 310 : 1972 A.L.J. 61.
7. Jadu Rai *v.* Bhubotaran Nundy, I.L.R. 17 Cal. 173 at pp. 186-87.
8. I.A.L.J. 224 (*notes*).
9. (1964) W.R. 1 at pp. 13, 38 ; but *see* Subba *v.* Queen-Empress, I.L.R. 9 Mad. 83.
10. Queen *v.* Mohun Banfor, 22 W.R. 38 (Cr.).

of the accused, but taken previously and merely read over to him on another day.[1] Where the Magistrate took the depositions, by reading over to the witnesses depositions made by them in another case, *held* that the depositions were illegally taken and could not sustain a charge.[2] Where the contention was that there was no evidence taken in the presence of the accused, as far as the examination-in-chief was concerned, *held* that the procedure, though irregular, was cured by Sec. 537 (now Sec. 465) Cr.P.C.[3] Evidence given, when a party never had the opportunity either to examine or to cross-examine the witnesses, or to rebut their testimony by fresh evidence, is not legally admissible for or against him, unless he consents that it should be so used.[4] A memorandum by a Judge that certain witnesses had deposed the same as the former witnesses is not in accordance with the Criminal Procedure Code.[5]

Deposition made in another case.

7. Appreciation of evidence.—The Judge is to form his own estimate of the evidence produced before him and should not be haunted by the idea that there is no ruling or precedent to guide him.[6]

Judge to form his own estimate for evidence.

137. Examination-in-chief.—The examination of witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.—The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.—The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

SYNOPSIS

1. Scope ... 4807
2. Discretion in the prosecution ... 4808
3. "By the party who calls him" ... 4808
4. Statutory right of cross-examination ... 4808
5. Cross-examination, a test of truth ... 4808
6. Essence of cross-examination ... 4808
7. Tendering of witness for cross-examination ... 4809
8. Absence of opportunity to cross-examination vitiates trial ... 4810
9. Who are subject to cross-examination ... 4810
10. Failure to cross-examine ... 4810
11. Witness can be cross-examined though not examined by party calling him .. 4811
12. Survival of right to cross-examine ... 4811
13. Admissibility of defence evidence as to doings of prosecution witness not cross-examined on the point ... 4811
14. Party must put important and crucial part of the case in cross-examination of his opponent's witnesses ... 4811
15. Evidence given by a witness who could not be produced for cross-examination ... 4812
16. The Court has power to regulate the manner of recording evidence ... 4812
17. When new accused summoned under Sec. 319, Cr.P.C., witnesses already examined are to be examined again—Proceedings to commence afresh ... 4812
18. Cross-examination without examination-in-chief is not warranted by law ... 4813
19. Engaging new counsel—Recalling of witnesses for further cross-examination ... 4813

1. Scope.—Section 137 of the Evidence Act gives only the three stages in the examination of a witness, namely, examination-in-chief, cross-examination and re-examination. This is a routine

Routine sequence of examination of witness.

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1. Ali Meah *v.* Magistrate of Chittagong, 25 W.R. 14 (Cr.) ; *see* also Queen *v.* Bishonath Pal. 12 W.R. (Cr.) 3 ; Attorney General of New South Wales *v.* Bertram, 36 I.J.P.C. 51.
2. 1 B.L.R. (O.Cr.) 37.
3. Queen-Empress *v.* Nand Ram, I.L.R. 9 All. 609 at p. 610.
4. Gorachand Sircar *v.* Ram Narain Chowdhry, 9 W.R. 587.
5. (1864) W.R. 18.
6. Ram Deo *v.* State of Rajasthan, (1964) R.L.W. 264 at pp. 268-69.

sequence in the examination of a witness.[1] Section 154 of the Evidence Act confers a discretionery power on the Court to permit a person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.[2]

2. Discretion in the prosecution.—The prosecution must, of course, have in Court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them, either calling and examining them or calling and tendering them for cross-examination. It is open to the Judge of trial to invite the prosecution to call a particular witness and if they refuse there is the ultimate sanction in the Judge himself calling that witness.[3]

3. "By the party who calls him".—The expression "by the party who calls him" means who calls him "at any stage of the case".[4]

4. Statutory right of cross-examination.—A reading of Sec. 137, Evidence Act, indicates that the right to cross-examine the witness is conferred by the statute upon the person concerned only when he has an interest adverse to the one who is proposed to be cross-examined. The very purpose of the cross-examination is to test the veracity of the testimony of the witness. When the plaintiff as well as defendants 3, 4 and 7 are sailing together by no stretch of imagination defendants 3, 4 and 7 can be said to have any interest that can be characterised even remotely as adverse to that of the plaintifff. Consequently, persons in the position of defendants 3, 4 and 7 cannot be said to have any right statutorily to cross-examine the plaintiff.[5]

5. Cross-examination, a test of truth.—Cross-examination is the most effective of all means for extracting truth and exposing falsehood.[6]

The testimony of a witness is not open to challenge if his statement made in examination-in-chief has gone uncrossed.[7]

Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.[8]

6. Essence of cross-examination.—The essence of cross-examination is that it is the interrogation, by the advocate of one party, of a witness called by his adversary, with the object either to obtain from such witnesses admissions favourable to his cause, or to discredit him.[9] The method of cross-examination *viva voce* is peculiarly English, and the word has no exact equivalent in the civil law or any continental jurisprudence.[10]

Cross-examination—Calcutta High Court's view.

A suggestion in cross-examination, to no extent whatsoever, can be a substitute for evidence if it is clearly repudiated by the witness to whom it is made. Vide *Emperor* v. *Karmuddi Sheikh*.[11]

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1. Jadu Kai *v.* Bhubotaran Nundy, I.L.R. 17 Cal. 173 at pp. 186-87.
2. Dahyabhai Chhaganbhai Thakkar *v.* State of Gujarat, A.I.R. 1964 S.C. 1563 at pp. 1568-69 : (1964) 1 Guj. L.R. 911.
3. R. *v.* Oliva, (1965) 3 All. E.R. 116 at p. 122.
4. Whitley Stokes, Vol. II, p. 929.
5. Karumanchi Subba Rao *v.* Yarlagadda Venkatapaiah, A.I.R. 1978 A.P. 193 at p. 195.
6. Meer Sujad Ali Khan Nawab Zoolfukar Dowla Bahadoor *v.* Lalla Kasheernath Doss, 6 W.R. 181 at p. 182 ; *see* also Gunanidhi Sundara *v.* State of Orissa, (1984) 857 C.L.T. 505.
7. State *v.* Rudia, 1985 (1) Crimes 125 at p. 127 (Raj.).
8. State of Himachal Pradesh *v.* Thakur Dass, 1983 Cr.L.J. 1694 at p. 1701 (H.P.).
9. Meer Sujad Ali Khan Nawab Zoolfukar Dowla Bahadoor *v.* Lalla Kasheernath Doss, 6 W.R. 181 at p. 182.
10. Queen-Empress *v.* Ram Chandra Govind Harshe, I.L.R. 19 Bom. 749 at p. 759.
11. A.I.R. 1932 Cal. 375.

This proposition holds good as much in regard to suggestions made to a defence witness as to those made to a prosecution witness.[1]

The very purpose of the cross-examination is to ask the question regarding what the witness has stated in the examination-in-chief. The answers in examination-in-chief are normally in reply to the questions put by the advocate, but whatever is stated is really the case of that witness and particularly when the witness is a party to the proceedings of that party. All the questions which are asked with a view to challenge the evidence-in-chief are permissible. There is no provision of law which says that cross-examination should be confined to what is volunteered by the witness and cannot be directed to challenge or clarify the answers given in reply to the questions put by his own advocate in examination-in-chief.[2]

It is a well-established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross-examination. The mere statement of the plaintiff's witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon. Looked at from this point of view it should be possible to take the view that, though the defence of the tenant has been struck out, there is nothing in law to preclude him from demonstrating to the Court that the plaintifff's witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfil the terms of the statute.

Even in a case where the defence of a tenant is struck off the defendant, subject to the exercise of an appropriate discretion by the Court on the facts of a particular case, would generally be entitled to cross-examine the plaintiff's witnesses. But the defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity, weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond the legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.[3]

Cross-examination is a deft and delicate art.

No doubt cross-examination is a deft and delicate art and to be effective must evince all sense of decorum, decency and profound responsibility. Unfounded, scandalous attacks do not legitimately form part of such a right. It must be understood that though it is a powerful and sharp instrument by which the cross-examiner can rip open the cloak to bring out the shining core of a case, it can by its recoil damage the very cause of the cross-examiner.[4]

7. Tendering of witness for cross-examination.—In *Manzurul Haque* v. *State of Bihar*[5] enunciates the principle thus:

> "A material witness should not be merely tendered but should be sworn and asked to give evidence by the prosecution. Tendering if at all should be confined to witnesses of secondary importance."

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1. Birkesh *v.* State, 1969 A.W.R. (H.C.) 369 at p. 372.
2. P. *v.* P., A.I.R. 1982 Bombay 498 at p. 504.
3. Modula India *v.* Kamakshya Singh Deo, (1988) 4 S.C.C. 619 at pp. 641, 643, 644.
4. Parkash Rajaram *v.* State of Maharashtra, (1975) 2 Cr.L.J. 1297 at p. 1301 : (Bom.), 1974 Mah. L.J. 416.
5. A.I.R. 1951 Pat. 422.

Views of the Madras, Calcutta and Punjab High Courts.

The Madras, Calcutta and Punjab High Courts have taken the definite view that tendering a witness for cross-examination is not a practice which should be encouraged. Vide *Veerakoravan* v. *Emperor*[1] relying on the decision in *Queen-Empress* v. *Ram Shai Lal*.[2]

Choota Singh v. *State*,[3] states that—

"...Tendering a witness for cross-examination is almost tantamount to giving up a witness. There is nothing in law that justifies such a course."

The Kerala High Court is in agreement with the above views.[4]

8. Absence of opportunity to cross-examine vitiates trial.—A court of first instance, at a re-hearing, did not recall the plaintiff's witnesses. *Held* that the Court of first instance should have recalled the plaintiff's witnesses and given the defendant an opportunity of cross-examination.[5] The fact that the accused had full opportunity of cross-examining, if not admitted, must be proved, as was ruled in *Queen* v. *Mowjan* alias *Nane Khan*,[6] and as may be inferred from Sec. 136.[7]

The opportunity of cross-examination involves two elements : (1) notice to the opponent that the deposition is to be taken at the time and place specified; and (2) a sufficient interval of time to prepare for examination and to reach the place.[8]

9. Who are subject to cross-examination.—All witnesses examined-in-chief or sworn are subject to cross-examination.[9]

Where a witness is sought to be examined by a party on commission by written interrogatories, the other side has a choice before it, either to file written interrogatories or to insist upon an opportunity being given to him to cross-examine the witness orally. It is unthinkable and the authority nowhere lays down that the oral cross-examination of a witness would be permissible after his examination and cross-examination is complete on written interrogatories.[10]

10. Failure to cross-examine.—Where in spite of statement-in-chief there has been no cross-examination the Courts will presume that the witnesses account has been accepted.[11]If the defendant in the instant case, wanted to argue that the plaintiff did not put forward any claim in respect of the second consignment and there was no notice under Sec. 78 B of the Railway Act, in respect of this claim, it was the bounden duty of the defendant's counsel to cross-examine Kundu on this point and put his case to him that the plaintiff never made any claim in respect of the second consignment. In absence of such cross-examination and suggestion Court is bound to hold that the defendant had accepted plaintiff's case on this point in its entirety.[12] The authorities on the point are ample and clear. *See*, for example, *Browne* v. *Dunn*,[13] relied on by P.B. Mukharji, J., in *A.E.G. Carapiet* v. *A.Y. Derderian*,[14] *Chunnilal Dwarka Nath* v. *Hartford Fire Insurance Co. Ltd.*[15] etc.

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1. A.I.R. 1929 Mad. 906.
2. I.L.R. 10 Cal. 1070.
3. A.I.R. 1964 Punj. 120.
4. Thazhathethil Hamsa *v.* State of Kerala, A.I.R. 1967 Ker. 16 at p. 18 : (1966) Ker. L.T. 136.
5. 3 B.L.R. (A.C.) 273.
6. 20 W.R. 69 (Cr.)
7. Queen-Empress *v.* Ram Chandra Govind Harshe, I.L.R. 19 Bom. 749 at pp. 759-60.
8. Ramaswami Gounder *v.* State, 1985 L.W. (Cr.) 186 at p. 187.
9. Queen-Empress *v.* Ram Chandra Govind Harshe, I.L.R. 19 Bom. 749 at pp. 759-60.
10. Ghulam Rasool Khan *v.* Wali Khan, A.I.R. 1983 J. & K. 54 at p. 55.
11. Babulal Chaukhani *v.* Caltex (India) Ltd., A.I.R. 1967 Cal. 205 at p. 215.
12. Traders Syndicate *v.* Union of India, A.I.R. 1983 Cal. 337 at p. 339.
13. (1893) 6 R. 67 at p. 70.
14. A.I.R. 1961 Cal. 359.
15. A.I.R. 1958 Punj. 440.

When the plaintiff had not subjected himself to cross-examination in spite of the order of the Court after the remand, it would not be safe to rely on the examination-in-chief recorded which was not subjected to cross-examination before the remand was made.[1]

11. Witness can be cross-examined though not examined by party calling him.—The opposite party has a right to cross-examine a witness though the party calling him has declined to ask a single question.[2]

12. Survival of right to cross-examine.—Where the cross-examining party subsequently calls his adversary's witness in support of his own case, the right to cross-examine such witness did not survive.[3]

13. Admissibility of defence evidence as to doings of prosecution witness not cross-examined on the point.—The statement of a witness for the defence, that a witness for the prosecution not then have been at another place where the latter says he was and saw the accused person, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point.[4]

14. Party must put important and crucial part of the case in cross-examination of his opponent's witnesses.—Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all.[5]

As observed in *Chuni Lal* v. *Hartford Fire Insurance Company*,[6] a party should put to each of his opponent's witnesses so much of his case as concerned that particular witness and if no such questions are put, the Courts presume that the witness account has been accepted.[7]

On this point the most important and decisive authority is *Brown* v. *Dunn*.[8] Lord Chancellor Hershell, at page 70 of the report observed :

Witness not speaking truth, his attention to be directed to that fact.

"Now my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that, that imputation is intended to be made."

Lord Halsbury, the other member of the House of Lords, at page 76 of the same report said :

"...To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given,...and to ask the jury afterwards to disbelieve what they have said."

In fact Lord Halsbury described the situation as a "perfect outrage" at page 77 of the said report.

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1. Gopal Saran *v.* Satyanarayan, A.I.R. 1989 S.C. 1141 at p. 1146.
2. Queen *v.* Ishan Dutt, 15 W.R. (Cr.) 34 : 6 B.L.R. App. 88 ; *see* also A.K. Roy *v.* Union of India, 1982 S.C.C. (Cr.) 152.
3. *See* Phipson's *Evidence*, 4th Ed., p. 460, referring to Malone *v.* Spillessy, Ir. Cir. Rep. 504 ; Lord *v.* Colvin, 3 Drew. 222 and *Re* Woodfine, 26 W.R. 678.
4. 11 B.H.C.R. 166 at p. 169.
5. A.E.G. Carapiet *v.* A.Y. Derderian, A.I.R. 1961 Cal. 359 at p. 362.
6. A.I.R. 1958 Punj. 440.
7. Ibadat Ali *v.* Baldia Co-operative Bank, Hyderabad, (1968) 2 Andh. L.T. 124 at pp. 131-32.
8. (1893) 6 R. 67.

The same view is expressed in the 13th Edition of Odger on *Pleading and Practice* at page 261 and the 9th Edition of Phipson on *Evidence* at pages 497-98.[1]

Where the evidence which remains unmistakable at the close of the witness cross-examination was that she heard the daughter of the appellant, calling her by her name and shouting that her father was assaulting her mother and the learned Sessions Judge rightly accepted and relied upon this part of evidence as it was certainly admissible as direct evidence as to what she actually heard, it was held that it could not be said to be inadmissible even though, it was not corroborated by the daughter and mother of the appellant.[2]

15. Evidence given by a witness who could not be produced for cross-examination.—The evidence given in examination-in-chief by person who could not be produced for cross-examination cannot be made use of.[3] It has been held in the case of *Phani Bhuson Ghosh* v. *Sibakali Vasu*,[4] and in the case of *Satish Chandra* v. *Emperor*,[5] that evidence unless complete by cross-examination cannot be proved. This is the view taken in the case of *S.C. Mitter* v. *State*,[6] and also in the case of *Aurabind De* v. *State*.[7] Mitter and Sen, JJ., also held that evidence before charge was inadmissible in the case of *Brahmachari Ajitananda* v. *Anath Bandhu Dutt*.[8]

Evidence if not complete by cross-examination not to be proved.

16. The Court has power to regulate the manner of recording evidence.—In almost all the courts in the country, holding trials in civil and criminal cases the oral examination of the witnesses, though conducted in question-answer form by the counsel, is generally recorded in narrative form by the Presiding Judges. The Court has power to regulate the manner of recording evidence. In spite of the manner of recording evidence being in narrative form the Presiding Judge can, wherever necessary, direct a particular question or group of questions to be recorded in question-answer form. Wherever necessary, a note as to demeanour of a witness can always be made by the Presiding Judge before whom the witness is being examined and such note on demeanour made in the presence of the witness and counsel for both the parties would be more useful to the trial Court itself while hearing arguments of the counsel for the parties at the end of the trial and also for the Appellate Court rather than a mere record of the statement in question-answer form.[9]

17. When new accused summoned under Sec. 319, Cr. P.C., witnesses already examined are to be examined again—Proceedings to commence afresh.—The Legislature has taken full precaution to safeguard the interest of the person who may be summoned as an accused since "evidence" has to be recorded again. In other words, right of cross-examination will be available to the newly summoned accused after he has appeared in Court. A combined reading and close scrutiny of the two definitions *viz.* "evidence" and "cross-examination" and the provisions contained in Sec. 319, Cr. P.C. reveals that the applicant became an "adverse party" only after he was summoned. Thus, his right of cross-examination would flow only after the witnesses are "reheard", since the proceedings have to commence afresh as against him.[10]

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1. A.E.G. Carapiet *v.* A.Y. Derderian, A.I.R. 1961 Cal. 359 at p. 362.
2. Tulshiram (Accused) *v.* State of Maharashtra, 1984 Cr. L.J. 209 at p. 211 (Bom.).
3. Sanatan Daw *v.* Dasarathi Tah, A.I.R. 1959 Cal. 677 at p. 678.
4. A.I.R. 1952 Cal. 218.
5. I.L.R. (1944) 2 Cal. 76 : A.I.R. 1945 Cal. 137.
6. 86 C.L.J. 21 : A.I.R. 1950 Cal. 435.
7. 57 C.W.N. 69 : A.I.R. 1952 Cal. 206.
8. 57 C.W.N. 954 : A.I.R. 1954 Cal. 395.
9. **Makhan Lal Bangal *v.* Manas Bhunia, (2001) 2 S.C.C. 652 at pp. 664-65.**
10. Ram Niwas *v.* State of U.P., 1990 Cr.L.J. 460 at p. 463 (All.).

18. Cross-examination without examination-in-chief is not warranted by law.—The Bombay, Kerala, Calcutta, Madras and Punjab High Courts have notwithstanding the provisions of Sec. 228 of the Code of 1898 consistently taken the view that there is no procedure whereby the prosecution is permitted to tender a witness for cross- examination only, without there being any examination-in-chief in relation to which, such a witness can be cross-examined. The practice of tendering a witness for cross-examination has been consistently discouraged and even condemned by those High Courts and in Apex Court's opinion rightly. Apex Court's attention has not been drawn to any judgment of any other High Court which may have taken the contrary view.

In *State of U.P. v. Jaggo* alias *Jagdish,*[1] which has been referred to and relied upon by the prosecution and the trial Court for adopting the procedure of tendering PW 4 and PW 5 for cross-examination only, has not been properly appreciated and has been misapplied. That judgment cannot be read to lay down, as a matter of legal proposition, that a witness can be "tendered" for cross-examination even without there being any examination-in-chief. If there is some earlier statement of the witness recorded by a competent Court or an affidavit filed in the trial Court and the witness testifies to the correctness of that earlier statement at the trial, it may (in certain cases of witnesses of a formal nature) as noticed earlier be permissible to tender him for cross-examination after he is sworn to the correctness of the earlier statement, because in that event that earlier statement is treated as the examination-in-chief of the witness but that is not the same thing as tendering a witness for cross-examination only, without there being any examination-in-chief on the record.[2]

In the instant case, as far as Dr. O.P. Poddar is concerned, he was only tendered for cross-examination without his being examination-in-chief. Though, Dr. O. P. Poddar was not examined- in-chief, this procedure of tendering a witness for cross- examination is not warranted by law. Supreme Court in *Sukhwant Singh* v. *State of Punjab,*[3] held that permitting the prosecution to tender a witness for cross-examination only would be wrong and the effect of their being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial. In the present case, however, non-examination of Dr. O.P. Poddar is not very material because the post-mortem report coupled with the testimonies of Dr. K.C. Jain P.W. 1 and Dr. J. L. Bhutani P.W. 9 was sufficient to enable the courts to come to the conclusion about the cause of death.[4]

19. Engaging new counsel—Recalling of witnesses for further cross-examination.—In the instant case, the accused had engaged no private counsel. Therefore, *Amicus Curiae* was provided to him at a later stage. The accused engaged a private counsel. Thereafter, he prayed that two witnesses, who had already been cross-examined by the learned *Amicus Curiae,* be recalled for further cross-examination. The learned lower Court has rejected this application without assigning any reason.

In the interest of justice, it is essential that in a serious case like this, under Sec. 302, IPC the accused be given abundant opportunity to cross-examine the witnesses. This is a question of life and death for the accused.

In the interest of justice, it is ordered that the learned lower Court shall recall the two witnesses aforesaid for cross- examination by the private counsel for the accused.[5]

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1. A.I.R. 1971 S.C. 1586.
2. Sukhwant Singh *v.* State of Punjab, A.I.R. 1995 S.C. 1601 at p. 1605 : 1955 (2) Crimes 148 (S.C.) ; *see* also Ganesh Jadav *v.* State of Assam, 1995 Cr.L.J. 3748 (Gau.).
3. 1995 (2) Scale 482 : A.I.R. 1955 S.C.W. 2521.
4. Tej Parkash *v.* State of Haryana, 1996 Cr.L.J. 394 at pp. 398-99 (S.C.) : 1996 (7) S.C.C. 322 : 1996 S.C.C. (Cr.) 412.
5. Ramashanker *v.* State of U.P., 1997 Cr.L.J. 1102 at p. 1103 : 1997 All. L.J. 169 (All.).

138. Order of examinations.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

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1. Scope of the section.—Section 138, Evidence Act, only provides the order in which the proceedings are to be conducted.[1]

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1. Emperor *v.* C.A. Mathews, A.I.R. 1929 Cal. 822 at p. 823.

Section 138 enacts that a witness must be examined and cross-examined as to relevant facts.[1] In a suit the plaintiff called the defendant as a witness, who denied the plaintiff's claim but the Court refused to allow the plaintiff to cross-examine him. *Held* that the refusal to cross-examine was not justifiable.[2] An accused person is entitled to cross-examine the prosecution witnesses, during the judicial enquiry in the Magistrate's Court.[3]

Further round of cross-examination.

While it is true that Sec. 137 and Sec. 138 do not in words speak of a further round of cross-examination there is neither in these sections nor anywhere else in the Evidence Act anything to bar the accused from exercising his right of cross-examination afresh if and when the prosecution witness makes a further statement of facts prejudicial to him.[4]

The provision of Sec. 138, Evidence Act, is mandatory and cross-examination or re-examination cannot be refused.

If cross-examination is directed as to relevant matters, it can cover the field not covered by examination-in-chief.[5]

Scope and extent of cross-examination.

Cross-examination cannot be confined to matters proved in examination-in-chief. As Phipson observes : ....the witness can be asked not only as to facts in issue or directly relevant thereto, but all questions which, though otherwise irrelevant tend to impeach his credit in the manner provided."[6]

2. Examination of witness.—Obviously Sec. 138 of the Evidence Act not only lays down the manner of examination of a particular witness but also impliedly

Examination of a witness—Meaning of.

confers on the parties right of examination-in-chief, cross-examination and re-examination. The section creates three distinct rights so far as the examination of a witness is concerned in different parties. Manifestly therefore, the examination of a witness does not refer to his examination-in-chief only but it extends to and includes his examination-in-chief, cross-examination as well as his re-examination. The right to cross-examine could be exercised if the adverse party so desires, and similarly the right to re-examine arises if the calling party so desires subject to the limitations given in Sec. 138 of the Evidence Act. The examination of a witness, therefore, will always include cross-examination unless the opposite party itself waives the right.[7]

Order of examination of witnesses.

Plainly, solicitors and counsel are entitled to conduct, within the rules of Court or of procedure, the proceedings as they think fit and, in particular, to call witnesses in the order they wish, subject to any particular rules which may apply, as in the case of criminal proceedings. The parties and their advisers must be left to conduct the case as they think fit, subject to the rules.[8]

3. Examination-in-chief.—Unless evidence of reputation be admissible witnesses must in general merely speak to facts within their own knowledge.[9] On

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1. Queen *v.* Gopal Doss, I.L.R. 3 Mad. 271 at p. 278 : 2 Weir 782.
2. 12 M.I.A. 380 at p. 395.
3. Queen-Empress *v.* Sagal Sanba Sajao, I.L.R. 21 Cal. 643 at p. 662.
4. C.T. Muniappan *v.* State of Madras, A.I.R. 1961 S.C. 175 at p. 176.
5. Chandramani Naik *v.* Binapani Dei, A.I.R. 1968 Orissa 17 at pp. 17, 18 : 33 Cut. L.T. 787.
6. *See* Phipson on *Evidence* 9th Ed., p. 497.
7. Dwarka Dass *v.* State, 1979 Cr.L.J. 550 at p. 553 (L.K.).
8. Barnes *v.* B.P.C. (Business forms) Ltd., (1976) 1 All. E.R. 237 at p. 239 (Q.B.D.) 1.
9. Taylor's *Evidence*, 8th Ed., para. 1271, 1417.

some particular subjects positive and direct testimony may often be unattainable, and in such cases a witness is allowed to testify as to his own belief or opinion or even to draw inferences respecting the fact in question, provided these facts be within his personal knowledge.[1] Witnesses are not permitted to state their views on matters of moral or legal obligtion or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another.[2] Witnesses ought not to be allowed to make hearsay statements.[3] The moment a witness begins to give evidence which is inadmissible he should be stopped by the Court.[4]

4. Cross-examination.—Hearsay evidence is not admissible in cross-examination, unless it be admissible under the provisions of Sec. 146, *post*.[5]

As to the cross-examination of witness in criminal cases, *see* also Sec. 256, (now Sec. 243), of the Code of Criminal Procedure.[6]

English law; practice followed in cross-examination.

According to the practice followed in England and Ireland, the cross-examination extends to the whole case. In America a party has no right to cross-examine any witness except as to circumstances connected with matters stated in his direct examination. In the case of *Queen* v. *Ishan Datta*,[7] the Calcutta High Court followed the English rule, which has also been substantially adopted by Sec. 138, Indian Evidence Act. Besides questions relating to relevant facts a witness may further be asked the questions intended to test his veracity to discover who he is and to shake his credit.

Calcutta High Court's view.

Rule.

As a general rule, evidence is not legally admissible against a party, who at the time that it was given had no opportunity of cross-examining the witnesses or of rebutting their testimony by other evidence.[8] When a case, decided *ex parte* in the absence of the defendant, was re-admitted to a hearing, it was held that the Court of first instance ought to have re-called the plaintiff's witnesses and allowed the defendant an opportunity of cross-examining them.[9] Where a witness called and examined by the plaintiff was not cross-examined on behalf of the defendants, the Court refused to allow him to be called afterwards for the defendant, as the leave of the Court had not been asked and obtained at the close of the first examination.[10]

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1. Taylor's *Evidence*, 8th Ed., para. 1273, 1416.
2. Taylor's *Evidence*, 8th Ed., para 1276, 1419.
3. Queen *v.* Kali Charan Ganguli, 7 W.R. (Cr.) 2.
4. Queen *v.* Pitambar Sardar, 7 W.R. (Cr.) 25.
5. *See* Ganauri Lal Das *v.* Queen- Empress, I.L.R. 16 Cal. 211.
6. In Kharakdhari Singh *v.* Persadi Mandal, 22 W.R. (Cr.) 44, it was held that it is in the discretion of the Court to allow the witnesses for the prosecution to be cross-examined before the witnesses for the defence are examined ; *see* also *In re* Thakur Dayal Sen, 17 W.R. (Cr.) 51 ; Queen *v.* Ram Krishan Halwai, 25 W.R. (Cr.) 48 ; Talluri Venkayya *v.* Queen, I.L.R. 4 Mad. 130 ; Empress *v.* Baldeo Sahai, I.L.R. 2 All. 253 ; Faiz Ali *v.* Koromdi, I.L.R. 7 Cal. 28 : 8 C.L.R. 325. In this last case it was ruled that if any accused person wishes to recall and cross-examine the witness for the prosecution, he must express such a desire when the charge is read over to him and he is called on for his defence.
7. 6 B.L.R. (App.) 88.
8. *See* Sec. 33, *ante*; Gorachand Sirkar *v.* Ram Narain Chaudhari, 9 W.R. 587 and Radha Jiban Mustafi *v.* Taramani Dasi, 12 M.I.A. 380.
9. Ram Baksh Lal *v.* Kishori Mohan Saha, 3 B.L.R. (A.C.) 273.
10. Mackintosh *v.* Nabin Mani Dasi, 2 Jur. N.S. 161.

A Court is not right in placing any dependence at all on the evidence given by S at a stage when the defendant had no opportunity to test the evidence given by S by cross-examination.[1]

Cross-examination and its utility

Cross-examination, properly conducted, is one of the most useful and efficacious means of discovering truth. Says Mr. Taylor, "...It is not easy for a witness subjected to this test to impose on a Court of jury; for, however, artful the fabrication of a falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended."[2] *See* also the observations of Norman, J., on this subject in *Sujad Ali Khan* v. *Kashinath Das*.[3] "Where a witness is evidently prevaricating or concealing the truth", says Mr. Alison. "...The most *effectual method* is to examine rapidly and minutely as to number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that in the course of such a rapid examination of facts most material to the cause are elicited, which were either denied or but partially admitted before."[4] Bullying and browbeating a witness, misleading him, confusing him when stupid—terrifying him when timid—will oftener than otherwise fail to search the mind and conscience of an adverse witness, when suavity of manner, gentleness and courtesy will surely put him off his guard, while rapid and subtle questioning elicits from him innumerable facts which when put together and arranged create a whole, in which the most ignorant beholder instinctively recognizes—*the truth*.

An effectual method of cross-examination.

On bullying and browbeating a witness.

If a competent witness be intentionally called and sworn, the opposite party is entitled to cross-examine him, although the party calling him has declined to ask him a single question. When several prisoners were tried on the same indictment a witness called on behalf of one of them might be cross-examined on behalf of others.

On right of cross-examination by the opposite party.

As pointed out in *Nur Baksh Kazi* v. *Empress*,[5] a Judge should not ordinarily question the witnesses on the points to which the cross-examination will properly be directed.

Medical officers (like other persons) are bound to attend Court on receipt of summons. They cannot refuse to give evidence but they should represent to the Court as regards fees payable to them.[6]

Doctors.

5. Object of cross-examination.—No evidence which has not been subjected to cross-examination can be used against anybody against whom it is sought to be tendered unless cross-examination is declined.[7]

As to admissibility of evidence not subjected to cross-examination.

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1. Neminath Appayya Hanamannanaver *v.* Jamboorao Satappa Kocheri, A.I.R. 1966 Mys. 154 at p. 156 : (1965) 1 Mys. L.J. 442.
2. Taylor's *Evidence*, 8th Ed., paras. 1285, 1428.
3. 6 W.R. 181.
4. Alison's *Practice of the Criminal Law of Scotland*, pp. 546, 547.
5. I.L.R. 6 Cal. 297 : 7 C.L.R. 385.
6. Chauthi Singh *v.* Emperor, A.I.R. 1937 All. 768 at p. 769 : 1937 A.L.J. 972 : 172 I.C. 31.
7. Haridas Mundhra *v.* Indian Cable Co. Ltd., A.I.R. 1965 Cal. 369 at p. 370.

The ordinary object of cross-examination is to displace, so far as it is adverse, the effect of the examination-in-chief. Under the name of cross-examination, it may even be converted by the examiner into a practical examination-in-chief, the very proof of his own case.

Cross-examination—Meaning of.

The term "cross-examination" is more usually applied to the examination of the witnesses of the other side. The best definition of cross-examination is the one furnished by Mr. Best, when he describes it as—

> "The interrogation by an advocate of a witness really hostile to his cause, whether in form coming before the Court as his witness, or that of his opponent."[1]

Failure to cross-examine.

Failure to cross-examine will not always amount to an acceptance of the witness's testimony.[2]

Adverse inference when not be drawn.

In *State of Orissa* v. *Kaushalya Dei*,[3] no question was put to the investigating officer as to how a Constable accompanied the deceased and that there was a previous Station Diary entry to F.I.R. to that effect. *Held* that in the absence of such a question, no adverse inference can be drawn.

6. Proper stage for cross-examination.—As a rule, the proper and convenient time, for the purpose of cross-examination of the witnesses for the prosecution, is at the commencement of the accused person's defence; but it is in the discretion of the Criminal Court to allow such cross-examination at any period of the defence.[4]

The cross-examination of every-witness should follow his examination-in-chief according to Sec. 138 of the Evidence Act of 1872. It is both irregular and inconvenient to allow all the witnesses to be examined one day and to reserve the cross-examination to a subsequent date. The accused is, therefore, not entitled as of right to postponement of the cross-examination. The Court may, however, grant such a postponement on reasonable grounds as, for instance, where the Counsel is unprepared or where the accused was undefended the first day and put only a few questions and applied the next day for cross-examination by his pleader explaining why he was not engaged before or, where the Counsel appointed to defend the accused, who had no instructions till then, requested the Court to postpone the cross-examination of the prosecution witnesses till the next day after the examination-in-chief were over.[5]

7. Oral cross-examination—Whether permissible after the cross-examination is complete on written interrogatories.—Where a witness is sought to be examined by a party on commission by written interrogatories, the other side has a choice before it, either to file written interrogatories or to insist upon an opportunity being given to him to cross-examine the witness orally. Accodingly, it was incumbent upon the Trial Court in the instant case to enquire from the defendant whether he wanted to cross-examine the witness orally or by written

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1. Best on *Evidence*, p. 492; Goodeve, p. 224.
2. *See* Phipson on *Evidence*, 10th Ed., para. 1542 at pp. 594 and 595 ; Mst. Sukhraji Bhuj *v.* Calcutta State Transport Corporation, A.I.R. 1966 Cal. 620 at p. 622; contra *see* Toga *v.* State of Rajasthan, 1984 R.L.W. 56.
3. A.I.R. 1965 Orissa 38 at p. 44.
4. Kurruckdharee Singh *v.* Pershadee Mundal, 22 W.R. (Cr.) 44.
5. Jayakar *v.* State of Karnataka, 1997 (1) Crimes 237 at pp. 238-39 (Kant.).

interrogatories, and if the defendant had indicated that he would like to cross-examine the witness orally, then the Court ought to have made a direction that the Court executing the commission shall give him an opportunity to cross-examine the witness orally. On the other hand, if the defendant had stated that he would like to cross-examine the witness through written interrogatories, then the Court ought to have allowed him reasonable time to file the same. The Trial Court has not adopted this procedure. It is impossible to say that the oral cross-examination is complete on written interrogatories. Therefore the order of Trial Court was erroneous.[1]

8. Judge not to interfere with counsel's discretion in cross-examination.—A Judge should not freely interfere with the discretion of counsel, while cross-examining witnesses.[2]

9. Judge's discretion to disallow question.—The admissibility of evidence depends upon the opinion of the Trying Judge. He may not allow question, on collateral issues to be put.[3] Where a witness is asked certain questions about a matter when he is not a person who can say anything in that behalf the questions should be disallowed.[4] In *Mst. Hassan Pari* v. *Emperor*,[5] it was argued by the Advocate-General that confession also admitted that the child was born alive. He relied in this connexion on the question put to the appellant by the Magistrate. *Held* that it was clear that the question was a question composite in nature to which it was almost impossible to give a direct answer "Yes" or "No".

10. Leading questions to what extent admissible for cross-examination.—As a general principle leading questions may be put on cross-examination; the objection which would apply to this on an examination-in-chief not ordinarily holding here.

Mr. Philips says :

> "...Witnesses under cross-examination may be led immediately to the point on which their answers are required.... There can be no danger in leading too much, where the witness is obstinately determined not to follow."[6]

As to abuse of privilege.

Still the privilege must not be abused; the examination must not be made a mockery. It must not put the words into the mouth of the witness which he is to echo back again; nor may it assume, as its basis, facts as proved which have not been proved; or ascribe to the witness's statements as made by him, which have not been uttered.[7]

11. Misleading questions by cross-examiner.—As question which assumes a fact that may be in controversy is leading, when put on direct examination. Conversely such a question may become improper on cross-examination.

Mr. Joseph Chitty, *Practice of the Law*[8] : "It is an established rule as regards cross-examination, that a counsel has no right...., falsely to assume or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had previously been proved when it had not...

Rule regarding cross-examination.

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1. Ghulam Rasool Khan *v.* Wali Khan, A.I.R. 1983 J. & K. 54 at p. 55.
2. 4 C.W.N. cxxi.
3. 2 C.W.N. cxxi.
4. Tan Bug Taim *v.* Collector of Bombay, A.I.R. 1946 Bom. 216 at p. 225.
5. A.I.R. 1941 Pesh. 22 at p. 23.
6. Phillips and Arnold, Vol. II, p. 472.
7. 24 Howell's State Trials, 755 ; Goodeve, pp. 228-29.
8. 2nd Ed., Vol. III, p. 901.

Hardy's trial.

Hardy's Trial,[1] L.C.J. Eyre : "I think it is so clear that the questions that are put are not to be loaded with all the observations that arise upon all the previous parts of the case; they tend so to distract the attention of everbody, the load is in point of time so much; and that is not the time for observation upon the character and situation of a witness is so apparent that as a rule of evidence it ought never to be departed from."[2]

12. Intimidating and annoying questions by cross-examiner.—An intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent the actual knowledge on the subject. So also questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanour and utterance that the impression produced by his statements does not do justice to his real testimonial value.[3]

Court's dignity be sustained.

The dignity of the Court is best sustained by the Judge invariably treating witnesses with courtesy and insisting that counsel should do so.[4]

13. Repetition of questions.—The repetition of a question or a topic may not be objectionable, according to its purpose :

(1) Repeating an answered question upon an inadmissible point, already ruled out by the Court, is of course, an impertinence to the Court.[5]

(2) Repeating an allowable question already once answered is ordinarily superfluous and therefore improper.[6]

Repeating some questions when desirable to cross-examination.

Repeating the same testimonial matter of the direct examination, by questioning the witness anew on cross-examination, is a process which often becomes desirable in order to test the witness's capacity to recollect what he has just stated and to ascertain whether he falls easily into inconsistencies and thus betrays falsifications.[7] Repeating precisely the same allowable question on cross-examination, in order by sheer moral force to compel a witnesss to admit the truth, not only savours of intimidation and browbeating, but also tends to waste time. The Trial Court has discretion to refuse or to allow this, as seems best under the circumstances.[8] Nevertheless, when used sparingly and against a witness who in the cross-examiner's belief is falsifying, there ought to be no judicial interference.[9]

14. Duty and the privilege of counsel appearing on behalf of the party whose evidence has been excluded.—Where the Court excludes a piece of evidence it is entitled to expect a loyal acceptance of its ruling on the part of the counsel, without any attempt to get behind the ruling or to raise the question again and again, after it has once been decided. It may, no doubt, happen, where the

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1. 24 How. St. Tr. 754.
2. Wigmore, Vol. III, para. 780, p. 135-36.
3. Wigmore, Vol. III, para. 781, p. 137.
4. Bakhori Gope *v.* Hafiz Abdul Halim, A.I.R. 1941 Pat. 362 at p. 366.
5. Jones *v.* Stevens, (1893) 36 Nebr. 849 at p. 852 : 55 N.W. 251 (repeating after objection sustained ; excluded in discretion); State *v.* Felch, (1918) 92 Vt. 477 : 105 Atl. 23.
6. Brahman *v.* State, (1905) 143 Ala. 28 : 38 So. 1919; Thomas *v.* State 1904, 47 Fla. 99, 36, So. 161 (excluded).
7. People *v.* Rader, (1902) 136 Cal. 253 : 68 Pac. 706.
8. Middlesex B. Co. *v.* Smith, (1897) 27 C.C.A. 485.
9. Wigmore, para. 782, pp. 144, 145, 146.

effect of such a ruling is far-reaching. That the Judge, on further consideration may wish to correct his previous ruling, and admit a piece of evidence whose relevance he had not previously appreciated. One knows this being done, without any sacrifice of judicial dignity but the reverse. It may be suggested by counsel to the Court in a proper case without any disrespect.[1]

15. Courts empowered to examine witnesses for ascertaining truth.—The law of procedure entrusts the courts with powers for obtaining the truth of cases and for examining the witnesses themselves, when suits are conducted by incompetent persons.[2]

Power of the Judge to cross-examine witnesses.

If the Judge finds that the exaimination of a witness is not being conducted in such a way as to unfold the truth, it is not only his right but his duty to intervene with his own questions particularly at a jury trial. It need hardly be pointed out that he must not take side; but he must not also "descend into the arena" and forsake the judicial calm for the zeal of combatant.

Again, although the law allows the Judge to put any question at any time, the time generally considered proper for an extended examination is when the lawyers for the parties have finished their questions or at least when the lawyer, examining the witness at the time, is passing on the view subject.[3]

In *Noor Bux Kazi* v. *Empress*,[4] Sir Richard Garth, C.J., and Toltenham, J., deprecated the practice of Judges and Magistrates questioning witnesses as if they were cross-examining counsel.

Any person would feel the embarrassment and trouble when the learned Judge puts questions during the course of either examination-in-charge or cross-examination which would take him away from the trend of his questions.[5] The courts cannot fetter the discretion of advocates by insisting that their case should be put to this witness or that.[6]

In this case the learned Judge took the witnesses out of the hand of counsel and examined and cross-examined them himself. In view of this fact the Court held that it must discard entirely the views formed by the learned Judge as to the demeanour of witnesses.[7]

In a striking passage Lord Greene, Master of the Rolls, in *Yuill* v. *Yuill*,[8] observed as follows (page 20) :

English law on Judges and cross-examination.

> "A Judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination. If he takes the latter course, he so to speak descends into arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation".

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1. Bal Rajaram *v.* Menklal, A.I.R. 1932 Bom. 136 at pp. 150-51 : 34 Bom. L.R. 55 : I.L.R. 56 Bom. 36 : 137 I.C. 717.
2. Ram Gutty *v.* Mumtaj Bebee, 10 W.R. 280 at p. 282.
3. Sunil Chandra Roy *v.* State, A.I.R. 1954 Cal. 305 at p. 317 : 57 C.W.N. 962.
4. I.L.R. 6 Cal. 279 at p. 283 : 7 C.L.R. 385.
5. *In re* Sivasubbu Nadar, A.I.R. 1951 Mad. 772 (1) at p. 772.
6. Mohammed Mian *v.* Emperor, A.I.R. 1919 Pat. 515 at p. 516.
7. Yusuf L. Abbas *v.* Bhagwandas P. Nangpal, A.I.R. 1949 Bom. 346 at p. 347.
8. (1945) p. 15.

Forbidding the further cross-examination of a witness on the ground that she was embarrassed clearly shows that the trial was most unsatisfactorily conducted.[1]

Duty and privilege of a Judge to a witness.

It is the duty and privilege of the Judge to put questions to witnesses in order to get the truth. This is the reason why the powers of the Court in this respect are much wider than those of the counsel.[2] The courts have frequently observed that the persons actually appointed at the expense of the Crown to defend the accused have conducted the defence in a most perfunctory manner.[3] It would be helpful to recall here the following observations made by a Division Bench of the Patna High Court in *Darpan Potdarin* v. *Emperor*.[4]

On conduct of defence by lawyers engaged by the Court.

> "We desire to make some remarks about the defence of prisoners who are too poor to instruct lawyers on their own account...We have frequently observed that the persons actually appointed to do their work very badly and conspicuous opportunities for cross-examination and obvious arguments are entirely ignored. In such circumstances... the Trial Judge should use his greater experience to cross-examine the witnesses when he sees that the defence lawyer is incompetent.

16. Cross-examination of witness called by Court.—When the counsel of the prisoner has examined or declined to cross-examine a witness and the Court, afterwards, of its own motion, examined him, the witness cannot then, without the permission of the Court, be subjected to cross-examination.[5]

Court's permission to cross-examine witness.

This principle applies equally, whether it is intended to direct the examination to the witness's statements of facts, or to circumstances touching his credibility.[6] Where under Sec. 540, Cr.P.C., a Court summons and examines a person as a witness, neither the prosecutor, nor the accused can claim, as of right to cross-examine such witness.[7] A witness called by the Court is liable to be cross-examined by any of the parties to the suit.[8] The ordinary practice in properly constituted courts is that, where a witness for the prosecution is not called on the part of the Crown he is placed in the witness-box in order that the defence may have an opportunity of cross-examining him.[9] There is nothing in Sec. 165 of the Evidence Act debarring or disqualifying a party to a proceeding from cross-examining any witness summoned by the Court.[10]

Witness under Sec. 540, (new sec. 311) Cr.P.C. claim as of right to cross-examine.

Section 540 (new Sec. 311), Cr. P.C. gives the Court a discretion to summon, examine or recall any person as a witness. This section does not confer a right in any party to examine, re-examine or cross-examine any witness. The right to cross-examine a

Scope of Sec. 540 (new Sec. 311) Cr.P.C.

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1. Ma Aya May *v.* Chew Cheng Guat, A.I.R. 1941 Rang. 334 at p. 335.
2. Mst. Khadija Begum *v.* Nisar Ahmad, A.I.R. 1936 Lah. 887 at p. 890 : 39 Punj. L.R. 52.
3. Dikson Mali *v.* Emperor, A.I.R. 1942 Pat. 90 at p. 93.
4. A.I.R. 1938 Pat. 153 : 173 I.C. 833 : 39 Cr.L.J. 384.
5. 11 B.H.C.R. 166 at p. 168.
6. 11 B.H.C.R. 166 at p. 169.
7. Queen *v.* Suroop Chunder Paul, 12 W.R. (Cr.) 75 and 3 B.L.R. (A.C.) 145.
8. 3 B.L.R. (A.C.) 145.
9. Empress *v.* Girish Chunder Talukdar, I.L.R. 5 Cal. 614 at p. 615.
10. Gopal Lall Seal *v.* Muniok Lall Seal, I.L.R. 24 Cal. 288 and Queen-Empress *v.* Durga, I.L.R. 16 All. 84 (F.B.).

witness who is called by a Court—a witness who is not one who has been summoned by any party—arises not under the provisions of Sec. 540 (new Sec. 311), Cr.P.C., but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness.[1]

17. Death or serious illness of witness between his examination-in-chief and his cross-examination.—In *Rex* v. *Doolin*[2] a prosecution witness was taken seriously ill while under cross-examination; his evidence was taken into consideration. In *Davies* v. *Otty*,[3] the Master of the Rolls said:

English law.

"The evidence of Susannah Davies must be admitted. It appears that her evidence was given on the 28th August last year, and that she died two or three days afterwards which made it impossible to cross-examine her.

Indian law.

In India, decisions bearing on this point are scanty. There is no provision in the Evidence Act that the evidence of a witness which is admissible at the time when he is examined should afterwards become inadmissible if it is not possible to cross-examine him.

The evidence of a witness who has been examined in open Courts is not inadmissible in England merely because it is impossible afterwards to cross-examine him. Reference may be made to the passage in para. 1469 in the Tenth Edition of Taylor's *Law of Evidence* and Phipson's *Law of Evidence*.[4]

That the evidence in such circumstances is admissible but that weight to be attached to it depends on the circumstances of each case has been held in *Mangal Sen* v. *Emperor*[5] following the case in *Maharaja of Kolhapur* v. *Sunderam Ayer*[6] and *Ahmed Ali* v. *Joti Prasad*.[7] Rowland, J., of the Patna High Court, in *Mst. Horil Kuer* v. *Rajab Ali*,[8] was of the same opinion.[9]

Cross-examination terminated prematurely evidentiary value.

Where owing to the refractory attitude of the witness the Court is constrained to terminate prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony.[10]

18. Cross-examination of witness sworn by mistake and also examined by mistake.—If a witness be sworn under a mistake and that mistake be discovered before the examination-in-chief has substantially begun, no cross-examination will be allowed.[11]

Regarding witnesses sworn by mistake the rule is thus laid down in Art. 1893 of Vol. 6 of Wigmore on *Evidence* (1940), 3rd Ed. at p. 563 :

Once the plaintiff even by mistake comes to the witness-box and swears and is examined about a document, he would become a witness and will be liable to be cross-examined by the defendant as to the whole of the case.[12]

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1. Mohammad Shafi *v.* State, A.I.R. 1953 All. 667 at p. 667 : 1953 A.L.J. 366.
2. Jebb. C.C. 123.
3. (1865) 55 E.R. 875 : 34 L.J. Ch. 252 : 13 W.R. 484 : 12 L.T. 789.
4. Seventh Ed., p. 459.
5. A.I.R. 1929 Lah. 840.
6. A.I.R. 1925 Mad. 497 : I.L.R. 48 Mad. 1.
7. A.I.R. 1944 All. 188 at p. 190 : I.L.R. (1944) All. 241.
8. A.I.R. 1936 Pat. 34 : 160 I.C. 445.
9. Shrikishun Jhunjhunwalla *v.* Emperor, A.I.R. 1946 Pat. 384 at p. 385.
10. Ram Kumar *v.* Emperor, A.I.R. 1937 Oudh 168 at p. 169.
11. Wood *v.* Mackinson, (1840) 2 M. & R. 273 ; Chifford *v.* Hunter, (1821) 3 C. & P. 16 ; Reed *v.* James, (1815) 1 Stark. R. 132 ; Taylor on *Evidence*, 10th Ed., para. 1429, p. 1034.
12. Onkar Bhikaram *v.* Balmukund Javarchand, A.I.R. 1957 M.B. 135 at p. 136.

19. Tendering for cross-examination.—"Tendering for cross-examination" can cover two types of cases. There is a type of case where witnesses of a secondary importance who have been examined before the committing Magistrate are not called before the Sessions Court and then in fairness to the defence, it tenders those witnesses for cross-examination. But the fact that the witness is tendered for cross-examination means and implies that there has been some examination-in-chief.

But the phrase "tendering for cross-examination" has also been used in this country in cases where the prosecution discards a witness examined before the committing Magistrate on the ground that in its opinion, he is not likely to prove himself to be a witness of truth. In such cases it nevertheless makes the witness available to the defence so that the defence may examine him, if it likes.[1]

Practice deprecated.

This practice of tendering witnesses leads to considerable confusion and is to be deprecated. Tendering if at all should be confined to witnesses of secondary importance.[2]

The Madras, Calcutta and Punjab High Courts have taken the definite view that tendering a witness for cross-examination is not a practice which should be encouraged. In *Veera Koravan* v. *Emperor*,[3] relying on the decision in *Queen Empress* v. *Ram Shai Lall*,[4] held that—

Practice should not be encouraged.

" 'Merely tendering him for cross-examination' is not a practice which should be encouraged especially in murder cases as it would be very unfair to the accused."

The Punjab High Court in *Chota Singh* v. *State*,[5] has emphatically stated that...

Punjab High Court's view.

"When a witness has not given statement in examination-in-chief, there is nothing in relation to which he is to be cross-examined. Tendering a witness for cross-examination is almost tantamount to giving up a witness. There is nothing in law that justifies such a course."

20. Witnesses before committing Magistrate need not all be tendered for cross-examination in Sessions Court.—The prosecution is not bound to call all the witnesses called by it in the committing Magistrate's Court. If it is of opinion that any witness is unreliable, it need not examine him.[6]

Bombay High Court on practice of tendering witnesses.

The practice of tendering witnesses for cross-examination, which he is no doubt often adopted, is inconsistent with Sec. 138, Evidence Act. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the Lower Court, but at the same time do not want to deprive the accused of the right of cross-examining such witness, they tender him for cross-examination. But he must in some way be

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1. Dhirendra Nath *v.* State, A.I.R. 1952 Cal. 621 at pp. 626-27. N.B. Section 209 of Cr.P.C., 1973 which deals with P.C. of case does not contemplate examination of witnesses by the commiting Magistrate.
2. Manzarul Haque *v.* State of Bihar, A.I.R. 1958 Pat. 422; Thazhathethil Halmsa *v.* State of Kerala, A.I.R. 1967 Ker. 16 at p. 18.
3. A.I.R. 1929 Mad. 906 at pp. 909, 910.
4. I.L.R. 10 Cal. 1070.
5. A.I.R. 1964 Punj. 120 at p. 122.
6. Queen-Empress *v.* Stanton and Flynn, I.L.R. 14 All. 521 : 12 A.W.N. 110 and Empress *v.* Kali Prosonno Doss, I.L.R. 14 Cal. 245. N.B. Section 209, Cr. P.C., 1973 does not contemplate examination of witnesses by the committing Magistrate.

examined-in-chief before he can be cross-examined. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eye-witness.[1]

Evidence on oath, most desirable.

In cases where any witness known to the prosecution is able to swear to facts very material to the case, the proper procedure to follow is to ask him to give evidence on oath. Merely "tendering him for cross-examination", their Lordships observed, was not a practice which should be encouraged as it was very unfair to the accused. In regard to a witness who was examined by the prosecution before the committing Magistrate if the prosecution was of opinion that no reliance could be placed upon such witness's testimony the Allahabad High Court held in *Queen-Empress* v. *Stanton and Flynn*,[2] that all that the prosecution was bound to do was to have the witnesses who were examined before the committing Magistrate present at the trial so as to give the Court or counsel for the defence, as the case may be, an opportunity of examining him.[3]

Public Prosecutor calling a witness.

In *Brahmaya* v. *King*,[4] complaint was made that the learned Judge remarked that he could not allow one *P* to be called by the Public Prosecutor and tendered for cross-examination by the defence. The learned Judge was quite right to point out the principle enunciated in *Nga Aung Gyi* v. *Emperor*[5] which he appeared to have done. If what the Judge said to the Public Prosecutor was in the nature of advice as to how the latter should exercise his discretion, no exception could be taken to it; but if the learned Judge went further and instructed the Public Prosecutor not to call him, that this was going too far.[6]

The practice of tendering witnesses for cross-examination leads to confusion and does not induce to the discovery of the truth.[7]

There is no provision in that Act for permitting a witness to be tendered for cross-examination without his being examined-in-chief and this practice is opposed to Sec. 138 of the Act.[8]

Where witnesses were declared hostile.

Two witnesses were declared hostile in the committing Court and their cross-examination permitted. In the Court of Sessions their evidence-in-chief was not taken at all. They were declared hostile and cross-examined by the prosecution. *Held* that this procedure was not permissible under the law.[9]

21. Re-examination.—The proper object of re-examination is to draw forth an explanation of the meaning of the expressions used by the witness on cross-examination; and also of the motive or provocation which induced him to use them to clear up evident misconceptions and errors committed by him while under examination; and to explain new facts which have come out on cross-examination. In England, it is not permitted to go further and introduce matter new in itself. Under Sec. 138 of

English law.

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1. Sadeppa Girappa Mutgi *v.* Emperor, A.I.R. 1942 Bom. 37 at p. 38 : I.L.R. (1942) Bom. 115 : 43 Bom. L.R. 946.
2. I.L.R. 14 All. 521.
3. Manzurul Haque *v.* State of Bihar, A.I.R. 1958 Pat. 422 at p. 426.
4. A.I.R. 1938 Rang. 442.
5. I.L.R. 14 Rang. 45.
6. Brahmaya *v.* King, A.I.R. 1938 Rang. 442 at pp. 444-45.
7. Emperor *v.* Kasamalli Mirzalli, A.I.R. 1942 Bom. 71 at p. 76 (F.B.) : 44 Bom. L.R. 27 : I.L.R. (1942) Bom. 384.
8. See *ibid*; Kesar Singh *v.* State, A.I.R. 1954 Punj. 286 at pp. 293-94.
9. Abdul Latif *v.* Emperor, A.I.R. 1941 Cal. 533 at p. 534 : 45 C.W.N. 763.

the Indian Evidence Act new matter relevant to the suit may, by permission of the Court, be introduced in re-examination; but if so introduced, the adverse party may further cross-examine upon such matter.

In India.

The right of re-examination of a witness is envisaged in Sec. 137 read with Sec. 138 of the Evidence Act and arises only after the conclusion of cross-examination and is directed to the explanation of any part of his evidence during cross-examination which is capable of being construed unfavourably to the party applying for re-examination. The object is to give an opportunity to reconcile the discrepancies, if any, between the statements in examination-in-chief and cross-examination or to explain any statement inadvertently made in cross-examination or to remove any ambiguitly in the deposition or suspicion so cast on the evidence by cross-examination. Where there is no ambiguity or where there is nothing to explain, questions put in re-examination with the sole object of giving a chance to the witness to undo the effect of a previous statement should never be allowed.[1]

Re-examination—Object of.

22. Clarification of ambiguities is not the only function of the re-examiner.—There is erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation. The Public Prosecutor should formulate his questions for the purpose. Explanation may be required either when ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the Court in accordance with the other provisions. But the Court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination.[2]

23. Remarks of the Judicial Committee.—Their Lordships of the Judicial Committee made the following remarks relating to the examination of witnesses in India. "It would appear that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client... It ought never to be permitted in the result to embarrass judicial investigation."[3] The species of advocacy in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client in order that he may himself have the opportunity of cross-examining that client, was condemned by the Judicial Committee as a vicious practice.[4]

An unfair practice.

The cross-examination of the witness had begun on 10th May and had been completed on the 11th and the Public Prosecutor then desired to re-examine the witness. The learned Judge permitted

Cross-examination of the witness.

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1. Champrapriya Devi *v.* Damyanti Misra, 1986 C.L.T. 601 at p. 604.
2. **Rammi *v.* State of Madhya Pradesh, A.I.R. 1999 S.C. 3544 at pp. 3547-48 : 1999 Cr.L.J. 4561 : (1999) 8 S.C.C. 649 : 1999 (4) Crimes 32.**
3. Kishori Lal *v.* Chunni Lal, I.L.R. 31 All. 116 at p. 122 : 13 C.W.N. 370 (P.C.).
4. Lal Kunwar *v.* Chiranji Lal, I.L.R. 32 All. 104 (P.C.).

re-examination only with reference to the cross-examination on the 11th. Apparently the learned Judge apprehended that with reference to answers which he had given in cross-examination on the 10th the wirness might have been tutored or prepared as to what explanation he should give in re-examination.

Held that statute, however, did not contemplate placing any such restriction on the right of re-examination.[1]

24. Judge not to interfere with counsel's discretion in cross-examination.—It is not always safe that a Judge should freely interfere with the discretion of counsel, while cross-examining witnesses.[2] When the Court is satisfied that the cross-examination of any witness on a commission is being unnecessarily prolonged it will order such cross-examination to be concluded within a certain time.[3] An order of a Magistrate fixing arbitrary limit of time, *viz.* five minutes for the cross-examination of a witness is illegal.[4]

It is the duty of the Trial Courts to check prolix examination and cross-examination of witnesses, in exercise of the powers inherent in all Magistrates to prevent abuse of the process.[5]

Length of cross-examination.

The length of the cross-examination may depend upon the matters in issue.

Court's discretion in controlling cross-examinations.

The principle is indisputable that the Court has a discretion in the matter of controlling the cross-examination of a party by counsel of the opposite-party. In *Vassiliades* v. *Vassiliades*,[6] the Privy Council says :

Privy Council's view.

"(No doubt) all reasonable latitude should be allowed, but the Judge has always a discretion as to how far it may go or how long it may continue. As Lord Sankey, L.C., said in *Mechanical and General Inventions Co. and Lehwess* v. *Austin Motor Co.* :"[7]

"...a protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time".

This principle has been put in another form in a judgement of the Privy Council reported in *Raj Kumar Sen* v. *Ram Sunder Shaha*.[8]

This ruling again says that the Court has got power to control the cross-examination if such examination appears to the Court to be unduly protracted and wholly irrelevant. Then there are two judgements of the Bombay High Court reported in *Emperor* v. *Rahimatall*[9] and *Queen-Empress* v. *Sayed Surfuddin*.[10] This is what Shah, J., observed in the former case (page 178) :

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1. Bakhori Gope *v.* Hafiz Abdul Halim, A.I.R. 1941 Pat. 362 at p. 366.
2. 4 C.W.N. cxxi.
3. Suraj Prosad *v.* Standard Life Assurance Co., I.L.R. 30 Cal. 625 ; *see* Golden R. Mining Co. *v.* Buxton Mining Co., 97 Fed. Report 414, noted in 4 C.W.N. cxxi.
4. Emperor *v.* Asiruddin Sarkar, 22 Cr.L.J. 524 (Cal.) ; Emperor *v.* Abed Ali, 34 C.L.J. 172 : 22 Cr.L.J. 412.
5. F.W. Soler *v.* Emperor, A.I.R. 1917 Sind 46 (2) at pp. 46, 47.
6. A.I.R. 1945 P.C. 38 : 1945 A.L.J. 34 : 1946 A.W.R. (P.C.) 15.
7. (1935) A.C. 346 at p. 350.
8. A.I.R. 1932 P.C. 69 : 1932 A.L.J. 198 : 136 I.C. 102 : 35 M.L.W. 409 : 62 M.L.J. 457 : 34 Bom. L.R. 526 : 1932 M.W.N. 584.
9. 22 Bom. L.R. 166 : A.I.R. 1920 Bom. 402.
10. Rat. Un. Cr.C. 344.

"...The length of the proceedings should have been appreciably reduced by avoiding questions and arguments which could have at least a remote bearing on the points arising in the case, and the omission whereof could involve no detriment to their respective cases."

Hayward, J., expressed his view in similar terms.

The observations in the latter case are more pertinent and one can do no better than quote a part of the head-note in that case:

"It is the duty of a Judge to control the cross-examination, so as to prevent any gross abuse and to protect a witness from being unfairly dealt with.

In *William* v. *Smallman*,[1] the learned Chief Justice said :

"Great latitude should be allowed and....care should be taken not to stop a cross-examination which, although it may appear lengthy and wide off the point, may subsequently prove to be of value."

It is not possible for a Court to impose an embrago on the time that can be taken for the cross-examination. Ultimately the extent and the manner of cross-examination will depend upon the facts and circumstances of the case and the issues involved in it as pointed out by the Bombay High Court in *Yeshpal Jashbhai Parikh* v. *Rasiklal Umedchand Parikh*[2] as follows :

> "As a general rule, the Court would not be justified in imposing a time limit upon the cross-examination of a witness. But the Court may in the course of a trial, come to the conclusion that the cross-examination has been unnecessary or irrelevant or even rambling, and in such a case the Court has power to control the cross-examination of a witness by counsel of the opposite party. Such power should be exercised in a reasonable way."

It is, therefore, clear that the Trial Court at no stage of the proceeding should lose control over the same and should see that the cross-examination does not go on in a rambling way or extend to question impermissible under the provisions of the Indian Evidence Act. Subject to these qualifications the powers of a Trial Court are wide and indeed they should be.[3]

Duty of the Court.

It is the duty of the Court to disallow any question which it considers to be misleading or improper. Leading questions are permitted by the law of evidence in cross-examination[4].

Cross-examination should not unduly be curtailed.

Court must be careful not to exercise too effective a control so as to unduly curtail legitimate cross-examination. Undue interference in cross-examination must be avoided by the Presiding Judge.[5]

All witnesses are subject to cross-examination. The right of cross-examination could not be curtailed or circumscribed on one pretext or the other or in one way or the other, as shutting up of cross-examination would necessarily result in the injustice to the cause and to the party against whom the statement is intended to be used.[6]

It is essential in the interests of justice that the Court should be armed with full powers to prevent any abuse of the right of cross-examination.[7] In cases where

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1. (1914) 10 Cr. App. R. 1.
2. 57 Bom. L.R. 282.
3. Baburao Patel *v.* Bal Thackeray, 1979 Mah. L.J. 11 at p. 17.
4. Abbas Ali *v.* Emperor, A.I.R. 1933 Lah. 667 at p. 668 : 143 I.C. 479 : 34 Punj. L.R. 536.
5. Salag Ram *v.* Emperor, A.I.R. 1937 All. 171 at p. 173 : 1936 A.W.R. 967 : 167 I.C. 515.
6. Dwarka Dass *v.* State, 1979 Cr.L.J. 550 at pp. 553-54 (J. & K.).
7. Banke Lal *v.* Kanhaya Lal, A.I.R. 1922 Oudh 124 (2) at p. 128.

cross-examination is often irrelevant and unnecessarily lengthy, Magistrates are justified in disallowing questions. If the accused (or the prosecutor) is dissatisfied, it is always open to him to put in an application to be placed on the record saying that such and such a question was put but not allowed.[1]

On cross-examining witnesses on commission.

The Commissioner appointed by the Court has complete power to stop-proceedings and to take the direction of the Court whenever it appears to him that the pleader cross-examining a witness is abusing his position and exceeding the limits of propriety.[2]

25. Correction in cross-examination of a statement made in chief examination.—A witness ought to be allowed on cross-examination to qualify or correct any statement, which he has made in his examination-in-chief.[3]

26. Hearsay equally inadmissible in cross-examination.—There is no rule of law which renders hearsay evidence more admissible in cross-examination.[4]

27. **Hearsay should be nipped in the bud.**—The moment a witness commences giving evidence which is hearsay evidence, he should be stopped by the Court.[5]

28. Opportunity to cross-examine.—The evidence of a witness cannot be admitted until the opposite party had an opportunity of cross-examining him.[6]

The case of *Gorachand* v. *Ram Narain Chowdhari*[7] has been approved in *Chatto Kurmi* v. *Rajaram Tewari*,[8] where it has been held that it is the right of every litigant in a suit to have an opportunity of cross-examining witnesses whose testimony is to be used against him. Where in a trial before the Sessions Court, counsel for the defence asked that he might cross-examine the prosecution witnesses, the day following, as he was not prepared to cross-examine that day; *held* that the request was a reasonable one which should have been granted.[9]

Aim of cross-examination.

"Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story."[10]

Every cross-examiner should indicate in cross-examination, whichever part of the evidence given in examination-in-chief is challenged and an omission to do so would lead to the inference that the evidence is accepted subject of course to its being assailed as inherently improbable. This is the rule in America, England and in India as is clear from the following authorities:

"Opportunity of cross-examination as equivalent to actual cross-examination—

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1. Sardar Dewan Singh Maftoon *v.* Emperor, 42 Punj. L.R. 589 ; A.I.R. 1940 Lah. 527 at p. 528.
2. Mst. Bibi Kaniz Zainab *v.* Sayed Mobarak Hossain, A.I.R. 1924 Pat. 284 at p. 295.
3. Queen *v.* Tulsi Desadh, 18 W.R. (Cr.) 57.
4. Ganouri Lal Das *v.* Queen-Empress, I.L.R. 16 Cal. 206 at p. 211 (Bhatori Mushabaini, H.C. Calcutta, Cr. App. No. 337 of 1882).
5. Queen *v.* Pittambar, Sirdar, 7 W.R. (Cr.) 25.
6. Gur Diyal *v.* Sukhandan Lal, A.I.R. 1929 All. 236 at p. 237 : Chandar Lal Joure Jama *v.* Messrs. Amir Chand Mohan Lal Firm, A.I.R. 1960 Punj. 500 ; Harihar Sinha *v.* Emperor, A.I.R. 1936 Cal. 356.
7. 9 W.R. 587.
8. 11 C.L.J. 124 at p. 130 (F.B.)
9. Sadasiv Singh *v.* Emperor, I.L.R. 41 Cal. 299.
10. *Per* Hanworth, M.R., cited with approval by Sankey, L.C., in Mechanical and General Inventions Co. *v.* Austin Motor Co., (1935) A.C. 346 at p. 360.

Doctrine of cross-examination.

"The doctrine requiring a testing of testimonial statements by cross-examination had always been understood as requiring... merely an opportunity to exercise the right to cross-examine, if desired.[1]

"As a rule a party should put to each of his opponent's witness in turn so much of his own case as concerns that particular witness.... If he asks no question he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account.[2]

"....Failure to cross-examine, however, will not always amount to an acceptance to the witness's testimony....And where several witnesses are called to the same point it is not always necessary to cross-examine them all.[3]

"....If the plaintiff has deposed to a conversation with the defendant, it is the duty of the counsel for the defendant to indicate by his cross-examination of the plaintiff how much of the plaintiff's version of the conversation he accepts, and how much he disputes, and to suggest what the defendant's version will be. If he asks no question as to it, he will be taken to accept the plaintiff' account in its entirety.[4]

"....The system of administration of justice allows of cross-examination of opposite-party's witnesses and when the witnesses were not tested in that way, their evidence is to be accepted...."[5]

In *Baliram Tikaram* v. *Emperor*,[6] the evidence of some witnesses was held inadmissible because destruction of the notes of their statements resulted in depriving the accused of the opportunity of cross-examination. In *Magan Lal Radhakrishan* v. *Emperor*,[7] if there is on the record any statement by any witness to the police it was held that, if there is on the record any statement by any witness to police and if the accused omits to avail himself of it he cannot be heard to say that he was denied the opportunity to cross-examine the witness.

Mitchell, J., in *Minneapolis Mill Co.* v. *R. Co.*,[8] said :

"...The chief objections to hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine; neither of which applies to testimony given on a former trial."[9]

Where the inquiry officer gave to the petitioner an opportunity of cross-examining him, but he declined to do so, it is no longer open to him to make any grievance about it.[10]

29. Omissions to cross-examine on certain points—Suggestions.—It must be assumed that when the witnesses were not cross-examined their evidence is to be accepted unless, of course, there are any inherent improbabilities.[11]

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1. Wigmore on *Evidence*, Vol. II, para. 1371.
2. Flanagan *v.* Foby, (1918) 2 Ir. R. 361 at pp. 388-89 (C.A.) ; Browne *v.* Dunn, (1893) 6 R. 67 at pp. 76-77 (H.L.).
3. Phipson on *Evidence*, 9th Ed., 1952, pp. 497-98.
4. Odger's *Pleading and Practice*, 13th Ed., p. 261.
5. *Per* Wort, J., in Kamidan Sarda *v.* Sailaja Kanta Mitra, A.I.R. 1940 Pat. 683 at p. 685 ; Velu Pillai Padakalingam *v.* Paramanandan Yesudasan, A.I.R. 1954 T.C. 152 at pp. 154-55.
6. A.I.R. 1945 Nag. 1 : I.L.R. (1945) Nag. 151 : 218 I.C. 294.
7. A.I.R. 1946 Nag. 173 at p. 181.
8. (1892) 51 Minn. 304 at p. 315 : 53 N.W. 639.
9. Wigmore on *Evidence*, Vol. V, para. 1371.
10. Shyamsingh *v.* Deputy Inspector-General of Police, Ajmer, A.I.R. 1965 Raj. 140 at p. 142 : 1965 R.L.W. 26.
11. Kamidan Sarda *v.* Sailap Kanta Mitra, A.I.R. 1940 Pat. 683 at p. 685.

It is much less true to say that cross-examination of a witnesss is allowed with the avowed object of testing his veracity and if in any case the witness is not cross-examined, unless his statement suffers from inherent improbability, it should be presumed that whatever be stated is accepted as true by the person afforded opportunity to cross-examine him.[1]

30. Suggestion in cross-examination.—Suggestion in cross-examination, which is denied, is no evidence at all.[2]

31. Right of co-accused to cross-examine witness called by another co-accused.— One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first.[3]

In Taylor's *Evidence*, para 1430, the law is stated to be as follows :

English law.

"When two or more persons are separately defended, any witness called by one of them may be cross-examined, on behalf of the others, if he gives any testimony tending to criminate them."

The only reason for allowing one accused to cross-examine the witness of another co-accused is that the evidence of the witness may be used against the co-accused.[4]

The appellant had the opportunity of cross-examining Po Htein and utilized it.

Held that there was no reason why this man's evidence should not be taken into account.[5]

Where in cross-examining a witness questions are disallowed by the Court the deposition should show what the questions are and the reasons for disallowing them.[6]

32. Cross-examination of approver.—Before or after the case was committed to the Sessions Court, the accused had not raised any objection that they were not permitted to cross-examine the approver, nor did they contend so when the approver was examined and cross-examined during the trial. Therefore, at the stage of final arguments, the accused cannot raise the said contention. Further, after cross-examining the approver in detail, there is no question of failure of justice nor any prejudice being caused to the accused on account of that omission.[7]

33. Cross-examination of co-defendant's witnesses.—If the witness of a defendant makes any statement which is injurious to the co-defendants, they have a right to cross-examine him.[8]

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1. Baldev Singh *v.* State of Himachal Pradesh, (1976) 1 Cr.L.J. 758 at p. 758 ; *see* also Toga *v.* State of Rajasthan, 1984 R.L.W. 56.
2. Binapani Roja *v.* Rabindranath Sarkar, A.I.R. 1959 Cal. 213 at p. 214.
3. Ram Chand Chatterjee *v.* Hanif Sheikh, I.L.R. 21 Cal. 401. But *see* Queen *v.* Suroop Chunder Paul, 12 W.R. (Cr.) 75.
4. Chaman Lal *v.* Emperor, A.I.R. 1940 Lah. 210 at p. 215 : I.L.R. (1940) Lah. 521.
5. Aung Than *v.* King, A.I.R. 1937 Rang. 540 at pp. 540-41, but *see* Chaturbhuj *v.* Emperor, A.I.R. 1931 Lah. 57.
6. Rameshwar Dusadh *v.* Emperor, 21 Cr. L.J. 321 (Pat.)
7. **State of H.P. *v.* Surinder Mohan, (2000) 2 S.C.C. 396 at p. 407.**
8. Shohanlal *v.* Gulab Chand, A.I.R. 1966 Raj. 229 at p. 232 : 1965 R.L.W. 346 : I.L.R. (1965) 15 Raj. 1035.

In order to cross-examine a witness, it must be shown that the party seeking cross-examination is an "adverse party". Merely because a party is shown as a defendant in the cause title of the plaint, that party cannot be styled as an adverse party, unless it is further shown that the party is a contesting party in the sense that he disputes the case put up by the plaintiff in the plaint. If a party accepts the plaintiff's case, there is no contest between the plaintiff and that party and such a defendant cannot be styled as an "adverse party" and would, therefore, not be entitled to cross-examine the plaintiff.[1]

Section 138, Evidence Act, allows the right of cross-examination of a witness to an adverse party. Sadhu Singh, petitioner, shall have a right to cross-examine Inder Singh, defendant, if they can be treated adverse to each other. The purpose of cross-examination is to test the veracity of the testimony of a witness. Under issue No. 4, reproduced above, it is relevant to find out whether *Hazoori* service of the last *Mohatmim* is an essential ingredient or not for becoming eligible for appointment as a *Mohatmim* of the Gurdwara. Their stands on this point are contradictory. Parties arrayed as defendants in a suit, having taken contradictory stands on a relevant and material issue, shall be adversary to each other and entitled to exercise their right of cross-examination against each other. Sadhu Singh, defendant-petitioner, therefore, had a right to cross-examine his co-defendant Inder Singh and it was wrongly disallowed by the Trial Court.[2]

34. Cross-examination before charge.—The accused must and cannot but have an absolute right to cross-examine a prosecution witness before charge as a matter of elementary principle of natural justice and judicial procedure, even without any express statutory provision to that effect. Section 138, Evidence Act, really embodies and enshrines such principle and procedure and does not merely provide for the order of examination of witnesses.[3]

35. Duty of Magistrate towards accused after charge is framed.—It is the duty of the Magistrate, after a charge has been drawn up, to require the accused to state whether he wishes to cross-examine and, if so, which of the witnesses for the prosecution whose evidence has been taken. The accused is entitled to have the witnesses for the proseuction recalled for cross-examination after a charge is framed and before he is called upon to enter upon his defence.[4] A Magistrate cannot refuse to allow witnesses to be recalled and cross examined after the accused hasbeen put upon his defence.[5] It is incumbent upon a Court, when it discharges a witness to ascertain from the accused whether he has, or is likely to have, any need of the witness's testimony, and, if he has such need, then, to take such steps for ensuring the presence of the witness, at the required time, as may be necessary.[6]

Right to re-call a witness.

36. Accused's right to recall and cross-examine prosecution witnesses, when to be exercised.—The right of an accused person, to recall and cross-examine the witnesses for the prosecution must be exercised at the time when the charge is read and explained to him.[7]

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1. Hussens Hasanali Pulavwala *v.* Sabirbhai Hasanali Pulavwala, A.I.R. 1981 Guj. 190 at pp. 191-192.
2. Sadhu Singh *v.* Sant Narain Singh Sewadar, A.I.R. 1978 Punj. 319 at pp. 320, 321.
3. State of Sikkim *v.* Premba Sherpa, A.I.R. 1981 Cr. L.J. 856 at pp. 860.
4. Zamunia *v.* Ram Tahal, I.L.R. 27 Cal. 370 : 4 C.W.N. 469. N.B. under Sec. 246, Cr. P.C. 1973 this procedure applies to cases instituted otherwise than on police report. As to the procedure applicable to cases instituted on police report *see* Secs. 239 to 243 of the said Code.
5. *In the matter* of Thakoor Dayal Sen, 17 W.R. (Cr.) 51.
6. Khurruckdharee Singh *v.* Pershadee Mundul, 22 W.R. (Cr.) 44.
7. Faiz Ali *v.* Koromdi, 8 C.L.R. 325 : I.L.R. 7 Cal. 28.

Where certain accused persons had not been allowed to recall and cross-examine the witnesses for the prosecution, *held* that the accused had always a right to recall the prosecution witnesses, which ceased only when they themselves waived it.[1] An accused person refused to cross-examine prosecution witnesses he had examined the defence witnesses. *Held* that he was not entitled to have the prosecution witnesses summoned for cross-examination by him on the date for production of defence witnesses.[2] Where it was not alleged that the accused applied to the Magistrate to recall for cross-examiantion of any witness for the prosecution, *held* that there were no sufficient grounds for interference.[3]

37. When charge framed in warrant cases.—In the trial of warrant cases the charge is not framed until the witnesses for the prosecution have been examined.[4]

38. Defendant not to be put in box before plaintiff is.—It is not only illegal but improper and unfair for Courts to permit the defendant, at the very outset of the case, to be put in the witness-box nominally as the plaintiff witness, before the plaintiff is even called upon to go into the box.[5]

39. Prosecution evidence may be recorded after defence closes.—A Magistrate is competent to record the evidence for the prosecution, both oral and documentary, after the case for the defence has been closed.[6]

40. Test of admissibility of evidence of witnesses absent or previously examined.—The test for determining whether the depositions of the witnesses, who are absent or who have been examined in a former suit, can be received, is, whether the party, against whom they are to be used, had the power to cross-examine.[7]

41. Grounds on which adversary may inspect writing and refresh witness's memory.—The opposite-party may look at the writing to see what kind of writing it is, in order to check the use of improper documents.[8] A counsel of the opposite side has a right to look at a particular writing before or at the moment when the witness used it to refresh his memory in order to answer a particular question.[9]

42. Chance of rebuttal.—If a Court after the close of the case grants indulgence for further evidence to one party, it cannot refuse the prayer for rebuttal of the other side. It is immaterial if the prayer was rejected earlier.[10]

43. Section 138 of the Act and Sec. 311, Cr.P.C. are complementary.—Section 138 of the Evidence Act provides for order of examination of witnesses wherein there is also provision for re-examination of a witness whereas Sec. 311, Cr.P.C. provides for power to summon material witnesses, or examine person present. It is needless to mention that the aforesaid two provisions are complementary to each other and not conflicting with one another. When Sec. 138 of the Evidence Act makes provision relating to the order of examination of

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1. Queen *v.* Ram Kishan Halwai, 25 W.R. (Cr.) 48.
2. Empress of India *v.* Baldeo Sahai, I.L.R. 2 All. 253 at p. 258, approved in Ratan Moni Dey *v.* King-Emperor, 9 C.W.N. 547 at p. 548 : I.L.R. 32 Cal. 292.
3. 14 C.P.L.R. 137.
4. Talluri Venkayya *v.* Queen, I.L.R. 4 Mad. 130 : 6 Ind. Jur. 30 : 2 Weir 324 ; *see* Secs. 244 to 246 Cr. P.C., 1973.
5. 116 P.W.R. 1908.
6. Empress of India *v.* Baldeo Sahai, I.L.R. 2 All. 253 at p. 258.
7. Meer Sujad Ali Khan Nawab Zoolfukar Dowla Bahadoor *v.* Lalla Kashenath Doss, 6 W.R. 181 at p. 182.
8. *In the matter of* Jhubboo Mahton, I.L.R. 8 Cal. 739 at p. 745 : 12 C.L.R. 235 : 6 Ind. Jur. 639.
9. *Ibid.*
10. Nand Lal Sah *v.* Ram Kali Devi, A.I.R. 1982 Pat. 184 at p. 185.

witnesses, Sec. 311 mentions about the procedure and the duty of the Court to consider and pass order relating to examination and/or re-examination of witnesses.[1]

If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Sec. 311 (Cr. P.C.), but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant.[2]

139. Cross-examination of person called to produce a document.—A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.

SYNOPSIS

1. History of the rule ... 4834
2. Scope ... 4834
3. Witness sworn by mistake ... 4834
4. Witness falsely denying possession of, or pleading inability to produce, document ... 4835

1. History of the rule.—With the section may be read Sec. 164 of the old Code of Civil Procedure[3] which enacts that "any person may be summoned to produce a document, without being summoned to give evidence."

Rule under English law.

The rule contained in Sec. 139 is in accordance with the practice under English law.

In a case in which a witness had been summoned to produce a document, and in which he came to Court and stated on oath that he could not produce it; the Judge disbelieving him fined him Rs. 75 ostensibly under Sec. 174 of the Penal Code. It was, however, held that this section was not applicable.[4]

Omission to produce document when ordered by a Court is an offence under Sec. 179, I.P.C.[5]

2. Scope.—This section is meant to regulate the right of cross- examination.[6]

There is nothing in the Chapter VII of the Criminal Procedure Code to provide that the person who appears in the Court, in pursuance of its summons under sub-section (1) of Sec. 94 (new Sec. 91) thereby becomes a witness and can be examined and cross-examined by the Court although he has not been cited as a witness in the proceedings. Even if a person produces the document for which a summons has been issued to him, Sec. 139 of the Evidence Act clearly provides that he does not thereby become a witness by the mere fact that he produces it, and he cannot be cross-examined unless and until he is called as a witness.[7]

3. Wintess sworn by mistake.—Regarding witnesses sworn by mistake the rule is laid down in paras 1893 and 1894 of Vol. 6 of Wigmore on *Evidence*.[8]

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1. G.H. Iyer *v.* State, 1998 Cr.L.J. 1821 at p. 1822 (Orissa).
2. Pradeep Kumar Agarwal *v.* State, 1995 Cr. L.J. 76 at p. 78 (Orissa).
3. *See* Order XVI, rules 6 and 15 of the present Code of Civil Procedure, Sec. 91, Cr. P.C., 1973.
4. *In re* Prem Chand Daulatram, I.L.R. 12 Bom. 63.
5. Queen *v.* Seshhayya, I.L.R. 13 Mad. 24.
6. M.P. Sharma *v.* Satish Chandra, A.I.R. 1954 S.C. 300; State of Gujarat *v.* Shyamlal Mohanlal, A.I.R. 1963 Guj. 178 at p. 179 : (1963) 4 Guj. L.R. 638.
7. Parmeshwari Devi, Smt. *v.* State, A.I.R. 1977 S.C. 403 at p. 405.
8. 1940, 3rd Ed. at p. 563.

Applying the principle of para 1893 read with para 1894, it should follow that once the plaintiff even by mistake comes to the witness-box and swears and is examined about a document, he would become a witness and will be liable to be cross-examined by the defendant. He can be cross-examined as to the whole of the case.[1]

There is nothing in the chapter to provide that the person who appears in the Court in pursuance of its summons under sub-section (1) of Sec. 94, thereby becomes a witness and can be examined and cross-examined by the Court although he has not been cited as a witness in the proceedings. Even if a person produces the document for which a summons has been issued to him, Sec. 139 of the Evidence Act clearly provides that he does not thereby become a witness by the mere fact that he produces it and he cannot be cross-examined unless and until he is called as a witness.[2]

4. Witness falsely denying possession of, or pleading inability to produce, document.—Where a witness denies on oath that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding.[3]

140. Witnesses to character.—Witnesses to character may be cross-examined and re-examined.

Comment

English practice.—The practice in England is not to cross-examine witnesses called merely to speak to the character of a prisoner.

141. Leading questions.—Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

SYNOPSIS

1. Meaning ... 4835
2. Leading question ... 4835
3. When can be put to a witness and when not ... 4835

1. Meaning.—Mr. Bentham defines a leading question to be one which indicate to the witnesses the real or supposed fact which the examiner expects and desires to have confirmed by the answer.

2. Leading question.—Leading question means also one suggesting disputed facts as to which the witness is to testify.[4]

3. When can be put to a witness and when not.—Leading question is to be one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answers to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in Chief examination to the subject to the enquiry/trial. The Court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the Court must only be controlled towards that end but a question which suggests to the witness, the answer the prosecutor expects must not be allowed unless the witness, with the permission of the Court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to

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1. Onkar Bhikaram *v.* Balmakund Javarchand, A.I.R. 1957 M.B. 135 at p. 136.
2. Smt. Parmeshwari Devi *v.* State, A.I.R. 1977 S.C. 403 at pp. 405-6.
3. *In re* Premchand Dowlatram, I.L.R. 12 Bom. 63 at p. 65.
4. Stephen's *Digest*, 7th Ed., Art. 128, p. 146.

state the facts or to give his own account of the matter making him to speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such manner, that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 provides the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but Sec. 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame question in such a manner which the witness by answering merely "yes" or "no" but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell untarnished tale of his own account.[1]

142. When they must not be asked.—Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

SYNOPSIS

1. When usually allowed ... 4836
2. Power of the Judge ... 4837
3. Distinction between objects of Secs. 142 and 154 ... 4838
4. Leading questions in departmental enquiry—Effect ... 4838

1. When usually allowed.—"To abridge the proceedings and bring the witness as soon as possible to the material points on which he is to speak, the counsel", says Mr. Taylor, "may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established.

Judge has power to allow leading question in direct examination.

With respect even to material points, the Judge, in his discretion, will sometimes allow leading questions to be put in a direct examination, as for instance, where the witness, by his conduct in the box, obviously appears to be *hostile* to the party producing him, or *interested* for the other party, or *unwilling* to give evidence.

Suggestion to witness in recollecting a thing.

Indeed, if the witness stand in a situation which of necessity makes him adverse to the party calling him, as if he be a defendant whom the plaintiff wished to examine.[2] Leading questions may, it seems, be asked him as a matter of right....Again, a witness will occasionally be allowed to be led, where an omission in his testimony is evidently caused by want of recollection, which suggestion may assist. And indeed, it must always be remembered that the Judge has a discretionary power—not

Witness contradicting another.

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1. Varkey Joseph *v.* State of Kerala, 1993 (2) S.C.J. 600 at pp. 607, 608 (S.C.) : 1994 Cr. L.R. (S.C.) 363 : 1994 Cal. Cr. L.R. 106 (S.C.) : 1993-2 (104) P.L.R. 643 (S.C.) : 1993 A.C.C. 478 (S.C.) : 1994 L.W. (Cr.) 186 (S.C.) : 1993 S.C. Cr. R. 433.
2. As in Radha Jabin Mustafi *v.* Tara Moni Dasi, 12 M.I.A. 380, where this part of the rule was recognized.

controllable on a bill of exception—of relaxing the general rule, whenever and under whatever circumstances and to whatever extent he may think fit though the power should only be exercised so far as the purposes of justice plainly require."[1] On a direct examining leading questions are not allowed, except in the sound discretion of the Court, under special circumstances, making it appear that the interests of justice require it."

American law.

As soon as the witness has been conducted to the material portion of his examination, as soon as the time and place of the scene of action have been fixed, "it is generally the easiest course," says Mr. Starkie, "to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he has heard from others, which he always supposes to be quite as material as that which he himself has seen.[2] So Mr. Alison says, "It is often a convenient way of examining, to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection, and bring him to state of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story.[3]

On examination of a witness.

Lord Ellenborough said in a case[4] before him... "It is necessary to a certain extent to lead the mind of the witness to the subject of inquiry. If questions be asked to which the answer 'yes' or 'no' would be concluisve, they would certainly be objectionable..."

What is a "leading question" ?

Leading questions shall be permitted also where the questions are for the purpose of identification, or after a witness's memory has been fairly exhausted, and he does not recollect without its being refreshed.[5]

Leading question—When permitted.

In the case reported in *Employers of Firestone Tyre and Rubber Co. (Pvt.) Ltd.* v. *The Workmen*,[6] some of the questions put to the delinquent in the domestic enquiry appeared to be leading. *Held* that too much of legalism must not be expected from a domestic enquiry.[7]

2. Power of the Judge.—There is no doubt as to the power of the Judge to give leave to put a leading question to one's own witness.[8]

As to the power in Enlgand *cf.* Best on *Evidence*.[9]

This rule must of necessity to be relaxed when the witness exhibits an opposite feeling, namely, when he by his conduct, attitude, demeanour or unwillingness to give answer or to disclose the truth shows that he is hostile or friendly to the party calling him. The Court in such a case may in its discretion, permit a party to put any question to his own

Relaxation from rule.

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1. Sections 1268-A, 1263 ; Secs. 1404, 1045, 8th Ed., compare Sec. 1842 of the New York Civil Court.
2. Starkie on *Evidence*, p. 167.
3. Allison's *Practice of the Criminal Law of Scotland*, p. 546.
4. Nicholls *v.* Dowding and Kemp, 1 Stark, 81 : 18 R.R. 146.
5. Whitley Stokes, Vol. II, p. 926, citing Taylor's *Evidence*.
6. A.I.R. 1968 S.C. 236 at p. 239 : (1968) 2 M.L.J. (S.C.) 29.
7. Tata Oil Mills Co. Ltd. *v.* Its Workmen, (1963) 2 Lab. L.J. 78 (S.C.) ; Sur Enamel and Stamping Works Ltd., *v.* Workmen, (1963) 2 Lab. L.J. 367 : A.I.R. 1963 S.C. 1914 ; Meenglas Tea Estate *v.* Its Workmen, (1963) 2 Lab. L.J. 392 ; A.I.R. 1963 S.C. 1719 and Associated Cement Co. Ltd. *v.* Workmen, (1963) 2 Lab. L.J. 396 (S.C.).
8. Profulla Kumar Sarkar *v.* Emperor, A.I.R. 1931 Cal. 401 at p. 404 : 131 I.C. 575 ; 53 C.L.J. 427 : 35 C.W.N. 731 : I.L.R. 58 Cal. 1404.
9. Eleventh Ed., Vol. II, p. 957.

witness which might be put in cross-examination by his opponent, that is, may permit him to lead. This in effect means that the Court may in a fit case permit a party to cross-examine his own witness as provided for under Sec. 137 of the Evidence Act.[1]

3. **Distinction between objects of Secs. 142 and 154.**—Section 142 is intended to provide for cases different to those contemplated by Sec. 154. The distinction between the object of these two sections, is that Sec. 154 provides for the cross-examination of the witness by the adverse party for the purpose of contradicting answers given by the witness or to test the witness's veracity or to drag the truth from him. Section 142 merely deals with leading questions.[2]

4. **Leading questions in departmental enquiry—Effect.**—It is true that in this case some leading questions were put to the prosecution witness and upon the appellant's complaint Collector of Customs directed the Enquiry Officer not to ask leading question. It cannot be said that whenever leading questions are put to witnesses by the Enquiry Officer that would vitiate the enquiry proceedings. Rules of Evidence do not apply to the departmental proceedings. Further, Enquiry Officer being in the position of a judge is entitled to ask leading queston to elicit the truth. Thus the leading questions put to the prosecution witness do not go to the root of the matter of having been vitiated the enquiry proceedings.[3]

143. When they may be asked.—Leading questions may be asked in cross-examination.

SYNOPSIS

1. Object of the section ... 4838
2. Meaning of "leading question" ... 4839
3. Kinds of leading questions ; assuming a controverted fact ... 4839
4. Leading questions calling for answers "Yes" or "No" ; alternative questions ... 4839
5. When leading questions may be asked ... 4839
6. Leading questions when not allowed. 4840
7. Reason for objecting to leading questions ... 4841
8. Rule against leading questions not inflexible : ... 4841
—Identification ... 4841
—Witness's recollection exhausted ... 4841
—Witness not understanding, children, invalids, illiterates, etc. ... 4841

1. Object of the section.—The reasons why leading questions are allowed to be put to an adverse witness in cross-examination is that it sometimes becomes necessary for a party to put leading questions in order to elicit facts in support of his case.

Leading question in cross-examination.

Now, after the petitioner had cross-examined the first witness an application was made to the second respondent pointing out that certain questions put to Mst. Punia and their answers had not been recorded by him. On this application the second respondent, *inter alia*, made the very general and wholly wrong order, that "no leading questions shall be allowed".

The order passed by the second respondent betrays an ignorance of the principles on which a cross-examiantion should be allowed to be conducted. The order was of a much too sweeping character and cannot be justified, regard being had to the basic meaning to be attached to the word "cross-examine".[4]

Section 143 permits leading questions to be put in cross-examination. This is in accordance with the English practice by which the cross-examination is not limited to the matters upon which the witness has already been examined-in-chief,

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1. **Dadabudappa Gouli** *v.* **Kalu Kanu Gouli, A.I.R. 2000 Kant. 158 at p. 159.**
2. Ammathayarammal *v.* Official Assignee, High Court, Madras, A.I.R. 1933 Mad. 137 at p. 142 : I.L.R. 56 Mad. 7 ; 64 M.L.J. 208 ; 37 M.L.W. 233.
3. Anandram Jiandrai Vaswani *v.* Union of India, 1983 Lab. I.C. 624 at p. 654.
4. Lalta Prasad *v.* Inspector-General of Police, A.I.R. 1954 All. 438 at p. 440 : I.L.R. (1954) 2 All. 325 : 1954 A.L.J. 316 : 1954 A.W.R. 138.

but extends to the whole case, and, therefore, if a plaintiff calls a witness to prove a single, even the simplest fact connected with the case, the defendant is at liberty to cross-examine him in every issue, and by putting leading questions, to establish, if he can, his entire defence. Same practice has been adopted in India under the provisions of Indian Evidence Act. Only question is that the cross-examining counsel must be confined to questions relevant to the case. If a certain question is relevant, a cross-examiner cannot be prevented from asking such questions.[1]

Cross-examination must be confined to questions relevant to the case.

2. Meaning of "leading question".—A leading question is one which suggests to the witness the answer which it is desired he should give.[2] Counsel must not put into the witness's mouth the words which he hopes the witness will utter nor in any other way suggest to him the answer which it is desired he should give.[3]

3. Kinds of leading questions ; assuming a controverted fact.—A question which in part *assumes the truth* of a controverted fact, and inserts the assumption as a part of a question on another fact, may lead a witness to reply without taking care to specify that his answer is based on that assumption. This is obviously a danger to be prevented.[4]

Bell, C.J., in *Steer* v. *Little*,[5] observed : "question is leading where the question assumes any fact which is in controversy....

English law.

4. Leading questions calling for answers "Yes" or "No" ; alternative questions.—(1) A question *admitting of being answered by a simple "yes" or "no"* is regarded as generally leading and improper one.[6] Nevertheless, so rigid a rule is unsound. Obviosly, such a question depends for its suggestion more in the tone of voice than in the form of words.[7]

Cornish, C.J., in *Audibert* v. *Michaud*,[8] stated : "A question is not necessarily leading because it can be answered by 'yes' or 'no'. The presiding Justice, who has an unprejudiced view of the entire situation, is allowed a wide discretion in this respect....

(2) The *alternative form* of question is free from this defect of form because both affirmative and negative answers are presented for the witness's choice. Nevertheless, such a question may become leading, in so far as it rehearses lengthy details which the witness might not otherwise have mentioned.

5. When leading questions may be asked.—"With respect to the mode of conducting a cross- examination", says Mr. Taylor, "it is admitted on all hands, that *leading questions* may in general be asked ; but this does not mean that the counsel may go the length of puttng the very words into the mouth of the witness which he is to echo back again.[9] Neither does it sanction the putting of a question which assumes that facts have been proved, which have not been proved, or that particular answers have been contrary to the fact."[10]

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1. Sanjib Kumar Das *v.* State of Tripura, 1994 (3) Crimes 411 at p. 412 (Gau.).
2. Nicholls *v.* Dowding, (1815) 1 Stark, 81 : 18 R. R. 746; Cockle, 265.
3. Powell, 10th Ed., p. 459.
4. Wigmore, Vol. III, Sec. 771, p. 128.
5. 44 N.H. 616.
6. Nicholls *v.* Dowding, (1815) 1 Stark. 81 : 18 R.R. 746.
7. Wigmore's *Evidence*, 3rd Ed., Vol. III, Sec. 772, pp. 128-29.
8. 119 Me, 295 ; 111 Atl. 305.
9. R. *v.* Hardy, 24 Howell's State Trials, 755.
10. Paragraph 1288 ; Secs. 14, 31, 8th Ed.

When defence can put leading question.

The accused are entitled in cross-examination in view of the generality of Sec. 143 of the Evidence Act, to ask leading questions. Under Sec. 154, *post*, the Court has the discretion to permit the prosecution to test, by way of cross-examination, the veracity of their own witness with regard to the unconnected matters elicited by the defence in cross-examination.[1]

6. Leading questions when not allowed.—The chief rule of practice relative to the interrogation of witnesses is that which prohibits *leading* questions. The rule is that on material points a party must not lead his own witnesses, but may lead those of his advesary.[2] On all matters, however, which are merely introductory and form no part of the substance of the inquiry, it is both allowable and proper for a party to lead his own witnesses. It is sometimes said that the test of a leading question is whether an answer to it be "yes" or "no" would be conclusive upon the matter in issue; but although all such questions undoubtedly come within the rule, it is by no means limited to them. Leading questions ought not to be put when it is sought to prove material and proximate circumstances.

Test of a leading question.

On the other hand, however, very unfounded objections are constantly taken on this ground. A question is objectionable as leading when it suggests the *answer*, not when it merely directs the attention of the witness to the *subject* respecting which he is questioned.[3] In an action for slander,[4] in saying of a tradesman that "he was in bankrupt circumstances, that his name had been seen in a list in the Bankruptcy Court, and would appear in the next Gazette" a witness—having deposed to a conversation with the defendant, in which he made use of the first two of these expressions—was asked, "Was anything said about the Gazette?" This was objected to as leading, but was allowed by Tindal, C.J. It should never be forgotten that "Leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract.

When a question is objectionable as leading.

Leading is a relative term.

There are some exceptions to the rule against leading—(1) For the purposes of identifying persons or things the attention of the witness may be directly pointed to them. (2) Where one witness is called to contradict another as to expressions used by the latter, he may be asked directly. Did the other witness use such and such expressions?[5] The authorities are not quite agreed as to the reason of this exception;[6] and some strongly contend that the memory of the second witness ought first to be exhausted by his being asked what the other said on the occasion in question.[7] (3) Whenever circumstances show that the witness is either hostile to party calling him or unwilling to give evidence, the Judge may in his discretion allow the rule to be relaxed.[8] And it would seem that, if the witness shows a strong bias in favour of the cross-examining party, the right of leading him ought to be restrained ; but the authorities are not quite clear about this.[9] (4) The rule will be relaxed where the inability of a witness to answer questions arises from defective memory ; or (5) from the complicated nature of the matter as to which he is interrogated.

Exception to the rule.

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1. Amritalal Hazra *v.* Emperor, I.L.R. 42 Cal. 957 : 19 C.W.N. 676.
2. Ph. & Am. *Evidence*, 887 ; 2 Phillips's *Evidence*, 461, 10th Ed.
3. Nicholls *v.* Dowding, (1815) 1 Stark, 81 : 18 R.R. 746.
4. Rivers *v.* Hague, C.B. Sittings after Mich. Term. 1837, M.S.
5. Edmords *v.* Walter, 3 Stark. 7.
6. Courteen *v.* Touse, 1 Camp. 43 ; Hallett *v.* Cousins, 2 Ms. & R. 238.
7. Ph. & Am. *Evidence*, 889 ; 1 Phillip's *Evidence*, 463, P. 10th Ed.
8. Ph. & Am. *Evidence*, 888 ; 2 Phillip's *Evidence*, p. 462, 10th Ed.
9. *See* Rose on *Criminal Evidence*, 131, 6th Ed. ; 2 Phill. *Evidence*, pp. 472-73, 10th Ed. ; Taylor's *Evidence*, para 1288, 4th Ed.

Criminal trial; question turning on identity.

In a criminal trial, where the question turns on identity, although it would be prefectly regular to point to the accused and ask a witness if that is the person to whom his evidence relates, yet if the witness can, unassisted, single out the accused, his testimony will have more weight.[1]

7. Reason for objecting to leading questions.—The objection to leading questions is, not that they are absolutely illegal, but only that they are unfair.[2]

Rule is to guard against the bias of witness.

Rule is to guard against the bias of the witness in favour of the side in support of which his evidence is sought. Where no such bias need be apprehended the rule loses much of its utility.[3]

Introductory or undisputed matter.

8. Rule against leading questions not inflexible.—The rule that leading questions must not be asked on an examination-in-chief, is not inflexible.

In the first place a question is not objectionable as leading when it is only introductory to what is material, or relates to matters as to which there is no dispute.[4]

Identification.—For the purpose of identification, too, a witness may be directed to look at a particular person, and say whether he is the man.[5] Indeed, wherever,[6] from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, questions may be put in a leading form.[7]

Witness's recollection exhausted.—Where recollection of the witness is exhausted, he may be aided by a question suggesting the answer.[8]

Witness not understanding children, invalid, illiterates, etc.—Where the witness does not appreciate the tenor of the desired details a question calling attention specifically to the details may be allowable, when other means have failed.[9]

The common situation of this sort is that of a *child or woman,*[10] or of an *illiterate* or *alien adult.*[11] A related situation is that of a person too ill or too feeble of speech to be able to articulate sentences ; here the sentences may be framed for him suggestively, leaving him as little as possible to articulate.[12]

144. Evidence as to matters in writing.—Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is

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1. Best on *Evidence,* 10th Ed., Secs. 641-43, pp. 545-48.
2. Queen-Empress *v.* Abdullah, I.L.R. 7 All. 385 at p. 397 (F.B.).
3. Profulla Kumar Sarkar *v.* Emperor, A.I.R. 1931 Cal. 401 at p. 406 ; 131 I.C. 575 : 53 C.L.J. 427 : 53 C.W.N. 731 : I.L.R. 58 Cal. 1404.
4. Powell, 10th Ed., pp. 459-60.
5. R. *v.* Watson, (1817) 2 Stark, R. 139 ; R. *v.* Berenger, (1817) 2 Stark R. 129n.
6. Gr. *Evidence,* Sec. 435, in part.
7. Taylor on *Evidence,* 10th Ed., para. 1405, p. 1012.
8. Courteen *v.* Touse, (1807) 1 Camp. 43 ; Wigmore, 3rd Ed., Vol. III, Sec. 777 p. 134.
9. Nicholls *v.* Dowding, (1815) 1 Stark, 81 : 18 R.R. 746.
10. Coon *v.* People, (1879) 99 Ill. 369 (but pointing out that sometimes leading questions, should specially be avoided with children).
11. State *v.* Simes, (1906) 12 Ida. 310 : 85 Pac. 914 (Simple-minded woman, in rape.).
12. State *v.* Burns, (Ia.), (1899) 78 N.W. 681 (deaf-mute) ; Wigmore, 3rd Ed., Vol. II, Sec. 778, pp. 134-35.

about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration

The question is, whether *A* assaulted *B*.

C deposes that he heard *A* say to *D*—"*B* wrote a letter accusing me of theft, and I will be revenged on him". This statement is relevant, as showing *A*'s motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

Comment

Evidence once admitted without objection cannot be challenged subsequently.

"The adverse party may object" etc.—Where a piece of evidence not proved in the proper manner, has been admitted without objection, it is not open to the opposite-party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, does not apply.[1]

145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him, or being proved ; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

SYNOPSIS

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1. Sudhana *v.* Gour, 35 C.L.J. 473 ; Shiv Chandra Singh *v.* Gour Chandra Pal, 27 C.W.N. 134.

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1. Rule laid down in the Queen's case altered.—This section is word for word nearly the same as Sec. 24 of the Common Law Procedure Act, 1854, (17 & 18 Vict, c. 128) which, however, contains an additional proviso. This proviso is, however, substantially contained in Sec. 165, *post*. The above section of the Common Law Procedure Act, 1854, altered the rule laid down in the *Queen's* case,[1] *viz.* that before the witness can be cross-examined as to the contents of a document, the cross-examining counsel must produce it as his evidence and have it read. Mr. Day, speaking of the section of the Common Law Procedure Act, 1854, remarks : "The effect is this : the witness, in the first instance, may be asked whether he has made such and such a statement in writing, without its being shown to him. *If he denies that he has made it*, the opposite-party cannot put in the statement without first calling his attention to it...and to any parts of it relied upon a contradiction. *If the witness, instead of denying that he has made the statement*, admits it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the Court and jury. It must always be borne in mind that this section is confined to written statements *made by the witness* relative to the subject-matter of the cause. This section, therefore, does not interfere with the decision in *Macdonnell* v. *Evans*.[2] It is right to notice this, as the Commissioners, in their second report, apparently refer to the case of *Macdonnell* v. *Evans*,[3] as one of the judicial decisions proceeding on the rule, which is now superseded."[4]

Judge competent to require document for inspection and use

If it is intended to contradict a witness by his statement in writing, his attention first should be called to the writing.[5]

2. Object of the section.—The object of Sec. 145 of the Evidence Act is to afford an opportunity to the witness to explain his previous statement.[6]

If the witnesses are recalled subsequent to the conclusion of their evidence in Court at the behest of the accused on the basis of affidavits subsequently filed by them contradicting their previous statements made in Court, it would be in violation of the provisions contained in Sec. 145, Evidence Act.[7]

3. Applicability.—It is obvious from a perusal of Sec. 145 that it applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a

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1. 2 Brodrip and Bingham's Rep. 286.
2. 11 C. B. 930.
3. *Ibid.*
4. Day's *Common Law of Practice.*
5. Ramakka *v.* Nagasam, I.L.R. 47 Mad. 800 at p. 807, *per* Venkata Subbi Rao, J.
6. Venkatlal Baldeoji Mahajan *v.* Kanhiyalal Jankidas, A.I.R. 1963 M.P. 155 at p. 157 : 1962 Jab. L.J. 796.
7. Tahir *v.* State of U.P., 2000 Cr. L.J. 1342 at p. 1344 (All.).

statement is sought to be contradicted, his attention should be drawn to his previous statement under Sec. 145. In other words, where the statement made by a person or witness is contradicted not by his own statement but by the statement of another prosecution witness, the question of the application of Sec. 145 does not arise.[1]

4. Scope of the section.—Section 145 gives the right to cross-examine a witness on previous statements made by him and reduced into writing, when these previous statements are relevant to the matter in issue.[2]

Section 145 applies also to a hostile witness examined by the party who calls him (Sec. 154).[3]

The section deals with the cross-examination of a witness and has no reference to a case where a person making the previous statement has not appeared as a witness and given evidence as such.[4]

In the instant case, it is difficult to accept the contention of the counsel for the appellants that the term 'evidence' as used in Sec. 319 Criminal Procedure Code would mean evidence which is tested by cross-examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examination the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person is to be added as accused or not. Word "evidence" occurring in sub-section is used in comprehensive and broad sense which would also include the material collected by the investigating officer and the material or evidence which comes before the Court and from which the Court can *prima facie* conclude that person not arraigned before it is involved in the commission of the crime.[5]

Procedure for proof of previous statement not laid down in Sec. 155.

Section 155 does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement is provided in Sec. 145 of the Act. In other words, Sec. 155 is controlled by Sec. 145 and is not independent of it.[6]

Where there is no compliance with Sec. 145, Evidence Act, previous statements of the witness should not be admitted in evidence.[7]

In *Bal Gangadhar Tilak* v. *Srinivas Pandit*,[8] the Privy Council pointed out that there is no warrant whatsoever for using the previous statement of the witness for the purpose of contradicting or discounting his evidence "unless the particular matter or point has been placed before the witness as one for explanantion in view of its discrepancy with the evidence then....being tendered."

In *Emperor* v. *Zawar Rahman*,[9] it was held that—

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1. Mohan Lal Gangaram Gehani *v.* State of Maharashtra, 1982 S.C. Cr. R. 186 at p. 189 : (1982) 26 M.L.J. (Cr.) 431 at p. 434 : A.I.R. 1982 S.C. 839 at p. 840.
2. Queen-Empress *v.* Mannu, I.L.R. 19 All. 390 at pp. 421-22 (F.B.) : (1897) 17 A.W.N. 174, *per* Aikman, J. ; *see* also Ram Kumar *v.* Gram Samaj, (1980) 6 A.L.R. 498.
3. Whitley Stokes, Vol. II, p. 926. *See* also Zamir Ali *v.* State, 1981 A. Cr. R. 442.
4. Firm Malik Des Raj Faqir Chand *v.* Firm Piara Lal Aya Ram, A.I.R. 1946 Lah. 65 at pp. 67-68 : 222 I.C. 28 ; *see* also Girdhari Biswal *v.* Golak Biswal, A.I.R. 1949 Orissa 27.
5. **Rakesh *v.* State of Haryana, 2001 (3) C.T.C. 380 at p. 384 (S.C.).**
6. Gopi Chand *v.* Emperor, A.I.R. 1930 Lah. 491 at p. 495 : I.L.R. 11 Lah. 460 : 31 Punj. L.R. 797 : 126 I.C. 573.
7. Emperor *v.* Ajit Kumar Ghose, A.I.R. 1945 Cal. 159 at p. 164: I.L.R. (1945) 1 Cal. 326 : 78 C.L.J. 217 : 220 I.C. 237.
8. A.I.R. 1915 P.C. 7 : I.L.R. 39 Bom. 441 : 42 I.A. 135 : 29 I.C. 639 (P.C.).
9. I.L.R. 31 Cal. 142 (F.B.).

"Unless the attention of a witness is expressly directed to any particular statement previously made by him any previous statement cannot be admitted in evidence in contradiction as the statement that he has subsequently made. And in admitting any statement shown to be in contradiction to a statement made at a trial, that statement alone should be put in evidence and not the entire deposition.

Previous statement not to be admitted in contradiction in evidence if not shown to witness.

Observations to the same effect were made in a decision of the Calcutta High Court in *Emperor* v. *Rahenuddi Mandal.*[1]

All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradiction after his attention has been drawn to them in a fair and reasonable manner.

The matter is one of substance and not of mere form.[2]

There is no duty cast upon counsel who wishes to cross-examine a witness by putting to him a previous statement first to prove that statement. If the witness admits the previous statement, or explains any discrepancy or contradiction, it obviously makes it unnecessary for the statement thereafter to be proved. On the other hand, if the statement still requires to be proved that can be done later by calling the person before whom the statement was made.

Proof of previous statement of witness.

The proposition that an illiterate person is immune from the processes of law with regard to contradiction by a previous statement has no authority in law and would nullify almost completely the provisions of Sec. 145 if it were so, as the majority of witnesses in criminal cases in Punjab are illiterate.

Section 145 makes not the slightest difference whether the witness is literate or illiterate.[3]

Section 145 nowhere lays down that the document which is intended to be used to contradict a witness must come from proper or legitimate custody.[4]

The principle underlying Sec. 145 is that it is unfair to contradict a witness by his previous statement without bringing the statement to the notice of the witness and affording an opportunity to him to tender his explanation as to why he made the previous statement or to clear up the point of ambiguity or dispute.

But where the witness is a party to the case and his previous admission has already been proved in the case to his knowledge then no question of unfairness can arise.

The duty is cast upon him to tender his explanation as to the admission. His mere bald statement contrary to his previous admission does not discharge the burden that lies on him to explain the circumstance in which the admission was made.

Duty to tender explanation.

If such an ambiguous or vague admission is relied upon to contradict the oral testimony of a party given in the case it is but fair opportunity be given to him to tender an explanation and clear up the ambiguity.[5]

Ambiguous admission.

A party has to explain admission himself.[6]

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1. A.I.R. 1944 Cal. 323 : I.L.R. (1943) 2 Cal. 381 ; Emperor *v.* Ajit Kumar Ghosh, A.I.R. 1945 Cal. 159 at pp. 164-65.
2. Bhagwan Singh *v.* State of Punjab, A.I.R. 1952 S.C. 214 at p. 218 : (1952) S.C.A. 513 : (1952) S.C.J. 284.
3. Muzaffar Khan Sikandar Khan *v.* Emperor, A.I.R. 1939 Lah. 268 at p. 269.
4. Emperor *v.* Raja Ram, A.I.R. 1934 Nag. 35 at p. 36 : 16 N.L.J. 198 : 146 I.C. 83.
5. Ajodhya Prasad Bhargava *v.* Bhawani Shanker Bhargava, A.I.R. 1957 All. 1 at pp. 4-5 : 1957 A.L.J. 350 : 1957 A.W.R. 866.
6. Raja Bhaiya *v.* Daulat Singh, 1962 M.P.L.J. 213 at p. 218.

A witness cannot be contradicted by first supposing that a certain thing must have taken place in a manner not deposed to by any witness and then to find that that was not consistent with the statement made by that witness.[1]

It is laid down in *Muharram Ali* v. *Barkat Ali*,[2] that a previous statement made by a party cannot be used against him as an admission by merely filing an attested copy of that statement, without putting it to the party concerned.[3]

Use of endorsement made on a letter.

Any endorsement made by the witness at the back of the letter making a statement which is at variance with the statement made by him in the Court cannot be used without drawing his attention to that endorsement.[4]

Use of statement made during investigation.

This section does nowhere exclude statements made by witnesses in writing or reduced to writing, during police investigation. Those statements can be used for purposes of contradiction under Sec. 145 of the Evidence Act and where any part of such statement is so used any part of it may also be used for purposes of any matter referred to in his cross-examination.

Supreme Court view regarding Secs. 145 and 162.

The history of exclusion of statements made to police officers and recorded by them has been set out, with great clarity by Subba Rao, J., delivering the majority judgment of their Lordships of the Supreme Court in *Tahsildar Singh* v. *State of Uttar Pradesh*.[5]

Attention of witness to be specifically drawn to parts to be contradicted.

If it is intended to contradict the witness by any previous writing, it is necessary to draw his attention to those specific parts of the statement which show contradiction between his previous and the present statements.[6]

Earlier statements made by prosecution witnesses, before police, may be used for the purpose of contradicting the prosecution witnesses.[7]

Witness to be confronted with previous statements.

The witness must be confronted with those parts of the earlier statement on which the defence relies for the purpose of contradicting him.[8]

Duty of defence counsel to confront the witness with previous statement.

It has been pointed out by the Gujarat High Court in the case of *State* v. *Hiralal*,[9] that if the first informant is not confronted with contradictions it cannot be said that the contradictions have been properly proved. It would be the duty ot the defence counsel whether a statement has been recorded as a first information report or is treated as a statement contemplated under Sec. 162, Cr. P.C., to confront the witness concerned with the omissions or contradictions from the statement.[10]

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1. R.K. Dalmia *v.* Delhi Administration, A.I.R. 1962 S.C. 1821 at p. 1847.
2. A.I.R. 1930 Lah. 695 : 125 I.C. 886 : I.L.R. 12 Lah. 286.
3. Secretary of State *v.* Akbar Shah, A.I.R. 1934 Lah. 753 at p. 758 : 153 I.C. 819.
4. Union of India *v.* Narayan Lal, A.I.R. 1963 Pat. 152 at p. 157 : 1963 B.L.J.R. 455.
5. A.I.R. 1959 S.C. 1012 : (1960) S.C.A. 201 : (1959) S.C.J. 1043. *See* also Malakala Surya Rao *v.* Gundapuncede Janakamma, A.I.R. 1964 A.P. 198 at pp. 199-200 : (1963) 2 Andh. A.I.R. 485.
6. Vidheswar Pathak *v.* Budhiram Barai, A.I.R. 1964 All. 345 at p. 345 : 1963 A.W.R. (H.C.) 447: 1963 A.L.J. 860 ; *see* also Venkatlal Baldeoji Mahajan *v.* Kanhiyalal Jankidas, A.I.R. 1963 M.P. 155 at p. 157 : 1962 J.L.J. 796—Where it is intended to contradict a witness by his previous statement, all that is required is that the witnesses attention must be called to that particular portion of the previous statement which is sought to be relied on.
7. Daitari Das *v.* Kulamani Panda, A.I.R. 1965 Orissa 21 at p. 23 : 30 Cut. L.T. 500.
8. Pangi Jogi Naik *v.* State, A.I.R. 1965 Orissa 205 at p. 206.
9. (1964) 5 Guj. L.R. 255 : A.I.R. 1964 Guj. 261.
10. Mehr Vajsi Deva *v.* State of Gujarat, A.I.R. 1965 Guj. 143 at p. 145 : (1964) 5 Guj. L.R. 834.

Purpose of contradiction under Sec. 145.

The purpose of using an earlier statement under Sec. 145 of the Evidence Act is to show that the witness is unreliable and that the Court should not believe him. Such use under Sec. 145 of the Evidence Act does not amount to "use against the witness", as contemplated by Sec. 6 of Commissions of Inquiry Act, 1952.[1]

It will be against all rules of natural justice to admit in evidence, against a delinquent servant, the previous statements of witnesses who have disposed against him, without giving him an opportunity to cross-examine those witnesses in respect of these statements.[2]

Right of delinquent during departmental inquiry.

The delinquent in a departmental enquiry should be given a reasonable opportunity to defend which includes not only a right to cross-examine the witnesses for the department but also to cross-examine them effectively.

The previous statements of witnesses are an effective aid in cross-examination and denial to supply them must be treated as denial of giving an adequate opportunity to defend against the charge.[3]

5. Section consists of two limbs.—The credit of a witness can be impeached by proof of any statement which is inconsistent with any part of his evidence in Court. This principle is delineated in Sec. 155 (3) of the Evidence Act and it must be borne in mind when reading Sec. 145 which consists of two limbs. It is provided in the first limb of Sec. 145 that a witness may be cross-examined as to the previous statement made by him without such writing being shown to him. But the second limb provides that "if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him." There is thus a distinction between the two vivid limbs, though subtle it may be. The first limb does not envisage impeaching the credit of a witness, but it merely enables the opposite party to cross-statements made by him. He may at that stage succeed in eliciting materials to his benefit through such cross-examination even without resorting to the procedure laid down in the second limb. But if the witness disowns having made any statement which is inconsistent with his present stand, his testimony in the Court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Sec. 145.[4]

A perusal of this section shows that this section permits the cross-examination of the witness in any trial, with reference to his previous statement, to establish a contradiction and the manner in which such contradictions can be established. Section 155 of the Evidence Act provides that the previous statement of a witness can be made use of during the cross-examination of that witness for the purpose of impeaching the credit of the witness. Thus, it is seen it is the right of a party in a trial to use the previous statements of a witness either for the purpose of establishing a contradiction in his evidence or for the purpose of impeaching the credit of the witness. This right given to a party in a trial under Sec. 145 of the Evidence Act is somewhat controlled in criminal trials by the provisions made in the Code.[5]

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1. Sohanlal Pahladrai Vaid *v.* State, A.I.R. 1965 Bom. 1 at p. 2 : 66 Bom. L.R. 353.
2. Bidya Bhushan Mohapatra *v.* State of Orissa, A.I.R. 1960 Orissa 68 at p. 71.
3. Sharmanand *v.* Superintendent, Gun Carriage Factory, Jabalpur, A.I.R. 1960 M.P. 178 at p. 179 : 1960 M.P. L.J. 110 : 1960 J.L.J. 205 ; *see* also L.J. Choudhary *v.* State, 1984 Guj. L.J. 864.
4. Binay Kumar Singh *v.* State of Bihar, A.I.R. 1997 S.C. 322 at p. 326 : 1997 Cr. L.J. 362 (S.C.) : (1997) 1 S.C.C. 283 : 1997 S.C.C. (Cr.) 333.
5. **State of Kerala *v.* Babu, 1999 Cr. L.J. 3491 at p. 3493 (S.C.) : A.I.R. 1999 S.C. 2161 : (1999) 4 S.C.C. 621 : 1999 (3) Crimes 27 (S.C.) : 1999 (2) K.L.T. 301 (S.C.).**

6. Rule as to confrontation does not apply to admissions.—The rule as to confrontation does not and should not apply to admission in so far as they are relevant facts in themselves.[1]

Application of the rule of confrontation.

There is no provision, similar to Sec. 145, Evidence Act, with regard to statements which are admissible under Secs. 17 to 21 and 32 of the Evidence Act. This view receives support from a Full Bench decision of the Allahabad High Court in *Ajodhya Prasad* v. *Bhawani Shanker*,[2] in which it was observed that when admission made by parties were to be proved in a case, it was not obligatory on the party who produced those documents to draw in cross-examination the attention of the opponent to the said admissions before he could be permitted to use them for purpose of contradicting the opponent provided that the admissions were clear and unambiguous. It was also held that the party producing such document containing such admissions could use them as substantive evidence in the case without drawing in cross-examination the attention of the opponent to those admissions.[3]

Admissions are admissible evidence.

Admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness-box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serve the purpose of throwing doubt on the veracity of the witness.[4]

Admission substantive evidence of what.

In order to attach weight, it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence. Even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, it is sound that if a witness is under cross-examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. This is a general, salutary and intelligible rule.[5]

Despite the lack of jurisdiction in the Court which recorded the statement, it still remains as previous statement for the purpose of Sec. 145 of the Indian Evidence Act.[6]

Distinction between a party who is the author of a prior statement and a witness who is sought to be discredited by use of his prior statement.

There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case an admission by a party is substantive evidence if it fulfils the requirements of Sec. 21 of the Evidence Act ; in the latter case a prior statement is used to discredit the credibility of the

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1. *See* Lal Singh *v.* Guru Granth Sahib, A.I.R. 1951 Pepsu 101 ; Ram Kishun *v.* Kausal Kishore, A.I.R. 1958 Pat. 294 and Narayan *v.* Gopal, A.I.R. 1960 S.C. 100 : (1960) 2 S.C.A. 153 : 1960 S.C.J. 263 : (1960) 1 S.C.R. 773 ; Shiv Ram *v.* Shiv Charan Singh, A.I.R. 1964 Raj. 126 at p. 137: I.L.R. (1964) 14 Raj. 26.
2. A.I.R. 1957 All. 1 (F.B.).
3. Veerbasavaradhya *v.* Devotees of Lidgadagudi Mutt, A.I.R. 1973 Mys. 280 at pp. 287-88.
4. Bharat Singh *v.* Mst. Bhagirathi, A.I.R. 1966 S.C. 405 at p. 410 : 1966 S.C.D. 153 : (1966) 2 S.C.J. 53 : (1966) 1 S.C.R. 608.
5. Patel Somabhai H. *v.* Patel Bavajibhai A., 1994 (1) Guj. L.H. 117 at p. 125 (Guj.).
6. Ramdas Srinivas Nayak *v.* Abdul Rehman Antulay, 1993 (1) Bom. C.R. 185 at p. 198.

witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore*, in the latter case, the Court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by Sec. 145 of the Evidence Act.[1]

When a document containing a previous admission of a person is going to be used against him he should be given an opportunity to tender his explanation to clear up the particular point.[2]

The infirmity against the admission being used against the respondent is that as long as the respondent was under cross-examination it was not brought to his notice. If admission is proved and if it is thereafter to be used against the party who has made it the question comes within the provisions of Sec. 145 of the Evidence Act. The general principle is that before any person is to be faced with any statement he should be given an opportunity to see that statement and to answer the same. The specific statutory provision is contained in Sec. 145 of the Indian Evidence Act that "a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved be called to those parts of it which are to be used for the purpose of contradicting him. Therefore, a mere proof of admission after the person whose admission it is alleged to be has concluded his evidence will be of no avail and cannot be utilised against him.[3]

7. Previous statements of witness may be used for contradiction.—

Section 145 not limited to statement on oath.

Section 145 of the Indian Evidence Act does not confine the right of contradiction only to previous statements recorded on oath.[4]

Supreme Court in *Rammi* v. *State of M.P.*[5] observed :

A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to the contradicted would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to contradict the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of Criminal Code also permits the cross-examiner to use the previous statement of the witness (recorded under Sec. 161 of the Code) for the only limited purpose *i.e.* to 'contradict' the witness.[6]

Judge should compare the statements of the witnesses recorded by the Magistrate at the preliminary investigation, with the evidence of the same wtinesses at the Sessions.[7]

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1. Biswanath Prasad *v.* Dwarka Prasad, A.I.R. 1974 S.C. 117 at p. 119.
2. Jatindra Nath Malik *v.* Sushilendra Nath Palit, A.I.R. 1965 Cal. 328 at p. 381 : 69 C.W.N. 210.
3. Sita Ram Bhau Patil *v.* Ramachandra Nago Patil, A.I.R. 1977 S.C. 1712 at pp. 1714, 1715 ; *see* also Punya Prasad Sankota *v.* Balvadra Dahai, 1985 C.W.L.J. 159.
4. Sharmanand *v.* Superintendent Gun Carriage Factory, Jabalpur, A.I.R. 1960 M.P. 178 at p. 179 ; *see* also State of Assam *v.* Suprabhat Bhadra, 1982 Cr. L.J. 1672 (Gau.). *See* also Smt. Sewaki *v.* State of Himachal Pradesh, 1981 Sim. L.C. 258 ; Sahab Lal *v.* State, 1983 A.I.R. Cr. R. 304.
5. 1999 A.I.R. S.C.W. 3546 : A.I.R. 1999 S.C. 3544 : 1999 Cr.L.J. 4561 : (1999) 8 S.C.C. 649.
6. **Referred in Munshi Prasad *v.* State of Bihar, A.I.R. 2001 S.C. 3031 at p. 3038 : 2001 Cr.L.J. 4708 at p. 4715 (S.C.) and also referred in Sukhdev Yadav *v.* State of Bihar, (2001) 8 S.C.C. 86 at p. 89 : 2002 (1) A.L.D. (Cri.) 36 (S.C.).**
7. Queen *v.* Bindabun Borree, 5 W.R. (Cr.) 54.

Use of contradiction.

Where the intention is to use a letter for limited purpose of contradicting the testimony of a witness it cannot be used as substantive evidence, but it can be used for testing the veracity of the witness.[1] The previous statement of a witness could only be used either for contradiction under Sec. 145 or for corroboration under Sec. 157 of the Evidence Act.[2] Previous statements when used for the purpose of contradicton, they merely destroy the credit of the witness, which is not a way of proving that what the witness says is true.[3]

If the witness during trial is intended to be contradicted by his former statement then his attention has to be drawn of those parts of the statement which are required to be used for the purpose of contradicting him before the said statement in question can be proved as provided under Sec. 145 of the Evidence Act.[4]

Cross-examination as to whether the witness told the police that he informed anybody at the place of occurrence as to his having accused escaping with the gun is permissible.

The Court finds that the Trial Court did not allow the defence counsel to cross-examine *L* with regard to his earlier statement to the police as to whether he had mentioned about going to the place of occurrence and whether Bhadar told him that Badri has killed Govindram and further whether he had told them to have seen Badri fleeing away with the gun. The only object of the examination of Lachhiram was to prove that he saw the accused armed with a gun running towards 10 Chak and that when he later heard that Govindram had been killed he went to the place of occurrence and, on enquiry as to who committed the murder, Bhadar told him that Badri murdered Govindram. It was his evidence also that he also disclosed running with a gun towards Chak 10. Since the above was the evidence that was led in examination-in-chief, it was perfectly legitimate for the defence to question him as to whether he had told the police that he informed anybody at the place of occurrence as to his having seen Badri escaping with the gun. The Trial Court has commited a serious error in disallowing the above questions on the ground that these were mere omissions not amounting to contradictions. These questions were clearly admissible under Sec. 162, Cr. P.C., read with Sec. 145, Evidence Act.[5]

Use of statement under Sec. 164.

A statement under Sec. 164 can be used to establish that what the witness has stated out of Court under Sec. 164 is true.[6]

The Supreme Court in *Tahsildar Singh* v. *State of U.P.*[7] laid down the test for ascertaining under what circumstances an alleged omission can be relied upon to contradict the positive evidence in Court.

In *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*,[8] the witnesses in their statements before the police attributed a clear intention to the accused to commit murder, but before the Court they stated that the accused was insane. *Held* that the previous statements of the witnesses before the police can be used to contradict their version in Court.

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1. Mellapa *v.* Guramma, A.I.R. 1956 Bom. 129 at p. 134.
2. Bashir Hussain Peshimam *v.* Gulam Mohammed Ismail Peshimam, A.I.R. 1966 Bom. 253 at pp. 260-61 : 67 Bom. L.R. 748.
3. Nur Mohammad *v.* Emperor, A.I.R. 1944 Sind 38 at p. 42 ; Sanika Munda *v.* Emperor, A.I.R. 1935 Pat. 19 at p. 20; Bishen Dutt *v.* Emperor, A.I.R. 1927 All. 705 : 25 A.L.J. 994.
4. **Rajendra Singh *v.* State of Bihar, 2000 Cr.L.J. 2199 at p. 2203 (S.C.) : (2000) 4 S.C.C. 298.**
5. Badri *v.* State of Rajasthan, A.I.R. 1976 S.C. 560 at p. 562.
6. Brij Bhusan Singh *v.* Emperor, A.I.R. 1946 P.C. 38 at p. 41 : 73 I.A. 1 : 1946 A.L.J. 73 : 1946 A.W.R. (P.C.) 1 : 48 Bom. L.R. 288.
7. A.I.R. 1959 S.C. 1012 at p. 1026 : (1959) Supp. (2) S.C.R. 875 at p. 903.
8. A.I.R. 1964 S.C. 1563 at p. 1569 : (1964) 1 Guj. L.R. 911.

The previous statement, unless relevant under some section of Chapter II, Evidence Act, is not substantive evidence and is admissible only for the purpose of impeaching the credit of the witness.[1]

A letter is no evidence of the facts stated therein. It can be used in the cross-examination for the purpose of discrediting the writer if what she had written was inconsistent with her evidence.[2]

A witness should be informed of the part of his statement which is to be used to contradict him. It is not sufficient to ask : "Is this Ex. D-1 your statement to the police?"[3] Statements made in the previous trial not otherwise admissible can be referred to for the purpose of contradicting the statements made in second trial.[4]

Chatterjee, J., in *Natha* v. *Hurmat*[5] observed that it is not necessary to examine a party to a case with reference to a former statement made by him and that the mere filing of an attested copy of that statement is sufficient to make it legal evidence in the case. It is clearly in conflict with the decision of their Lordships of the Privy Council in *Bal Gangadhar Tilak* v. *Srinivas Pandit*[6] and cannot be accepted as good law.[7] When the entire statements were read out to the witnesses and they were asked to say what they had in regard to the entire statements. *Held* that these were not in compliance with the provisions of Sec. 145 of the Indian Evidence Act.[8]

Entire statement read to a witness.

A confession made to the Investigating Excise Officer is admissible as a piece of substantive evidence against its maker.[9] But it is admissible for the purpose of impeaching his credit in respect of the statement made by him in his evidence in the Court when he is examined as a witness.[10]

Confession to Investigating Excise Officer inadmissible.

Before a witness can be contradicted by his previous statements it must be shown that the statements were voluntary.[11]

Statement of a witness abstracted in a judgement cannot be made use of for the purpose of contradicting a witness.[12]

When the record of the statement has been proved, then those parts of it which have been put to the witness may be used to contradict his evidence. The remainder of the statement is inadmissible for any purpose.[13]

Remainder of the statement used for contradiction inadmissible.

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1. Bhaga Bharti *v.* Sarkar, A.I.R. 1950 Raj. 10 at p. 12.
2. Judah *v.* Isolyna Shrojbashini Bose, A.I.R. 1945 P.C. 174 at p. 175 : 1945 M.W.N. 634 : 26 P.L.T. 279.
3. Raghuraj Singh *v.* Emperor, A.I.R. 1934 All. 956 at p. 957 : 152 I.C. 873 ; *see* also Samuel John *v.* Emperor, A.I.R. 1935 All. 935 at p. 936 : 1935 A.L.J. 1079 : 160 I.C. 162.
4. Fazlur Rehman *v.* King-Emperor, A.I.R. 1927 Pat. 315 at p. 316.
5. (1903) 31 P.R. 1903.
6. A.I.R. 1915 P.C. 7 : I.L.R. 39 Bom. 441.
7. *See* also the judgment of Mookerji, J., in Upendra Nath Nag *v.* Bhupendra Nath Nag, (1916) 21 C.W.N. 280 : 32 I.C. 267 ; *see* also Muharram Ali *v.* Barkat Ali, A.I.R. 1930 Lah. 695 at p. 698 : 125 I.C. 886.
8. Inderdeo *v.* State, A.I.R. 1959 All. 238 at p. 241 : I.L.R. (1958) 2 All. 917 : 1958 A.W.R. 844 : 1958 A.L.J. 885.
9. *Vide* Amin Shariff *v.* Emperor, A.I.R. 1934 Cal. 580 (F.B.).
10. Kerat Ali *v.* Emperor, A.I.R. 1934 Cal. 616 at p. 617 : 38 C.W.N. 1095 : I.L.R. 61 Cal. 967 : 150 I.C. 980.
11. Nayeb Shahana *v.* Emperor, A.I.R. 1934 Cal. 636 at p. 639 : 38 C.W.N. 659 : I.L.R. 61 Cal. 399 : 152 I.C. 44.
12. Saradamba *v.* Pattabhiramayya, A.I.R. 1931 Mad. 207 at p. 209 : 1930 M.W.N. 601 : I.L.R. 53 Mad. 962 : 60 M.L.J. 13 : 33 M.L.W. 20 : 129 I.C. 463.
13. *See* Mst. Sabhai *v.* Emperor, A.I.R. 1930 Lah. 449 : 121 I.C. 66 : 1930 Cr. C. 553 : 121 I.C. 66 : 31 Cr. L.J. 199.

It is unfair to the witness to seek to discredit him by referring to statements which he has made on some previous occasion without pointedly drawing his attention to them and giving him an opportunity of explaining them.[1]

Witness not to be discredited without drawing to attention his statement.

Previous statements of witnesses are only ordinarily admissible to corroborate or contradict the witnesses. In neither of these two cases is the previous statement itself substantive evidence.[2]

A pure and simple reading of the section makes it perfectly clear that the rule laid down in it is only applicable when a witness is sought to be contradicted by his previous statement. Where there is no statement in existence which could be contradicted by previous statement, rule laid down in Sec. 145 does not apply and it is not necessary before it could be admissible in evidence to draw the attention of the witness to it.[3]

In *Gulam Mhurtaza* v. *Nagina*,[4] it was held that before a previous admission can be used against a party, it must be put to him and an opportunity afforded to him to explain it if it is capable of explanation.

Use of previous admission when.

At the trials of civil cases the statements made by various witnesses at the trials were compared with the statements which they had made in the criminal proceedings, but the provisions of Sec. 145, Evidence Act, were entirely ignored.

Civil trials vitiated on ground of only comparison of statement with previous statement in criminal proceedings.

Held that the trials had been conducted wrongly throughout and that both the cases should be retried *ab initio*.[5]

In the case reported in *Ayub Ali* v. *Emperor*,[6] the provisions of Sec. 145 were not strictly complied with.

The attention of the witnesses was not drawn to each one of the previous statements that were made by her which were ultimately used for the purpose of contradicting her, but the failure to put each individual statement to her obviously did not result in any miscarriage of justice. *Held* that failure was of no importance in the present case.

Failure to comply with provisions of Sec. 145 not resulting in miscarriage of justice.

The Evidence Act makes no express provision regarding the mode of contradicting a witness by his previous oral statement. But there seems no difference in principle between a previous written statement and a previous oral statement and the procedure to be adopted for establishing such contradiction should be the same.[7]

Principle to contradict previous oral or written statements same.

This view is based on the observation of Patteson, J., in *Carpenter* v. *Wall*.[8]

Section 145 makes it necessary that a document used to contradict a witness must be put to witness. It cannot be admitted simply because he does not go into the witness-box.[9]

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1. Mahla Singh *v.* Emperor, A.I.R. 1931 Lah. 38 at p. 44 : 32 P.L.R. 259.
2. Abdul Jalil Khan *v.* Emperor, A.I.R. 1930 All. 746 at p. 747 : 1930 A.L.J. 1105 : 128 I.C. 593.
3. Jagdip Singh *v.* Kausal Kishore Singh, A.I.R. 1958 Pat. 294 at p. 301 : 1957 B.L.J. 542.
4. A.I.R. 1930 Lah. 991.
5. Abdul Gafoor *v.* Kali Charan, A.I.R. 1931 Rang. 273 at p. 273-74.
6. A.I.R. 1942 Cal. 277 at p. 279 : 200 I.C. 328 : 74 C.L.J. 547.
7. State *v.* Minaketan Patnaik, A.I.R. 1952 Orissa 267 at p. 277 : 53 Cr. L.J. 1393 : I.L.R. (1952) Orissa 364.
8. (1840) 113 E.R. 619; *see* also Taylor on *Evidence*, 11th Ed., Vol. II, Art. 1451.
9. Gajadhari Tewari *v.* Nand Lal Padde, A.I.R. 1934 Pat. 55 (2) at p. 56.

High Courts are not bound to set aside a verdict where inadmissible evidence has been adduced.[1]

High Court not to set aside verdict.

Where the records of the previous trial are before the Magistrate there is nothing to prevent the parties to the proceeding from making use of the original records. When the records are there, it is the duty of the learned Magistrate to refer to the record of the previous statements himself, and see whether there is any contradiction between the statements then made and the evidence now given before him.

Duty of Magistrate when to refer to previous statement.

Where the Magistrate does not give the petitioners the benefit of contradictions which were sought to be brought on the record, it vitiates the trial.[2]

Statements in the petition of complaint filed by the witness can be used to contradict the witness or to impeach his credit.[3] As well as to corrobrate him.

It is not necessary, in order to make the previous statements admissible for the purpose of impugning the credit of a witness, that the accused should have an opportunity to cross-examine.[4]

Impeachment of credit of witness.

Sale-deeds executed by plaintiff's witness in respect of a neighbouring house in which the house in dispute is described as belonging to the defendant can be produced by the defendant in order to contradict oral testimony of plaintiff's witness.[5]

Oral testimony liable to be contradicted by sale-deed executed by the witness.

Section 145 gives the right to cross-examine a witness on previous statements made by him and reduced into writing, when these previous statements are relevant to the matter in issue.[6] Section 145 applies also to a hostile witness examined by the party who calls him (Sec. 154).[7]

8. Previous statements cannot be treated as substantive evidence.—It is trite that a case has to be decided on the basis of the evidence adduced by the witnesses during the trial and any previous statements made by any of such witnesses can be used by the defence for the purpose of only contradicting and discrediting that particular witness in the manner laid down in Sec. 145 of the Evidence Act. Under no circumstances can such previous statements be treated as substantive evidence as has been treated by the High Court in the instant case. In view of the well established principles of law, the High Court was first required to consider the statements made by the prosecution witnesses during trial and decide for itself whether those statements should be relied upon in view of their contradictions (if any) with their earlier statements, provided those contradictions had been brought on record under Sec. 145.[8]

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1. Amalesh Chandra *v.* State, A.I.R. 1952 Cal. 481 at p. 488 : I.L.R. (1953) 1 Cal. 1302.
2. Kali Pada Das *v.* State, A.I.R. 1958 Cal. 186 at p. 187 : I.L.R. (1958) 1 Cal. 432 : 61 C.W.N. 339 : 1957 A.W.R. Sup. 52.
3. Abdul Latif *v.* Emperor, A.I.R. 1941 Cal. 533 at p. 534 : 45 C.W.N. 763 : 1961 I.C. 439.
4. Emperor *v.* Raghoo Ganpat, A.I.R. 1926 Bom. 404 at p. 404 : 28 Bom. L.R. 775 : 97 I.C. 37.
5. Das Mal *v.* Sunder Singh, A.I.R. 1937 Lah. 480 at p. 480 : 174 I.C. 751.
6. Queen-Empress *v.* Mannu, I.L.R. 19 All. 390 at pp. 421-22 (F.B.) : (1897) 17 A.W.N. 174, *per* Aikman, J.
7. Whitley Stokes, Vol II, p. 926.
8. Chinnamal *v.* State of T.N., (1977) 1 S.C.C. 145 at pp. 145-146.

In the absence of proof when the document is being produced in the cross-examination, that document unless admitted by the other party, cannot be a substantive evidence. Apart from that the documents which are used for the purposes of contradication under Sec. 145 of Evidence Act that contradicted documetary evidence cannot be a substantive evidence but it is only used for the purposes of impeaching the witness, and therefore, the trial Court should have permitted the documents to be produced on record.[1]

9. Subsequent statement cannot be used for contradicting a witness.—Section 145 of the Evidence Act lays down that a witness may be cross-examined as to previous statement for the purpose of contradicting him. Nowhere in the Evidence Act a subsequent statement of a witness can be taken into account more so when the trial has closed.[2]

10. Procedure to be adopted when a witness is proposed to be contradicted.—It is the duty of the presiding Judge to draw the attention of the advocate appointed in Session cases to the statutory provisions of Sec. 145 of the Indian Evidence Act, as explained in *Bal Gangadhar Tilak* v. *Shrinivas Pandit*[3] and *Tara Singh* v. *State*.[4] It is possible that if the attention of the witness is drawn to the portions with reference to which it is proposed to contradict him, he may be able to give a perfectly satisfactory explanation.[5]

Duty of Sessions Judge to draw counsel's attention to Sec. 145.

In *Tahsildar Singh* v. *State of U.P.*,[6] the Supreme Court observed thus :

> "Resort to Sec. 145 would only be necessary if the witness denies that he made the former statement. But when the witness admits the former statement : all that is necessary is to look to the former statement of which no further proof is necessary....[7]

In case of denial by witness resort to Sec. 145 necessary.

By putting suggestions to the witness denying the same will not amount putting contradiction to the witness. The contradiction has to be put to the witness as contemplated under Sec. 145 of the Evidence Act. If a contradiction is put to the witness and it is denied by him, then his attention had to be drawn to the statement made by such witness before the police or any other previous statement and he must be given a reasonable opportunity to explain as to why such contradiction appears and he may give any answer if the statement made by him is shown to him and if he confronted with such a statement and thereafter the said contradiction must be proved through the investigation officer. Then only it amounts to putting the contradiction to the witness and getting it proved through the investigating officer.[8]

11. Witness refreshing memory during cross-examination by using privileged document—Effect.—Where witness, during cross-examination is asked to refresh his memory by referring to a privileged document the consequence would be to allow the other side to have a look at the document.[9]

Consequence of refreshing memory.

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1. **Vishwas V. Mugalikar *v.* Jyoti M. Mugalikar, 2000 (1) Bom. C.R. 421 at p. 422.**
2. Rajendra *alias* Vijai *v.* State, 1983 (1) Crimes 547 at p. 551 (Delhi).
3. 42 Ind. App. 135 : A.I.R. 1915 P.C. 7.
4. A.I.R. 1951 S.C. 441 : 1952 S.C.A. 458 : 1951 S.C.J. 518 : 1951 S.C.R. 729 : 1951 A.L.J. 640.
5. State of Gujarat *v.* Hiralal Devji, A.I.R. 1964 Guj. 261 at p. 264 : (1964) 5 Guj. L.R. 255.
6. A.I.R. 1959 S.C. 1012 at p. 1021 : (1960) 1 S.C.A. 201 : 1959 S.C.J. 1043.
7. *In re* Saibanna Tippanna, A.I.R. 1966 Mys. 248 at p. 252.
8. **Shaik Subbani *v.* State of A.P., 2000 Cr. L.J. 321 at p. 326 (A.P.).**
9. 4 C.L.J. 268 ; *see* also S.J. Choudhary *v.* State, 1984 Cr. L.J. 864.

12. Previous statements made by person as another's clerk.—Where a person got his account books written up by a clerk, on information furnished by him such entries were held to be inadmissible under Sec. 145 to contradict him.[1]

Entries by clerk when held inadmissible under Sec. 145

13. Grounds of inspection of document used to refresh memory.—The grounds, upon which the opposite-party is permitted to inspect a writing, used to fresh the memory of a witness, are threefold.[2]

Inspection of writing used to refresh memory.

14. Right to inspect writing must be exercised then and there.—If the right to look at a particular writing, when a witness uses it to refresh his memory be not then exercised, it cannot be retained throughout the subsequent examination of the witness.[3]

Time of exercise of right to inspect writing.

15. When witness compellable to refresh memory from document.—A witness cannot be compelled to refresh his memory from any document.[4]

16. Previous statement must be voluntary.—Before a witness can be contradicted by his previous statements it must be shown that the statements were voluntary.[5]

17. Proof of contradictory statement.—The first part of the section permits oral questions being put in cross-examination which are relevant to the matters in question. The writing cannot be shown to the witness or be proved. But if it is intended to contradict the witness, the document has to be put to the witness and attention of the witness called to those parts of the document with which it is sought to contradict him. No doubt the attention of the witness has to be so drawn to the document and that too before it is proved. It is obvious that the second part of the section is intimately connected with the proof of the document. In order to prove a document, it must be admissible in evidence. It is here that proviso to Sec. 49 of the Registration Act becomes material. If it can be admitted under Sec. 49 of the Registration Act, the bar of Sec. 91 of the Evidence Act becomes *otiose*....If what is stated above is kept in view, it will be apparent that the defendant can use the previous statement in the document marked "A" for the purpose of the first part of Sec. 145 without bringing into play Sec. 91 of the Evidence Act and Sec. 49 of the Registration Act. But, in case the second part of Sec. 145 of the Evidence Act is to be made use of, Sec. 49 of the Registration Act will step in. If however this bar is eliminated, Sec. 91 of the Evidence Act will not come into play.[6]

Applicability of Sec. 49, Registration Act and Sec. 91, Evidence Act.

In the instant case, after drawing the attention of the witnesses to their contradictory statements recorded by the police with regard to their having seen the assault which they denied, the entire respective statements recorded by the committing Magistrate in Hindi were read out to the witnesses who did not deny to have made the same but only explained that they had deposed in that manner under threat and pressure from the police. *Held* that the provisions of Sec. 145 of the Evidence Act have been substantially complied with in this case.[7]

Compliance of the section.

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1. Munchershaw Bezonji *v.* New Dhurumsey Spinning & Weaving Co., I.L.R. 4 Bom. 576.
2. *In the matter of* Jhuboo Mahton, 12 C.L.R. 233 : I.L.R. 8 Cal. 789.
3. *In the matter of* Jhuboo Mahton, 12 C.L.R. 233 : I.L.R. 8 Cal. 739.
4. *Per* Wilson J., Empress *v.* Kali Churn Chunari, I.L.R. 8 Cal. 154 : 10 C.L.R. 51, approving 11 B.H.C.R. 120.
5. Nayeb Shahana *v.* Emperor, A.I.R. 1934 Cal. 636 at p. 639 : I.L.R. 61 Cal. 399.
6. Remington Rand of India Ltd., Chandigarh *v.* Smt. Lila Wati Bansal, A.I.R. 1974 Punj. 350 at pp. 351-352.
7. Ashok Kumar *v.* State (Delhi Administration), A.I.R. 1977 S.C. 1304 at p. 1307.

18. Only contradictory portion of testimony of witnesses to be proved.—Only those passages in the previous statements should be proved, which clearly contradict some portion of the testimony of the witnesses before the Judge. To put in entire deposition is illegal.[1] A particular portion of the statement must be read over and explained to the witness and the witness be asked whether he has stated accordingly in his previous statement legally recorded by the authority empowered to do so. Marking of the whole of the statement is not contemplated under Sec. 145 of the Indian Evidence Act, 1872.[2] There may be two kinds of endorsements, complete or unqualified and restricted or qualified. An example of qualified endorsement is—"Admitted subject to all just exceptions." This kind of limited endorsement is considered as not waiving the requirements of Sec. 145. Where the document bears the parties counsel to the effect "formal proof dispensed with" the parties take it for granted that the person relying upon the document is absolved from the necessity of adducing formal proof thereof. An endorsement of this kind is not a half-hearted endorsement confined to the signature or thumb impression but covers the whole document and therefore in such circumstances the document becomes admissible in evidence without formal proof.[3]

Endorsements.

Once a document has been assigned an exhibit mark in the Court of the first instance without any objection by the party who later challenges its admissibility, such objection must be overuled.[4]

Document assigned an exhibit mark.

19. Statement in writing or reduced to writing.—Previous statements of a witness recorded by a Magistrate having no jurisdiction to record them can be used in cross-examination under this section.[5]

Previous statement recorded without jurisdiction covered by Sec. 145.

The record of a conversation appearing on a tape-recorder can by no stretch of meaning be regarded as a statement "in writing or reduced into writing." Record of a previous inconsistent statement as prepared by a scientific instrument (tape-recorder) can be put in evidence for contradiction.[6]

Record of conversation appearing on tape-recorder no statement.

20. Questions to test witnesses' credit.—A party might be asked, on cross-examination, with a view of testing his credit, whether an action had not previously been brought against him and the verdict of the jury was, against him without producing the record of the proceedings in the previous case.[7]

Cross-examination as to the verdict of jury against him permissible without record of the case.

Evidence as to the estimate formed by a Judge in another case of the credit to be attached to the testimony of a wtiness who is examined in a subsequent trial is inadmissible.[8]

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1. Emperor *v.* Ajit Kumar Ghosh, A.I.R. 1945 Cal. 159 at p. 165 : I.L.R. (1945) 1 Cal. 326 : 78 C.L.J. 217 : 220 I.C. 237.
2. Annasab Melappa Pattanshetty *v.* State of Karnataka, (1982) 1 K.L.C. 260 at p. 263 : (1983) 27 M.L.J. (Cr.) 285 at p. 287 : (1982) 1 Knt. L.J. 433 at p. 435.
3. Daya Shankar *v.* Smt. Bachi, A.I.R. 1982 All. 376 at p. 383.
4. Daya Shankar *v.* Smt. Bachi, A.I.R. 1982 All. 376 at p. 382.
5. Ramkishun Sao *v.* Emperor, A.I.R. 1946 Pat. 82 at p. 83.
6. Rup Chand *v.* Mahabir Prasad, A.I.R. 1956 Punj. 137 at p. 173 : 58 Punj. L.R. 441.
7. *Ibid.* at p. 174.
8. Henman *v.* Lester, 31 Law Journal Rep. C.P. 366. *See* also Gambhir *v.* State of Maharashtra, (1982) M.L.J. (Cr.) 396.

21. Document lost or destroyed.—What course is to be pursued, if the document has been lost or destroyed is a point upon which the English and Indian Acts are alike silent.[1]

22. Statements must be witness's own statements.—In a Bombay case, *Munchershaw Bezonji* v. *New Dhurumsey Spinning and Weaving Co.*,[2] a witness had been employed by another person to make entries in that other person's cash books. It was proposed to contradict the witness by these entries. It was, however, held that this could not be done, as they were the previous statements of the other person from whose memoranda or oral dictation the witness wrote them.

Previous statement to be that of the witness.

In *Jit Singh* v. *State of Punjab*,[3] *N* was confronted with his former contradictory statement. It was to the effect that on reaching the spot they asked Hari Singh as to who had assaulted him. It was held that the previous contradictory statement of *N* could be used only to contradict and discredit *N*. It could not be used to impeach or undermine the credit ot witness B when no specific suggestion was put to them about their having questioned Hari Singh in regard to the identity of his assailant.

23. Corroboration necessary to accept a particular version.—The statement of prosecution witness, in the committing Court can be treated as evidence in the Sessions Court, subject to the witness being confronted with the statement under Sec. 145, Evidence Act. When a witness gives different versions in two Courts, he stands self-condemned. It is, therefore, necessary for the Trial Court to examine both the versions carefully and to see which is true. In most of the cases, corroboration is necessary to accept a particular version.[4]

24. Statement before the police.—The statement before the police can be only used for the purpose of contradication and does not constitute substantive evidence.[5]

A reading of Sec. 145 of the Evidence Act shows that it permits contradiction of witnesses with reference to a statement made by him in writing or reduced into writing. Section 145 does not require any such statement must be signed by him. In other words, the enabling power as regards Sec. 145 extends to statement in writing whether it is signed or not. Thus, it is clear that the Trial Court was in error in brushing aside the case diary contradictions on the ground that they are unsigned statements.[6]

Statement to police not signed—Use of.

It is immaterial whether the complainant examines witnesses on his behalf in prosecuting the complainant or a prosecution is launched by the State through the investigating agency, the witnesses so examined in support of the prosecution case remain prosecution witnesses and as such, if they have made any previous statements to the investigating officers in regard to the very incident in question, those statements can be used to contradict the witnesses if such an occasion arises.[7]

Use in a complaint.

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1. *Per* Jenkins J. *In re* Pasumarty Juggappa, Cr. C. for C.W.N. 684.
2. I.L.R. 4, Bom. 576.
3. A.I.R. 1976 S.C. 1421 at p. 1427.
4. *See* Shamappa Mutyappa Halke *v.* State of Maharashtra, A.I.R. 1964 S.C. 1357 ; Mingular Mallik *v.* State, A.I.R. 1967 Orissa 24 at p. 25 : 32 Cut. L.T. 1011.
5. Lanka Koteswar Rao *v.* State, (1967) 33 Cut. L.T. 971 at p. 973.
6. Narayanan *v.* Krishnan, A.I.R. 1981 Cr. L.J. 563 at p. 567.
7. Madhav Rao *v.* Mohd. Abdul Mateen, 1978 Cr. L.J. 295 at p. 296.

Statement before police—not to be used for seeking corroboration of prosecution only.

In *Sat Paul* v. *Delhi Admisinistration*,[1] it was held that the High Court was not competent to use the statements of these witnesses recorded by the police during investigation, for seeking assurance for the prosecution story. Such use of the police statements is not permissible. Under the Proviso to Sec. 162, Cr. P.C., such statements can be used only for the purpose of contradicting a prosecution witness in the manner indicated in Sec. 145, Evidence Act, and for no other purpose. They cannot be used for the purpose of seeking corroboration or assurance for the testimony of the witness in Court.

Use of statement before police to prove omissions—Whether permissible.

Where most of the cross-examination of the witness was based on the attempt to prove omissions made by the witness in his earlier depositions before the police, it was held that Trial Court should not have allowed the use of the earlier statements of the witnesses before the police for that purpose as the witness was never contracted with that evidence.[2]

Witnesses cited as prosecution witnesses appearing as defence witness—Use of statement before police not permissible.

It was held in *Shakila Khader* v. *Nausher Gama*[3] that the statements to the police under Sec. 161 of the Code of Criminal Procedure cannot be used for any purpose except for contradicting them when they appear as witnesses on the side of prosecution and that their statements cannot be used even for contradicting them when they appear as defence witnesses. In the present case, the witnesses were never examined by the prosecution. They appeared as defence witnesses and therefore their statements given before the police could not be used at all even for the purpose of contradicting them.[4]

Statement before the police—Proof of.

Before the prosecution can take advantage of contradicting the witnesses under Sec. 145 of the Evidence Act, it is the bounden duty of the prosecution to get the statements of those witnesses made under Sec. 161 of the Code of Criminal Procedure proved by the officer who has recorded those statements during the course of investigation. Where no attempt has been made to get those statements proved in this manner, the Court cannot look into the statements made by the witnesses under Sec. 161, Cr. P.C.[5]

There is no presumption of law that the statement of witness recorded by an investigating officer under Sec. 161, Cr.P.C. is truthful. So the purpose of contradicting a witness who has deposed to certain facts in Court with his earlier police statement is primarily to shake his credit on the ground that he has made contradictory statements on two different occasions. Hence, the question whether the credit of a witness has been impeached successfully or not depends on various factors including, of course, the contradictions, if any, which may appear in his deposition in Court and his previous statement to the police. It is highly doubtful that the giving of evidence by a Government servant in a case like this can be said to be in performance of his official duties so as to attract penal consequences by way of departmental action. Anyhow it would appear that the *punch* witnesses in the instant case, are labouring under this impression and, therefore, it cannot be

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1. A.I.R. 1976 S.C. 294 at p. 308.
2. Chaman Lal *v.* State, (1976) 2 Cr. L.J. 1310 at p. 1315.
3. A.I.R. 1975 S.C. 1324 : 1975 Cr. L.J. 1105.
4. Iqbal Singh *v.* State, 1981 Cr. L.J. 512 at p. 513.
5. Tarseem Singh *v.* State, A.I.R. 1978 J. & K. 53 at p. 57 ; *see* also Gunamidho Sundara *v.* State of Orissa, 1984 C.W.L.J. 1215.

said that their testimony is totally free from any kind of constraints. This will simply put the Court on guard to scrutinise their evidence with greater care and circumspection. The evidence of the *punch* witnesses is quite consistent truthful and credit-worthy. No doubt, some discrepancies have cropped up in their testimony but they are of trivial and insignificant nature which cannot by any stretch of reasoning, be magnified into fatal infirmities.[1]

25. Police diaries.—Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries not as evidence in the case but to aid it in such inquiry or trial.[2] Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court.

Court empowered to send for police diaries.

The accused cannot insist on a police officer refreshing his memory by referring to his diaries, and a Sessions Judge is not bound to compel him to do so.[3] But an accused on his trial has a right to call for and inspect statements of witnesses recorded by a police officer and cross-examine the witnesses thereon.[4] Statements of witnesses, entered in a police diary are not protected from use under Secs. 145 and 159 of the Evidence Act.[5]

Accused not to insist for police officer refreshing memory.

Police diaries containing statements under Sec. 161, Cr.P.C.

It is made abundantly clear in sub-section (2), Sec. 172 (Cr.P.C.) itself that the Court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the Court uses the entties in a Case Diary for contradicting a police officer it should be done only in the manner provided in Sec. 145 of the Evidence Act *i.e.* by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the Court for persual of the diary under Sec. 172 of the Code is not intended for explaining a contradiction which the defence has winched to the fore through the channel permitted by law. The interdict contained in Sec. 162 of the Code, debars the Court from using the power under Sec. 172 of the Code for the purpose of explaining the contradiction.[6]

Analysing the provisions of Sec. 172, Cr. P.C. the Supreme Court held that the accused can peruse that particular part of the diary in the context of Sec. 161 of the Indian Evidence Act, or Sec. 145 thereof in case :

Perusal of police diary by the accused.

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1. Ramesh *v.* State, 1986 Cr. L.J. 1101 at p. 1109 (Delhi).
2. *I.e.*, not to use them as evidence but to discover further evidence or possible source of evidence, which, if brought before the Court, may throw additional light upon the guilt or innocence of the accused.
3. *In re* Kali Charan Chunari, I.L.R. 8 Cal. 154 : 10 C.L.R. 51 and *In re* Jhabu Mahton, I.L.R. 8 Cal. 739 : 12 C.L.R. 233.
4. Bikao Khan *v.* Queen-Empress, I.L.R. 16 Cal. 610 ; *In the matter of* Mohammad Ali Haji *v.* Queen-Empress, I.L.R. 16 Cal. 612.
5. Shero Sha *v.* Queen-Empress, I.L.R. 20 Cal. 642.
6. **Mahabir Singh *v.* State of Haryana, 2001 (3) C.T.C. 504 at p. 509 : A.I.R. 2001 S.C. 2503;** *see also* Dadan Gazi *v.* E, I.L.R. 33 Cal. 1023 : 10 C.W.N. 890; Queen-Empress *v.* Mannu, I.L.R. 19 All. 390 (F.B.), approved in Dal Singh *v.* Emperor, A.I.R. 1917 P.C. 25 at p. 29 ; *see* also Deo Lal Mahton *v.* Emperor, A.I.R. 1933 Pat. 440 ; Emperor *v.* Dharamvir, A.I.R. 1933 Lah. 498 ; Queen-Empress *v.* Jadub Das, I.L.R. 27 Cal. 295 : 4 C.W.N. 129 ; Syed Abdul Rahim *v.* Salhu Kherwar, 10 C.W.N. 600 ; Dal Singh *v.* King-Emperor, I.L.R. 44 Cal. 876 (P.C.) : 21 C.W.N. 8181 : 26 C.L.J. 13.

(*a*) if it is used by the police officer concerned to refresh his memory; or

(*b*) if the Court used it for contradicting the police official concerned.[1]

Entries in the case diary.

It is settled law that the entries of the case diary can only be used for contradicting the prosecution witnesses. They cannot be relied upon by the prosecution as substantive evidence. Therefore, if the entries of the case diary are not put to a witness whose statement is sought to be contradicted, then those entries of the case diary cannot be relied upon by the prosecution against the accused persons.[2]

Procedure for contradicting witness.

When a prosecution witness is contradicting himself the witness's attention must be called to the same,[3] before the investigating officer is called to prove the record made by him.[4]

The way to prove those portions of the written statement of a witness which have been specifically put to him in order to contradict him is for the accused to mark the passage or passages in the copy from the police diaries given to him and then to ask the writer of the statement to say that it is a true copy.[5]

26. First information report.—FIR is not a substantive piece of evidence. It is an information of a cognizable offence given under Sec. 154 of the Criminal Procedure Code and if there is any statement made therein it can only be used for the purpose of contradicting and discrediting a witness, under Sec. 145 of the Evidence Act.[6] In the case reported in *Waris Khan* v. *Emperor*,[7] it was held that the first information report can be used for corroborative purposes.[8] But in the case reported to *Abdul Hamid* v. *State of Tripura*,[9] Datta, J., takes a contrary view.

F.I.R., not substantive evidence.

As pointed out by the Supreme Court in the decision of *Nisar Ali* v. *State of Uttar Pradesh*,[10] the first information report is not a substantive piece of evidence and it can only be used to corroborate the statement of the maker under Sec. 157 of the Evidence Act, or to contradict under Sec. 145 of that Act and it cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses and that it is therefore not evidence.[11]

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1. Mukund Lal *v.* Union of India, 1989 S.C.C. (Cri.) 606 at pp. 608, 609 ; *see* also Selvenathan *alias* Raghavam *v.* State by Inspector of Police G.S., Police Station, Madras, 1988 L.W. (Cr.) 503 (Mad.) (F.B.).
2. Bandhu *v.* State of U.P., 1997 Cr. L.J. 3010 at p. 3014 (All.) : 1997 All. L.J. 1136.
3. *See* Bal Gangadhar Tilak *v.* Srinivas Pandit, A.I.R. 1915 P.C. 7 : I.L.R. 39 Bom. 441 : 42 I.A. 135 (P.C.).
4. Kashiram *v.* Emperor, A.I.R. 1928 All. 280 at pp. 282-83 : 26 A.L.J. 139 : 109 I.C. 120.
5. Dharam Singh *v.* Emperor, A.I.R. 1928 Lah. 507 at p. 510 : 108 I.C. 162.
6. Nanhku Singh *v.* State of Bihar, A.I.R. 1973 S.C. 491 at p. 493.
7. A.I.R. 1940 Oudh 209.
8. *See* also Panchu Sheikh *v.* Emperor, A.I.R. 1943 Cal. 612 at p. 613 : 210 I.C. 17 : 45 Cr. L.J. 170.
9. A.I.R. 1958 Tripura 1.
10. A.I.R. 1957 S.C. 366 at p. 367.
11. Public Prosecutor *v.* Thulasingam, (1963) 2 M.L.J. 473 at p. 473 ; *see* also Bhagirati Burhia *v.* State, A.I.R. 1965 Orissa 99 at p. 100 : (1965) 1 Cr. L.J. 744 ; *see* also Emperor *v.* Rahenuddin Mondal, A.I.R. 1944 Cal. 323 ; Muhammad Ibrahim *v.* Emperor, A.I.R. 1929 Nag. 43 ; Mahadeo *v.* Ram Kuber, A.I.R. 1943 Oudh 451 ; Goman *v.* Emperor, A.I.R. 1928 Lah. 913; Tikkaram *v.* State, A.I.R. 1957 All. 755 ; Magan Lal Radhakishan *v.* Emperor, A.I.R. 1946 Nag. 173 ; Nga Tun Hlaing *v.* Emperor, A.I.R. 1934 Rang. 60 ; Gajadhar *v.* Emperor, A.I.R. 1932 Oudh 99 ; A.W. Khan *v.* State, A.I.R. 1962 Cal. 641 ; Autar Singh *v.* Emperor, 17 C.W.N. 1213 ; Emperor *v.* Ibrahim , A.I.R. 1928 Lah. 17 ; Dharam Singh *v.* Emperor, A.I.R. 1928 Lah. 507 ; Emperor *v.* Nga Hlaign, A.I.R. 1928 Rang. 295.

In *Azimaddy* v. *Emperor*,[1] it was pointed out that the first information report, if proved, may be of value as one of *res gestae*.[2]

The principal object of the first information report from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party. The first information report does not constitute substantive evidence though its importance as conveying the earliest information regarding the occurrence cannot be doubted. It can, however, only be used as a previous statement for the purpose of either corroborating its maker under Sec. 157 of the Indian Evidence Act or for contradicting him under Sec. 145 of that Act. It cannot be used for the purpose of corroborating or contradicting other witnesses.[3]

Witnesses other than informant not to be discredited by statements in F.I.R.

One should not rely upon statements contained in the first information report for the purpose of discrediting the witnesses other than the first informant. To use the first information report in this way is in effect to treat it as substantive evidence in a case, whereas it is merely a previous statement which may be used either for the purpose of corroborating the first informant or for discrediting him, provided the proper procedure is observed.[4]

Statements in F.I.R. are not substantive evidence.

Statements made in the reports are not substantive evidence in the case and Courts should be clear about the relevancy of the statements before they use them.[5]

When an eye-witness gives the earliest report, it can be used for his corroboration and in certain respect for contradiction as well. But when it is given by somebody other than eye-witness, the case has to be considered on the evidence available without any bias.[6]

Therefore it is clear that FIR can ordinarily be used only for the purpose of corroborating, contradicting or discrediting (under Secs. 145, 155 and 157, Evidence Act) its author if examined, and not any other witness.[7]

27. Inquest report.—It is questionable how far an inquest report is admissible except under Sec. 145 of the Evidence Act.[8]

The primary purpose of holding an inquest is to ascertain the cause of death and to find out whether it is homicidal, suicidal or accidental. The law, therefore, requires a Police Officer to make an investigation and prepare a report describing the wounds and indicating by what weapon such wounds appear to have been caused. The inquest report, though a document of limited scope and nature, can nevertheless be utilised under Sec. 145 of the Evidence Act.[9]

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1. A.I.R. 1927 Cal. 17 : 44 C.L.J. 253 : 99 I.C. 227 : I.L.R. 54 Cal. 237.
2. Mahla Singh *v.* Emperor, A.I.R. 1931 Lah. 38 at p. 40 : 130 I.C. 410 : 32 P.L.R. 259 ; Dharindra Nath *v.* State, 53 Cr. L.J. 1427 : A.I.R. 1952 Cal. 621.
3. Hasib *v.* State of Bihar, A.I.R. 1972 S.C. 283 at p. 286.
4. Emperor *v.* Rahenuddin Mondal, A.I.R. 1944 Cal. 323 at pp. 324-25 ; Emperor *v.* Ajit Kumar Ghosh, A.I.R. 1945 Cal. 159 : I.L.R. (1945) 1 Cal. 326 : 78 C.L.J. 217.
5. Ram Naresh *v.* Emperor, A.I.R. 1939 All. 242 at p. 244 : 1939 A.L.J. 107 : 1939 A.W.R. (H.C.) 190.
6. *In re* Kalusingh Motisingh, A.I.R. 1964 M.P. 30 at p. 37 : (1964) 1 Cr. L.J. 198.
7. Shanker *v.* State of Uttar Pradesh, A.I.R. 1975 S.C. 757 at p. 758.
8. Pandurang *v.* State of Hyderabad, A.I.R. 1955 S.C. 216 at p. 220 : 1955 S.C.A. 228 : 1955 S.C.J. 106 : (1955) 1 S.C.R. 1083.
9. Vikram *v.* State of U.P., 1990 (1) Cr. L.C. 92 at p. 98 (All.) : 1989 All. L.J. 1086 at p. 1091.

Notes on the site-plan.

In the instant case, it was held that the notes on the site-plan were statements recorded by the Police Officer in the course of investigation, and were hit by Sec. 162 of the Code of Criminal Procedure. These notes could be used only for the purpose of contradicting the prosecution witnesses concerned in accordance with the provisions of Sec. 145, Evidence Act and for no other purpose. But this was not done. The witnesses were never confronted and contradicted with this record. Hence it cannot be suggested that the notes on the site-plan contradict the account given by the witnesses in Court in regard to the distances from which they saw the occurrence.[1]

Use of statement to police.

28. Statements under Sec. 162, Cr.P.C.—It is not permissible to use statements to the police, whether oral or written, in order to corroborate a prosecution witness, or to contradict a defence witness. They can only be used by the accused, to contradict a prosecution witness in the manner provided by this section.[2]

Prosecution not to use Sec. 162 statements.

A right subject to the permission of the Court has been given to the prosecution to use Sec. 162 statements for purposes of contradiction, but the condition preceded for this is that the witness must have been called for the proseuction.[3]

The proviso to Sec. 162 of Cr.P.C. only enables the accused to use the statement of a witness recorded by the police to contradict him in the manner provided in the Part II of Sec. 145. The statements made before the IO cannot be used for the purpose of cross-examining a witness within the meaning of the first part of Sec. 145 to establish a contradiction between one statement and another.[4]

In *Tahsildar Singh* v. *State of U.P.*,[5] the Supreme Court considered the scope of Sec. 162, Cr. P.C., and also considered under what circumstances omissions from the statement before the police can be allowed to be brought on the record of the case. After examining the entire legal position, Subba Rao, J. summarized the legal position as follows :

Verdict of the Supreme Court.

> "From the foregoing discussion, the following propositions emerge : (1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness-box and for no other purpose ; (2) statement not reduced to writing by the police officer cannot be used for contradiction ; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded, can be used for contradiction...."[6]

Object of Sec. 162, Cr.P.C.

The object of Sec. 162, Cr.P.C. is plainly to exclude altogether the hearsay evidence of police officers except for the purpose of contradicting a witness in the manner provided by Sec. 145, Evidence Act.[7]

Statement of the accused person before the investigating officer cannot be used as a substantive evidence.[8]

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1. Jit Singh *v.* State of Punjab, A.I.R. 1976 S.C. 1421 at p. 1426.
2. E. *v.* Vithu Babu, 26 Bom. L.R. 965 ; *see* also Gahur Howladar *v.* King-Emperor, 30 C.W.N. 503.
3. *In re* Vajrala Koti Reddi, A.I.R. 1960 A.P. 76 at p. 78 : (1959) 1 Andh. W.R. 419 : (1959) 1 Andh. L.T. 857.
4. **Kemparaju *v.* State, 2000 Cr.L.J. 4747 at p. 4734 (Kant.).**
5. A.I.R. 1959 S.C. 1012.
6. Ismail *v.* State, (1967) 8 Guj. L.R. 25 at p. 26.
7. Emperor *v.* Najibuddin, A.I.R. 1933 Pat. 589 at p. 595.
8. Roma Naik *v.* State, A.I.R. 1965 Orissa 31 at p. 32 : 30 Cut. L.T. 517.

No conclusion can be based on a statement made by a P.W. to the police under Sec. 162, Cr. P.C.[1]

Statement made during investigation no substantive evidence.

Statements made by prosecution witnesses before the investigating police officer are valuable material for testing the veracity of the witnesses examined in Court ; but the statements made during police investigation are not substantive evidence.[2]

The statements made before a police officer cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar.[3]

Use of previous statement.

A previous statement under Sec. 162, if there is no contradiction between it and the deposition of the witness in Court, cannot be used at all.[4] Moreover, the Judge has to draw the attention of the witnesses to the suppposed contradictions in the previous statements.[5]

Use of statement to investigating officer for contradicting witness.

A statement made by a witness to a police investigating officer can be used only to contradict him, if he be examined as a prosecution witness. If he be examined as a defence witness, then that statement cannot be used. Any other use of the statement is forbidden.[6]

Duty of counsel for accused.

It is open to counsel for the accused to bring out discrepancies between the evidence of the witnesses as given in Court and the statements as made to the police with a view to throwing doubt on the credibility of other testimony.[7]

"Any person."

The words "any person" in Sec. 162 in their ordinary meaning would include any person though he may thereafter be accused.[8]

The Court should not allow to a witness use of the statement, made by him to the investigating officer, in the witness-box to refresh his memory.[9]

Use of statement under Sec. 162 for contradicting witness.

Under Sec. 162, Cr. P.C., a statement made before the investigating officer by witness can be used for the purpose of contradicting such witness when produced at the trial but after strict compliance with the provisions of Sec. 145, Evidence Act. It is only when the cross-examiner has done so, that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and can then be proved in any manner permitted by law.[10]

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1. *In re* Packirisamis Pillai, A.I.R. 1942 Mad. 288 (2) at p. 289.
2. Baladin *v.* State of Uttar Pradesh, A.I.R. 1956 S.C. 181 at p. 187.
3. Tahsildar Singh *v.* State of U.P., A.I.R. 1959 S.C. 1012 at pp. 1022-23 : (1960) 1 S.C.A. 201 : (1959) S.C.J. 1043 : (1959) 2 S.C.R. Sup. 875 : 1959 A.W.R. 522 : (1959) 2 M.L.J. (S.C.) 201 : 1959 Mys. L.J. 809.
4. Lakhan Vaish *v.* State, A.I.R. 1958 All. 445 at p. 446 : 1958 Cr. L.J. 722.
5. Lakhan Vaish *v.* State, A.I.R. 1958 All. 445 at p. 446.
6. Sheo Shankar *v.* State, A.I.R. 1953 All. 652 at p. 654.
7. Indar Singh Tara Singh *v.* Emperor, A.I.R. 1943 Lah. 163 at p. 166 : 45 P.L.R. 155 : 207 I.C. 447.
8. Pakala Narayana Swami *v.* Emperor, A.I.R. 1939 P.C. 47 at p. 51 : 66 I.A. 66 : 1939 A.L.J. 298 : 1939 A.W.R. (P.C.) 35 : 41 Bom. L.R. 428 : 69 C.L.J. 273.
9. Superintendent and Remembrancer of Legal Affairs, Bengal *v.* K. Zahiruddin, A.I.R. 1946 Cal. 483 at p. 487 : 223 I.C. 408.
10. Gopi Chand *v.* Emperor, A.I.R. 1930 Lah. 491 at p. 495 : I.L.R. 11 Lah. 460 : 126 I.C. 573 : 31 P.L.R. 797.

The statement made to a police officer during the investigation can be used only for the purpose of contradicting the proseuction witnesses under Sec. 145 of the Evidence Act. It cannot be used for the purpose of cross-examination.[1]

The fact that the petitioner made a statement under Sec. 161, Cr.P.C., contradictory to her substantive evidence in Court only goes to discredit her and make her substantive evidence unreliable. But by no stretch of imagination can it be said that the substantive evidence was false because to say that, would be tantamount to assuming that her statement under Sec. 161, Cr.P.C., was true which is not permissible under Sec. 162, Cr. P.C.[2]

Duty of prosecution counsel when to re-examine witness.

It is not sufficient to ask a witness whether he did or did not make a certain statement to the Sub-Inspector unless the witness in answer to that question admits that he made such a statement. In that case if the statement is contradictory of something else which the witness had said, it is the duty of the cross-examiner to give the witness an opportuntiy of reconciling his statement. But if the cross-examiner does not do so, the counsel for the prosecution may on re-examination, give that opportunity or the Court itself should do so.[3]

Use of police diaries by Judge.

There is nothing in Sec. 162, Cr. P.C., which prevents a Judge from looking into the police diaries *suo motu* and himself using the statement of a person examined by the police recorded therein for the purpose of contradicting such person when he gives evidence in favour of the Crown as a prosecution witness.[4]

Which statement has been treated as evidence.

In *Mst. Sabhai* v. *Emperor*,[5] it was held that only those portions of statements as had been actually used under Sec. 162, Cr.P.C., to contradict the witnesses in the manner provided for in Sec. 145, Evidence Act, could be treated as evidence in the case. The other parts of these statements ought not to have been referred to by the learned Judge.[6]

The statement made in accordance with Secs. 161 and 162, Cr.P.C., can be used for the purposes which are indicated in Sec. 162, Cr.P.C.[7]

In *Emperor* v. *Ahmad*,[8] procedure for contradicting prosecution witnesses was not carried out.

Held that the learned Sessions Judge's action in referring to statements made before the police with a view to contradict prosecution witnesses was entirely erroneous.[9]

Police proceedings not substantive evidence.

Standing by themselves the police proceedings are not substantive evidence in the case and cannot be used in order to test the correctness of the statements made by witnesses on oath before the Court.[10]

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1. State (Delhi Administration) *v.* Laxman Kumar, 1985 Cr. L.R. 501 at p. 518 (S.C.).
2. Mina Adhikari *v.* State of West Bengal, 1989 East Cr. C. 171 at pp. 175-76 (Cal) : 1988 C. Cr. L.R. 276 at p. 281.
3. Iqbal Ahmad *v.* Emperor, 1942 A.L.J. 637 : 1942 A.W.R. (H.C.) 379 : A.I.R. 1943 All. 49 at p. 55.
4. Emperor *v.* Lal Mia, A.I.R. 1943 Cal. 521 at p. 527 : 209 I.C. 206 : 47 C.W.N. 336.
5. A.I.R. 1930 Lah. 449.
6. Mst. Sabhai *v.* Emperor, A.I.R. 1930 Lah. 449 at p. 450 : 121 I.C. 66.
7. Sital Chandra Dutta *v.* Emperor, A.I.R. 1942 Cal. 495 at p. 496 : 46 C.W.N. 775.
8. A.I.R. 1928 Lah. 144.
9. Emperor *v.* Ahmad, A.I.R. 1928 Lah. 144 at p. 146 : 106 I.C. 350 ; but *see* Emperor *v.* Lal Mia, A.I.R. 1943 Cal. 521 : 47 C.W.N. 336.
10. Emperor *v.* Ram Rang, A.I.R. 1928 Lah. 820 at p. 823 : 109 I.C. 211.

Both parts of Sec. 145 of the Evidence Act deal with cross-examination.

Section 145 of the Evidence Act is in two parts. Both parts deal with cross-examination, the first part with cross-examination other than by way of contradiction, and the second with cross-examiantion by way of contradiction only. The police statement cannot be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of Sec. 145 of the Evidence Act.[1]

Use of previous statement of witness.

A previous statement falling under Sec. 162, Cr. P.C., cannot be used for corroborating a prosecution witness or contradicting a defence witness.[2]

Evidentiary value of note of statements by police officers.

When the only record of a witness's statement to the investigating officer is a brief note, omission from that note are of practically no value for the purpose of proving that the witness did not state to the officer matters to which he deposes at the trial.[3]

Right of accused to obtain copies of statement.

The accused has an absolute right to obtain copies of statements made by witnesses during the course of the police investigation. It is immaterial whether the statement is recorded in the actual words of the witness and it is sufficient if it is written in the diary merely in the form of a memorandum.[4] At the same time the Court would be justified in refusing the copy of an abstract of the statements of several witnesess prepared in such a way that it was not clear what each witness was supposed to have said.[5]

Defence not entitled to a copy of an entry of summary in diary.

Similarly, the defence would not ordinarily be entitled to a copy of an entry in the diary which merely summarised the conclusions at which the investigating officer had arrived after examining a particular witness.[6]

It is always considered very undesirable for police officers to record statements in the form *"A* supported *B"* or *"A* corroborated *B"* without a clear indication of the substance of the statement of *A* which the recording officer regards as supporting or corroborating *B*.

It is highly desirable that all investigating officer should be strongly discouraged from making in the case diaries records of the statements of witnesses in these forms, which are always ambiguous and may frequently be misleading.[7]

In *Shyama Rajaram Pardhan* v. *Emperor*,[8] the investigating sub-inspector questioned several persons but did not record what each of them said and contended himself by making a digest of what he had learnt from them all. *Held* that this was a contravention of the provisions of sub-section (3) of Sec. 161, Cr. P.C.[9]

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1. Tahsildar Singh *v.* State of Uttar Pradesh, A.I.R. 1959 S.C. 1012 at p. 1021 : 1959 S.C.J. 1043.
2. Jit Singh *v.* Crown, A.I.R. 1949 E.P. 334 at p. 335 ; Emperor *v.* Ajit Kumar Ghosh, A.I.R. 1945 Cal. 149 ; Das Ram Gehla Ram *v.* Emperor, A.I.R. 1941 Lah. 471 ; Sheo Shanker *v.* State, A.I.R. 1953 All. 652 ; Emperor *v.* Girdhari Teli, A.I.R. 1940 Pat. 605 ; Magan Lal Radha Kishan *v.* Emperor, A.I.R. 1946 Nag. 173 ; Emperor *v.* Najibuddin, A.I.R. 1933 Pat. 589.
3. Emperor *v.* Najibuddin, A.I.R. 1933 Pat. 589 at p. 593 : 14 P.L.T. 543 : 147 I.C. 142.
4. Mafizaddi *v.* Emperor, A.I.R. 1927 Cal. 644 : 104 I.C. 545 : 31 C.W.N. 940.
5. Emperor *v.* Karimuddi Sheikh, A.I.R. 1932 Cal. 375 : 36 C.W.N. 196 : 139 I.C. 245 ; Emperor *v.* Salik, A.I.R. 1937 Oudh 201 : 166 I.C. 259.
6. Emperor *v.* Ajit Kumar Ghosh, A.I.R. 1945 Cal. 159 at p. 167.
7. Emperor *v.* Ram Sewan Mistri, A.I.R. 1945 Pat. 109 at pp. 112-13 : I.L.R. 23 Pat. 656 : 218 I.C. 465 : 25 Pat. L.T. 163.
8. A.I.R. 1949 Nag. 260.
9. Shyam Rajaram Pardhan *v.* Emperor, A.I.R. 1949 Nag. 260 at p. 261 : I.L.R. (1949) Nag. 379.

Omission of contradiction.

Just as it is too much to say that all omissions are contradictions, it is equally hazardous to say that all omissions are not contradictions. It will depend on facts and circumstances of each case whether a particular omission ought to be taken as amounting to contradiction. Desai, J., in *Ram Bali* v. *State*[1] aptly expresses thus :

> "Omission is not contradiction unless what is actually said contradicts what is omitted to be said."

Omission when contradiction or not.

In other words, the omission must refer to a detail which if it really existed could not have been missed by the witness as being an essential link in the chain of events.[2]

In *Tahsildar Singh* v. *State of U.P.*,[3] the majority judgment held that every omission in a statement under Sec. 162, Cr.P.C., is not a contradiction.[4] Decision in *Sakhawat Imami* v. *Emperor*[5] lays down that an omission on a vital point is contradiction and this would obviously be so. In *Shivlal* v. *Emperor*,[6] Grille, J., following the decisions in *Nga U Khine* v. *Emperor*[7] and *Emperor* v. *Mahomed Adam Chohan*[8] held that a contradictory statement, when used in the cross-examination and denied by the witness, has to be proved and brought on record by the examination of the police officer who recorded it. When such a statement is denied by the witness and no formal proof is given of it, the same has to be disregarded. Where the contradictory statement in the polic diary is something positive, that is

Use of contradictory statement.

where there is direct contradiction between what is said to the police and what is said in Court, the proof has to be confined to particular part of the contradictory statement of the witness in the police diary but where contradiction consists in omission the said omission can be proved either by bringing on record the

Proof of omission.

whole of the statement confining its use to the actual absence of the statement made in Court or the police officer might be asked to refer to the police statement of the witness for refreshing his memory and asked whether such statement had been made.[9]

The rule contained in Sec. 145 is a common law rule. Referring to it McLean, J., said in *Frederic D. Conrad* v. *David Griefly*[10] :

> "This rule is founded upon common sense, and is essential to protect the character of a witness."

Rule under Sec. 145 founded on commonsense.

He added that the rule is a statutory one and cannot be dispensed with. The law in India is not different. The Supreme Court refused to look into a statement because it was not brought to the notice of the witness as required under Sec. 145.[11]

Supreme Court view regarding use of contradictory statement.

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1. A.I.R. 1952 All. 289 : 53 Cr. L.J. 600.
2. State of M.P. *v.* Kalu Kachru, A.I.R. 1959 M.P. 390 at p. 394.
3. A.I.R. 1959 S.C. 1012 : (1960) 1 S.C.A. 201 : 1959 S.C.J. 1043.
4. Dukhi Dei *v.* State, A.I.R. 1965 Orissa 33 at p. 35 : I.L.R. (1964) Cut. 752.
5. A.I.R. 1937 Nag. 50 : 39 Cr. L.J. 68.
6. A.I.R. 1938 Nag. 110.
7. A.I.R. 1935 Rang. 98.
8. A.I.R. 1937 Bom. 60.
9. State of Madhya Pradesh *v.* Kalu Kachru, A.I.R. 1959 M.P. 391 at p. 394 : 1959 M.P. L.J. 891.
10. (1853) 14 Law. Ed., 835 at p. 839.
11. *See* Tara Singh *v.* State, A.I.R. 1951 S.C. 441—Bose, J., observed in that case that the failure to act as required under Sec. 145 is a fatal defect ; Birey Singh *v.* State, A.I.R. 1953 All. 785 at p. 788 : 54 Cr. L.J. 1817.

Section 162 applies to statements made by persons to a police officer in the course of investigation. The police or the prosecution cannot render the section nugatory by disobeying its provisions and making the witnesses sign their statements.[1]

Reconciling of Sec. 145 and Sec. 162, Cr.P.C.

It will appear that under Sec. 145, proof of the statement follows the putting of it to the witness. It is curious that Sec. 162 of the Code should say that a previous statement to the police can be used to contradict a witness, "if duly proved" and at the same time refer, for the mode of contradiction, to Sec. 145, Evidence Act, which seems to place use for the purpose of contradiction before the proof of the statement. The only way in which the two sections can perhaps be reconciled is by taking "contradiction" under both the sections to mean, not contradiction in the course of the cross-examination by way of putting the statement of the witness as against his evidence in Court but subsequent use by way of contradiction when assessing the value of his evidence.[2]

Use of statement made to investigating officer.

The law as laid down is clear that statement made by a witness to the police investigating officer can be used only to contradict the statement of a witness if he be examined as a prosecution witness. If the same person be not examined as a prosecution witness but examined as a defence witness, then that statement cannot be used, and further any other use of the statement is also forbidden. In other words, if he is examined as a Court witness, the same result would follow.

This view is supported by *Sheo Shanker* v. *State*,[3], and *Bhupal Chandra* v. *Emperor*.[4]

29. Statements not reduced to writing by the police officer cannot be used for contradiction.—Section 162, Cr. P.C. and Sec. 145 of the Evidence Act, are the two provisions of law which have a crucial bearing on the admissibility of the statements made by the prosecution witnesses before the police as recorded in the case-diary. Having regard to these provisions of law, the procedure prescribed for contradicting witnesses by their previous statements made during investigation, has been indicated by the Supreme Court in a decision reported in *Tahsildar Singh* v. *State of Uttar Pradesh*.[5]

The proper method of contradicting witnesses with their statements under Sec. 162, has been elaborately set out in a decision reported in *Ramlal Singh* v. *State*.[6]

Statements not reduced to writing by the police officer cannot be used for contradiction.

Having regard to the principles laid down in the aforesaid two decisions, *viz.*, statements not reduced to writing by the police officer cannot be used for contradiction, nor can omissions unless by necessary implication be deemed to be part of the statements made in the witness-box. Therefore any statement elicited from a prosecution witness that he did not state before the police that he deposed in Court when such discrepancy does not amount to contradiction must be ruled out of consideration.[7]

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1. Abdul Majid *v.* King, A.I.R. 1950 Cal. 165 at p. 166 : 51 Cr. L.J. 680.
2. Sunil Chandra Roy *v.* State, A.I.R. 1954 Cal. 305 at pp. 325-36 : 57 C.W.N. 962 : 55 Cr. L.J. 805.
3. A.I.R. 1953 All. 652.
4. 44 C.W.N. 451.
5. A.I.R. 1959 S.C. 1012.
6. A.I.R. 1958 M.P. 380.
7. Krushna Chandra Pail *v.* State, A.I.R. 1968 Orissa 172 at pp. 174-75 : 34 Cut. L.T. 585.

30. Practice of the Supreme Court.—The practice of the Supreme Court is to contradict a witness with the earlier statement and parts thereof, after declaring him hostile and then to use the record of the earlier statement as substantive evidence. It may be stated that it is highly desirable that the Court should, before the transfer of the earlier statement to the record of the Sessions case indicate in a brief order why the earlier deposition was being transferred to the record of the trial.[1]

31. Issue of copies.—Neither Sec. 162 of the Criminal Procedure Code nor Sec. 145 of the Evidence Act expressly makes provision for issue of copies. A statement recorded by a police officer in the course of the investigation or by an Excise Officer in the course of the investigation is not a public document within the meaning of Sec. 74 of the Evidence Act, as held in *Mandal* v. *Queen-Empress*.[2] Accordingly the question of grant of certified copies does not arise. There remains no provision under which the accused can claim to get copies of the statements in advance even on payment of cost.[3]

Use of Sec. 145 and Sec. 162, Cr.P.C. for issuing copies.

Statement to police officer not public document.

32. Statement under Sec. 164, Cr. P.C.—A statement made under Sec. 164 Cr. P.C., may be used to corroborate or contradict a statement made in the Court in the manner provided by Secs. 145 and 157, Evidence Act.[4]

Statements were recorded by the police in course of investigation and by a Magistrate under Sec. 164, Cr. P.C., none of the statements are substantive evidence and are not admissible in evidence except for contradiction or corroboration as prescribed in law.[5]

The statement made by the approver under Sec. 164 plainly does not amount to the corroboration in material particulars which the Courts require in relation to the evidence of an accomplice. An accomplice cannot corroborate himself ; tainted evidence does not lose its taint by repetition.[6]

Accomplice not to corroborate himself.

Statements made by persons at identification parades are nothing but statements under Sec. 164, Cr. P.C. These statements can only be used for the purposes of corroborating witnesses or contradicting them.[7]

Statement at identification parade to be treated as under Sec. 164, Cr.P.C.

In regard to the statement under Sec. 164, Cr. P.C., the correct view to take is, undoubtedly, the view taken by the Madras High Court in the case of *Villiah Kone* v. *Emperor*,[8] that a statement by a witness recorded by a Magistrate under Sec. 164, Cr. P.C.,

Admissibility of statement recorded by Magistrate under

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1. Periyasami *v.* State of Madras, A.I.R. 1957 S.C. 1027 at p. 1028 : (1957) 2 Andh. W.R. (S.C.) 41.
2. I.L.R. 28 Cal. 348.
3. Sunil Kumar Datta *v.* State of West Bengal, A.I.R. 1963 Cal. 431 at p. 433 : (1963) 2 Cr. L.J. 129. Under Sec. 207, Cr. P.C. 1973 the accused is entitled to copy of police statement of the witness free of cost.
4. Manik Gazi *v.* Emperor, 74 C.L.J. 208 : A.I.R. 1942 Cal. 36 at p. 37, *see* also Bisipati Padhan *v.* State, A.I.R. 1969 Orissa 289 at p. 291 : 35 Cut. L.T. 362.
5. State of Orissa *v.* Kaushalya Dei, A.I.R. 1965 Orissa 38 at p. 43 : (1965) 1 Cr. L.J. 321 ; *see* also State *v.* Hoby Khan, A.I.R. 1960 All. 521 at p. 525 : I.L.R. (1960) 2 All. 644 : 1960 A.W.R. 484 : 1960 A.L.J. 642.
6. Bhuboni Sahu *v.* King, A.I.R. 1949 P.C. 257 at p. 259 : 76 I.A. 147 : 1949 A.L.J. 283 : 51 Bom. L.R. 955.
7. Abdul Aziz *v.* Crown, A.I.R. 1950 Lah. 167 at p. 168 : 51 Cr. L.J. 1350.
8. A.I.R. 1923 Mad. 20 : 72 I.C. 529 : 24 Cr. L.J. 417 : I.L.R. 45 Mad. 766.

was admissible in evidence to corroborate the statement made by that witness before the committing Magistrate.

If the genuineness of the document, i.e. the statement recorded under Sec. 164, Cr. P.C., is not in dispute, it can very well be placed in evidence and not necessary to prove it through the mouth of the Magistrate who recorded the same. It is true that the document is admissible subject to the limitations laid down under Secs. 145 and 157 of the Evidence Act, and not beyond that, but it is incorrect to argue that the statement tendered in evidence in absence of the Magistrate is inadmissible.[1]

Statement under Sec. 164, Cr.P.C. when not to be put to jury.

In *Mannar Ali* v. *Emperor*,[2] it was held that the statements under Sec. 164, Cr. P.C., could not be put to the jury in their entirety.

33. Omission.—Strictly according to law an omission cannot be regarded or proved as a contradiction. An omission in a previous statement cannot be used for the purpose of contradiction under Sec. 145 of the Evidence Act. Hence, what is not found in a police statement under Sec. 162, Cr. P.C., cannot be used under that section, nor can the same be proved under Sec. 145 of the Evidence Act.

Omission when or not contradiction.

Section 145 and Sec. 162, Cr.P.C., whether bar to the proof of omission as contradiction.

However, it cannot be said that in no case could a serious and glaring omission from a police statement be relied on. It may not be relied on as a contradiction as such, but it may be relied on as a relevant circumstance.[3]

Reliance on omission from police statement.

Every omission does not amount to contradiction unless that omission vitally touches the very factum which is required to be proved by the prosecution. It is to be brought in such a way that it becomes clear as to what exactly the contradiction is otherwise, it would appear that nothing was stated in the police statement. It is also necessary, therefore, that if by bringing out a contradiction that the first statement which is given in the Court is totally absurd having regard to the police statement, a person is required to be given a change as to what he wanted to say or what was his explanation in regard to the contradiction.[4]

So far as contradictions and material omissions are concerned, they can be used to discredit a witness only after the attention of the witness is drawn to them and he is given an opportunity to explain the same.[5]

In order to see whether there is a contradiction by omission it is necessary to find out whether the two statements cannot stand together. It is also necessary to see whether the statement which the witness has made in the witness-box should have been made by him while reporting the matter soon after the incident. If the two statements made by the witness cannot stand together and the statement in the Court is such that the witness would necessarily have made at the time of his earlier statement, then alone omission thereof can be considered to be a contradiction.[6]

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1. Laxmi Narain Singh *v.* State of Bihar, 1987 B.L.J.R. 804 at p. 807.
2. A.I.R. 1934 Cal. 124.
3. State *v.* Mohd. Misir Ali, A.I.R. 1963 Assam 151 at pp. 153-54.
4. Nareshkumar Kikabhai Tandel *v.* State of Gujarat, 1986 Cr. L.J. 457 at p. 465 (Guj.).
5. Harbans Kaur *v.* State of Rajasthan, 1985 (2) Cr. L.C. 560 at p. 564 (Raj.).
6. Dasu *v.* State of Maharashtra, 1985 Cr. L.J. 1933 at p. 1938 : 1985 (2) Cr. L.C. 378 (Bom.).

In the case of *Ghanshyam* v. *State of M.P.*,[1] the M.P. High Court held that it would have been better that omissions sought to be elicited in the statement of Prabhawati with reference to F.I.R. and case diary statement were separately put to the witnesses and putting questions about omission with reference to two documents at the same place could lead to confusion. It is also seen that there is no compliance with the latter part of Sec. 145 of the Evidence Act, 1872. It was intended to contradict Smt. Prabhawati with her previous statement before writing could be proved by Haresingh Rathore (PW 10), it was necessary that her attention was called to those parts of two statements separately which were to be used for the purpose of contradicting her. On going through F.I.R. it was found that while the witness Prabhawati omitted to state about fist blow, she has substantially given out the same story as given in the Court. On going through her case diary statement brought on record by defence to prove omission, it was found that omissions do not, in fact, exist, for instance in the case diary statement there is mention of Rajesh sleeping near her though not on a cot, about accused giving her slap and fist blows. Confessions on the point could have been avoided if the contradictions or omissions with reference to the two documents were separately elicited. Be whatever it may, the omission, if any, are of a minor nature and do not affect credibility of Smt. Prabhawati.

Where in a case the cross-examination of the witnesses were scrappy, jumpy and not pursuant to any set theory of defence and there were some omissions but these omissions of trivial details have hardly any bearing on the main part of the prosecution case, it must be held that the so-called inner variations between the evidence of the witnesses and omissions of trivial details would not cause any dent in the testimony of witnesses.[2]

Evidence Act applies only to contradiction. If there are omissions in previous statements which do not amount to contradictions but throw some doubt on the veracity of what was omitted, the uncertainty or doubt may be capable of removal by questions in re-examination.[3]

34. Right to inspect document shown to witness.—"Questions not unfrequently arise," says Mr. Taylor, "as to whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by his opponent. The cases on this subject are somewhat conflicting ; but the practice seems to be as follows : if the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some questions as to its general nature or identity, or respecting the character of the handwriting, his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness, or if any questions be put respecting its contents, a sight of the document may then be demanded by the opposite counsel."[4] The right must be exercised before or at the moment when the witness uses the document to refresh his memory.[5]

Right of inspecting document shown to witness when available.

A witness may be told that if he refers to a privileged document to refresh his memory, the other side will have a right to have a look at it.[6]

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1. 1990 Cr. L.J. 1017 at pp. 1019, 1020 (M.P.).
2. Kishan Chand Mangal *v.* State of Rajasthan, 1983 Cr. L.J. 1 at p. 6 : A.I.R. 1982 S.C. 1511 at p. 1517.
3. Laxman *v.* State of Maharashtra, A.I.R. 1974 S.C. 308 at p. 312; *see* also *the goods of* Gopessur Dutta *v.* Bissessur Dutta, I.L.R. 39 Cal. 245 : 16 C.W.N. 265, approving Taylor as quoted above.
4. Sections 1307, 1452, 8th Ed.
5. *Per* Field, J., *In re* Jhabu Mahton, I.L.R. 8 Cal. 739 : 12 C.L.R. 233.
6. Nemi Chand *v.* Wallace, 4 C.L.J. 269 at p. 280.

35. Previous verbal statements.—The section at present under notice relates to previous statements made in writing or reduced into writing. If, however, the previous statements have been verbal and not reduced to writing, they may be proved in order to contradict, if only they be relevant to the issue.[1] There can be little doubt that the circumstances of such previous statement, sufficient to designate the particular occasion, ought to be mentioned to the witness, and he ought to be asked whether or not he made such a statement.

Verbal statement how to be proved

36. Former statements.—Statement of the informant made before the person not legally competent to investigate the fact is a former statement of his and can be used for contradiction under Sec. 145 and for impeaching his credit under Sec. 155.[2]

When a witness was not specifically cross-examined on a matter, the Court cannot presume something adverse to the witness unless his attention is specifically drawn to.[3]

Unless the particular matter or point in the previous statement sought to be contradicted is placed before the witness for explanation, the previous statement cannot be used in evidence. In other words, the drawing of the attention of the witness to his previous statement sought to be contradicted and giving of all opportunities to him for explanation are compulsory.[4]

While recording contradiction it is the duty of the Court to verify the former statement and to compare the same with the statement made before the Court to ascertain whether the two statements are really contradictory to each other. A mere statement of additonal fact in the course of evidence cannot amount to contradiction by itself unless the same is material and relevant in the facts and circumstances of the case and for the decision in the matter.[5]

A Court under Sec. 145, Evidence Act, for instance is entitled to discredit a witness by taking into consideration his earlier contradictory statement, even though the same has been recorded by a person not authorised to do so by law. Whereas Sec. 145, Evidence Act, does not specifically exclude a previous contradictory statement recorded by a person or Tribunal not having jurisdiction to record the same, Section 73, Evidence Act, creates a specific bar against taking the specimen handwriting or signature of the accused when the case is still at the stage of investigation and no power vests in the Court at all to obtain specimen handwriting or signature of the accused under Sec. 5. Identification of Prisoners Act. In the instant case, even if the part of the evidence is to be excluded from consideration, still there is lot of other evidence to support the finding that the appellant is the perpetrator of the crime.[6]

Earlier contradictory statement recorded unauthorisedly—Whether the Court is entitled to discredit the witness by taking into consideration.

37. Evidence of a witness taken under commission.—The evidence of the witness taken under commission must constitute previous statement of the witness and would therefore be available for the purposes of Sec. 145 of the Evidence Act.[7]

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1. As to contradicting a witness by contradictory oral statements made to the police, *see* Reg. *v.* Uttamchand Kapurchand, 11 Bom. H.C.R. 120.
2. State *v.* Pareswar Ghasi, A.I.R. 1968 Orissa 20 at p. 24 : 33 Cut. L.T. 1193.
3. State of U.P. *v.* Anil Singh, 1988 A. Cr. R. 621 at p. 626 (S.C.).
4. Mohd. Badaruddin Ahmed *v.* State of Assam, 1989 Cr. L.J. 1876 at p. 1880 (Gau.).
5. **Siddharth Sawant *v.* State of Mah., 2000 (3) Mah. L.J. 46 at pp. 57-58.**
6. Sher Chand *v.* State, 1983 Cr. L.J. 1482 at pp. 1488, 1489 (J. & K.).
7. Mir Abdul Sovan *v.* Rafikan Bibi, A.I.R. 1972 Orissa 213 at p. 215.

38. **Admissibility of deposition into Criminal Courts.**—A certified copy of deposition in a Criminal Court cannot be used by way of substantive evidence as an admission.[1]

In *Bal Gangadhar Tilak* v. *Shrinivas Pandit*,[2] it was held that the introduction and use in bulk in a civil suit of depositions of witnesses recorded in a criminal trial for contradicting the witnesses of the suit without placing the particular matter for explanation in view of the discrepancy, were illegitimate. In *Bhagwan Singh* v. *State of Punjab*,[3] it was observed that the witness should be afforded a reasonable opportunity of explaining contradictions after his attention is drawn to them in a fair and reasonable manner.

39. What is required under the section.—It may be pointed out that any statement made in the *panchanama* cannot be used in evidence except for the purposes of contradicting the witness whose statement is contained in *panchnama* but if it is intended to contradict him by the writing, his attention must before the writing can be proved, be called to those parts of it which are to be used for contradicting him.[4]

146. Questions lawful in cross-examination.—When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

SYNOPSIS

1. Scope of section ... 4872
2. "Hereinbefore referred to"—Meaning of ... 4874
3. Veracity ... 4874
4. Credit ... 4874
5. On what credibility of a witness depends ... 4875

1. Scope of section.—Sections 132, 146, 147 and 148 together embrace the whole range of questions, which can properly be addressed to a witness.[5] Sections 132 and 146 seem to imply that a witness, who is himself liable to prosecution for the same offence as the accused person, is a competent witness.[6] *A* and *B* were sent up for trial together by the police on a charge of murder. The Magistrate discharged *A* before recording any evidence and subsequently examined him as a witness. *Held* that, whether *A*'s discharge was or was not illegal, his evidence was admissible, but not worthy of credit.[7]

Implication of Secs. 132, 146, 147 and 148.

Section 146, Evidence Act, indicates the lawful ambit and scope of such cross-examination *inter alia*, by pointing out that questions which test the veracity of a witness or which tend to discover who he is and what is his position in life,

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1. Gaya Muzaffurpur Roadways Co. *v.* Fort Gloster Industries Ltd., A.I.R. 1971 Cal. 494 at p. 501.
2. I.L.R. 19 Cal. 729 at p. 742 : A.I.R. 1915 P.C. 7.
3. A.I.R. 1952 S.C. 214 at p. 218.
4. Kanu Ambu Vish *v.* State of Maharashtra, A.I.R. 1971 S.C. 2256 at p. 2262.
5. Queen *v.* Gopal Das, I.L.R. 3 Mad. 271 at p. 278 : 2 Weir 782.
6. Aung Min *v.* King-Emperor, 9 Cr. L.J. 370 at p. 372 : 4 L.B.R. 362.
7. *Ibid.*

or which go to shake his credit by injuring his character, although the answer to such question might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture, are within permissible precincts of that provision.[1]

Questions which may be permitted under Sec. 146 (3), Evidence Act.

It is plain that the provisions of Sec. 146(3), Evidence Act, permit a cross-examiner to put questions which will not only shake the credit of a witness, but which will also expose his ethical and moral behaviour which may ultimately weigh with the Court while evaluating or appreciating testimonial evidence. By its very nature questions on *mola fides* as opposed to *bona fides*, immorality as opposed to good morality, dishonesty as against honesty, falsehood as against truthfulness, can all conceivably be put, provided there is necessity and foundation for the same.[2]

The effect of the provisions of Secs. 146 and 149 is that though it is permissible for a lawyer to put a question in cross-examination of a witness to shake his credit by injuring his character, nonetheless, the lawyer must be satisfied that there are reasonable grounds for thinking that the imputation which it conveys is well founded.[3]

Scope of cross-examination under Sec. 146(3), Evidence Act.

The assault on the character of a witness permitted by Cl. (3) of Sec. 146 must be directed only for the purpose of shaking the credit of the witness and not for any other purpose. In other words, if the cross-examination was intended to shake the credit of a witness it must naturally be to impugn the credibility of that witness in relation to the matter which is involved and relevant under one or the other provisions of the Evidence Act. It is not permissible to have recourse to Cl. (3) of Sec. 146 to ask all sorts of questions which are not necessary to shake the credibility of that witness. Considering the clear terminology of Sec. 146 to 148 it is clear that Cl. (3) of Sec. 146 does not open the gates to unbridled cross-examination of a witness in order to assail his character except insofar as it is necessary to shake his credit in relation to the matter in issue.[4]

Under Sec. 146(3) of the Evidence Act, a witness in cross-examination may be asked any question which tends to shake his credit by injuring his character. if facts are called out on cross-examination which tend to impeach the integrity or character of the witness he may on re-examination make explanation showing that such facts are consistent with credibility of a witness although such testimony would be otherwise irrelevant.[5]

There is an age-old rule that if you dispute the correctness of the statement of a witness you must give him opportunity to explain his statement by drawing his attention to that part of it which is objected to as untrue, otherwise you cannot impeach his credit. In *State of U.P.* v. *Nahar Singh*,[6] a Bench of Supreme Court stated the principle that Sec. 138 of the Evidence Act confers a valuable right to cross-examine a witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Sec. 146 of the Evidence Act by permitting a witness to be questioned, *inter alia*, to test his veracity.[7]

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1. Parkash Rajaram *v.* State of Maharashtra, (1975) 2 Cr. L.J. 1297 at p. 1299 : 1974 Mah. L.J. 416.
2. Parkash Rajaram *v.* State of Maharashtra, (1975) 2 Cr. L.J. 1297 at p. 1300 (Bom.) : 1974 Mah. L.J. 416.
3. Deepchand *v.* Sampathraj, A.I.R. 1970 Mys. 34 at p. 36 : (1969) 1 Mys. L.J. 606.
4. Baburao Patel *v.* Bal Thackeray, 1979 Mah. L.J. 11 at pp. 14, 15, 16.
5. Khirod Behera *v.* Kasinath Behera, (1990) 32 O.J.D. (Cr.) 209 at p. 210.
6. (1998) 3 S.C.C. 561 : 1998 S.C.C. (Cri.) 850.
7. **Rajinder Pershad *v.* Darshana Devi, (2001) 7 S.C.C. 69 at p. 70.**

Section 146, Evidence Act, deals with the scope of the questions which can be put in the cross-examination. It does not deal with any directions which can be given to the witness. It does not envisage giving of direction by a Court to a witness to give sample voice.[1]

2. "Hereinbefore referred to"—Meaning of.—The expression "hereinbefore referred to" means in Sec. 138, para. 2, Whitley Stokes, Vol. II, p. 927. Section 146 extends the power of the cross-examination far beyond the limits of Sec. 138.[2] All the questions covered by Sec. 146 are governed by the provisions of Secs. 148-153.[3]

Section 146 wider than Sec. 138.

3. Veracity.—The word "veracity" means accuracy or credibility.[4]

The veracity of the witness is to be tested with reference to the answer given by him in the cross-examination. Merely because he stated certain facts supporting the prosecution, in the examination-in-chief, the Court cannot conclude that those facts alone deserve to be given weight ignoring the several admission made by the witness in the cross-examination, which, if appreciated properly, would show that he has stated in the chief- examination is not at all true and as such no reliance should be placed, on them. The object of cross-examination is to obtain from the witness admissions favourable to the party on whose behalf the cross-examination is directed or to discredit the witness. It is well said by the authoritative judicial pronouncements that cross-examination is, the most effective of all the means for exacting truth and exposing flasehood. It is the duty of the Court to consider the entire evidence of the witness brought on record in the examination-in-chief, cross-examination and re-examination. Damaging admission made by the witness in the cross-examination cannot be got rid of merely by stating that the witness is helping the adverse party. Such an approach is derogatory to the well established principles of law.[5]

Where the diary maintained by appellants' counsel could be only an evidence which could either corroborate or contradict the counsel or his clerk, but the respondents' counsel had not got the diary produced in the Court in order to test the veracity of the evidence given by them it was held that there was no option but to accept the testimony of these two witnesses.[6]

4. Credit.—The word "credit" used in Sec. 146, Evidence Act, is of a wide and varied connotation and has to be distinguished from the word "character", though the latter may include the former. "Credit" would take in belief, estimate of reputation, however, good character and "creditable" so construed would mean, honourable or trustworthy. The "character" envisages a moral or ethical qualities of a person as a social being.[7]

Matter of cross-examination is not a mere empty formality, but one is required to put its own case in cross-examination otherwise a version of the witness has to be taken as unchallenged. The matter has been considered in number of decisions, that it is the duty to put one's own version to opponent in cross-examination otherwise deposition of a witness cannot be discredited.[8]

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1. Vinod Kumar *v.* State, 1981 Cr. L.J. 927 at p. 928.
2. Markby on *Evidence*, p. 106.
3. *Ibid.*, p. 107.
4. Whitley Stokes, Vol. II, p. 927.
5. Rajanna Rajulu *v.* State of Andhra Pradesh, 1979 Andh. L.T. 215 at p. 218.
6. Jagtu *v.* Badri, A.I.R. 1978 J.K. 50 at p. 53.
7. Parkash Rajaram *v.* State of Maharashtra, (1975) 2 Cr. L.J. 1297 at p. 1300 (Bom.) : 1974 Mah. L.J. 416.
8. **Sirmul *v.* Smt. Annapurna Devi, 2001 (2) M.P.L.J. 339 at pp. 345-46 (D.B.).** Cases, Maroti Bansi Teli *v.* Radhabai, 1944 N.L.J. 492 : A.I.R. 1945 Nag. 60 ; Chuni Lal Dwarka Nath *v.* Hartford Fire Insurance Co. Ltd., A.I.R. 1958 Punj. 440 and Kunwar Amritlal *v.* Rekhlal Koduram, A.I.R. 1950 Nag. 83, relied on.

5. On what credibility of a witness depends.—The credibility of a witness depends upon : (1) his knowledge of facts to which he testifies ; (2) his disinterestedness ; (3) his integrity ; (4) his veracity ; and (5) his being bound to speak the truth by an oath or by affirmation or declaration.[1]

Ground of credibility of witness

A witness may be discredited because he has been convicted for one of two reasons : (1) because the offence that he has committed shows a certain amount of moral obliquity ; or (2)) because it has resulted in the witness having spent some time in jail in company with men presumably of bad character, which association may very possibly have contaminated him.[2]

Grounds of discrediting witness.

147. When witness to be compelled to answer.—If any such question relates to a matter relavant to the suit or proceeding, the provisions of Sec. 132 shall apply thereto.

SYNOPSIS

1. Scope ... 4875
2. Limit ... 4875
3. Determination of relevancy ... 4875

1. Scope.—Section 147, Evidence Act, empowers a Court to compel a witness to reply to a relevant question.[3]

2. Limit.—In addition to questions which relate to relevant matters, a witness may further be asked the questions mentioned in Sec. 146. But these latter questions may or may not relate to relevant matters. If they relate to relevant matters, the witness must answer and *evidence will be admissible to contradict his answers.* If the questions relate to *irrelevant matters,* it will, generally speaking, be in the discretion of the Court to compel him to answer or not,[4] and evidence will *not be admissible to contradict the answer when given, unless* in the cases provided for by the *Exceptions* to Sec. 153, *post.*[5] But no question respecting any fact irrelevant to the issue can be put to a witness for the mere purpose of contradicting him.[6] It is only with regard to relevant matters that a witness can be contradicted by proof of previous inconsistent statements reduced to writing.[7]

Court's discretion to compel witness to answer or not irrelevant question.

Question on fact irrelevant not permitted for purpose of contradicting.

3. Determination of relevancy.—It appears from the record that none of the Courts below have tried to ascertain from the counsel who put these questions as to the relevancy for the purposes of defence of the accused and have proceeded to determine the matter opining that the question was irrelevant from the point of view of the prosecution case. When the provisions of the Evidence Act speak of relevancy of a fact, it may have bearing both on prosecution and defence versions of the incident and may affect a proposition [sic] prosecution and help the opposition. It was, therefore, primary duty of the Court before rejecting such a question to be satisfied whether such a question was relevant or not from the point

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1. Archbold's *Criminal Pleading,* 34th Ed., Sec. 1347, p. 514 ; *see* also in the matter of reference under Art. 317(7) 8th Constitution of India, (1983) 4 S.C.C. 258.
2. Gafoor *v.* Emperor, A.I.R. 1936 Rang. 373 at p. 379.
3. Shive Sharnagat *v.* State, A.I.R. 1953 Bhopal 21 at p. 23.
4. Section 148.
5. *See* Queen *v.* Gopal Das, I.L.R. 3 Mad. 280.
6. Taylor's *Evidence,* Secs. 1292, 1435, 8th Ed.
7. *See* Secs. 145 and 155 (3), and Khadijah Khanum *v.* Abdul Karim Sheraji, I.L.R. 17 Cal. 344.

of view of the defence. That has not been done, and on this sole ground, the order made by the trial Judge as also of Additional Sessions Judge is liable to be set aside.[1]

148. Court to decide when question shall be asked and when witness compelled to answer.—If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witnesses by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :–

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies ;

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies ;

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence ;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

SYNOPSIS

1. Meaning of the section ... 4876
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1. Meaning of the section.—Section 148 assumes it as a general proposition that a *witness cannot be compelled to answer irrelevant questions*, and Sec. 153 assumes it as a further general proposition that, if a *witness does answer an irrelevant question, his answer cannot be contradicted by other evidence, but that his answer to relevant questions may be so contradicted.* Section 148 then provides, that when a question, although irrelevant, affects the credit of the witness by injuring his character, the Court shall have a discretion as to compelling an answer ; and Sec. 153 enacts that where such a question has been answered, the usual rule as to the inadmissibility of evidence to contradict answers to irrelevant questions shall apply, save and except in two cases ; but that, if the witness answers falsely, he may afterwards be charged with giving false evidence.

Sections 148 and 153 compared and distinguished.

Witness when permitted to be contradicted or not.

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1. Parkash Rajaram *v.* State of Maharashtra, (1975) 2 Cr. L.J. 1297 at p. 1299 (Bom.) : 1974 Mah. L.J. 416.

Questions relating to certain matters not to be put to witness.

With reference to Cl. (2) it may be observed that where the facts which form the subject of the question are comparatively *recent*, they are more important as bearing upon the moral principles of the witness than when they are of remote date. "The interests of justice", says Mr. Taylor, "can seldom require that the errors of a man's life, long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant".

Inference from silence.

Mr. Taylor observes as follows : "....although it would be going too far to say that the guilt of the witness *must* be implied from his silence, it would seem that, in accordance with justice and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness.[1]

Jury entitled to decide on credit of witness.

Duty of Court.

It is the duty of the Court under this section to determine whether the witness should be compelled to answer the question or not. When a Court overrules an objection as to a question it impliedly decides that the question is one which the witness must answer.[2]

In order to understand the meaning of Secs. 146, 147 and 148 the following extracts from Taylor on *Evidence*,[3] may be perused with advantage :

Witness when bound to answer.

"Where the transaction as to which the witness is interrogated, forms *any material part of the issue* he will be obliged to give evidence, however, strongly it may reflect on his own conduct....

Witness not bound to answer.

"Where, however, the question is not directly material to the issue but is only put for the purpose of testing the *character*, and consequent *credit*, of the witness,...the older dicta and authorities tend to show, that in such case the witness is not bound to answer;[4] but this privilege, if it still exists, is certainly much discountenanced in the practice of modern times.[5] No doubt cases may arise, where the Judge, in the exercise of his discretion, would properly interpose to protect the witness from unnecessary and unbecoming annoyance. So, questions respecting alleged improprieties of conduct which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked.

Discretion of Judge to protect witness.

Cases where protection to witness not extended.

"But no protection of his sort should be extended to cases where the inquiry relates to transaction...bearing directly upon the moral principles of the witness, and his present character for veracity.[6]

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1. Sections 1321, 1427, 8th Ed.
2. Deputy Superintendent and Remembrancer of Legal Affairs *v.* Promotho Nath Bose, 14 C.W.N. 957 ; *see* notes under Sec. 132, *ante*, as to meaning of the word "compelled".
3. Tenth Ed., Secs. 1459, 1462.
4. R. *v.* Cook, (1696) 13 How. St. Tr. 348 ; R. *v.* Friend, (1696) 13 How. St. Tr. 16 ; R. *v.* Layer, (1722) 16 How. St. Tr. 214 ; R. *v.* O'Coigly, (1798) 26 How. St. Tr. 1351 ; Macbride *v.* Macbride, (1803) 4 Esp. 242 ; Dodd *v.* Norris, (1814) 3 Camp, 520 ; R. *v.* Hodgson, (1812) R. & R. 211.
5. Parkhurst *v.* Lowten, (1816) 1 Mer. 401 ; Cundell *v.* Pratt, (1827) M. & M. 108 ; Roberts *v.* Allat, (1828) M. & M. 192 ; R. *v.* Edwards, (1791) 4 T.R. 440. Even Lord Ellenborough, who is reported to have once held in Millman *v.* Tucker, (1803) Pea. Add. Cas. 222, [R. *v.* Lewis, (1803) 4 Esp. 226] seems, in a later case, to have disregarded the rules previously enunciated by himself [Frost *v.* Holloway, (1818) cited Stroud's *Evidence*, 212, n. ; and 2 Phipson's *Evidence*, 500].
6. And this is the practice in America ; *see* Carroll *v.* State, (1893) 40 Am. St. R. 786.

Witness required to answer.

"Wherever the answer, which the witness may give, will not immediately and certainly show his infamy, but will only *indirectly tend* to disgrace him, he may certainly be compelled to reply."[1]

Value of general evidence of character.

A general evidence of character to *impeach the veracity of a witness*, however, sometimes receivable, not so much to shake the credit of the witness, as to show directly that the act in question has not been committed.[2]

2. Scope of the section.—Sections 148-152 were intended to protect the witness against being improperly cross-examined.[3] If the question is as to a matter relevant only in so far as it affects the credit of the witness by injuring his character, the Court is, by Sec. 148, directed to decide whether or not the witness is to be compelled to answer, and may, if it does not think fit to compel him to answer, warn him that he is not obliged to answer it. The decision of the Court as whether or not it shall compel an answer is to be governed by the consideration declared in the section.[4] The provisions of Sec. 148 open up by a qualifying clause that when a question relates to a matter not relevant to a suit or proceeding, then the Court has discretion to decide as is indicated by the section itself. It follows, therefore, that once a question, which is not relevant is put, the matter is within the discretion of the Court and it has to decide whether the witness has to be compelled to answer such a question or whether a warning should ensue that the witness is not obliged to answer the same. The decision of the Court must reach either to these two results. While exercising the discretion in this regard what matters should be taken into account are enumerated in Cls. (1) to (4) of Sec. 148 and one of them is that such questions are proper if the same are of such a nature that the truth of the imputaion conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.[5] It is not true that the Judge has nothing to do in the matter at all, and that it is a mere empty farce for the witness to object to answer ; for the Judge has to decide whether the question is relevant to the matter in issue and upon that determination, partly depends the obligation to answer.[6] A Magistrate should refuse to allow a question as to a previous conviction to be put, upon the ground that it was so remote in time that it ought not to influence his decision as to the fitness of a surety, under Sec. 122 (now Sec. 121), Cr. P.C.[7]

Protection to witness under Secs. 148—152.

Witness's right to object to answer.

Court when to compel or not witness to answer.

Exercise of discretion.

Powers of Judge to allow or refuse questions to witness.

Impeachment of credit of witness where permitted.

Sections 138, 140, 145, 146, 148 and 154 provide for impeaching the credit of a witness by cross-examination. The learned Subordinate Judge was, therefore, justified in discrediting the plaintiff by answers elicited in the cross-examination, to the effect that his antecedents were bad.[8]

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1. Macbride *v.* Macbride, (1805) 4 Esp. 242.
2. Taylor's *Evidence*, 10th Ed., Vol. 1, Sec. 363, pp. 281-282.
3. Markby on *Evidence*, p. 107.
4. Queen *v.* Gopal Doss, I.L.R. 3 Mad. 271 at p. 285 (F.B.). 2 Weir 782, *per* Kernan, J. 26 All. 371 at p. 374 : 1904 A.W.N. 52.
5. Prakash Rajaram *v.* State of Maharashtra, (1975) 2 Cr. L.J. 1297 at p. 1299.
6. Moher Sheikh *v.* Queen-Empress, I.L.R. 21 Cal. 392 at p. 400.
7. Emperor *v.* Ghulam Mustafa, I.L.R. 26 All. 371 at p. 374 : 1904 A.W.N. 52.
8. Guntaka Hussenaiah *v.* Busetti Yerraiah, A.I.R. 1954 A.P. 39 at p. 40.

3. Credit of the witness.—Section 146, Evidence Act, allow questions in cross-examination to shake the credit of the witness by injuring his character. Section 148 of the Act lays down that where a question is only relevant as to character, the Court should decide whether the question should be asked. The Magistrates should confine questions as to character asked in cross-examination to questions which are relevant to the case, and disallow questions which are unnecessary, provocative or merely harassing.[1] The credit of a witness can be said to have been shaken only if it can be shown that he is not a man of veracity, and not that he is of bad moral character.[2]

Cross-examination of witness regarding his credit.

Cross-examination on relevant questions permitted.

Credit of witness when shaken.

4. If he thinks fit.—The expression "if he thinks fit" means, if it does not think fit to compel him to answer the question.[3]

5. Prior character.—Prior character at any time may be admitted, as being relevant to show present character and, therefore, indirectly to show the probability as to truth-speaking.[4]

6. Power to disallow questions should be effectively exercised by excluding improper and impermissible questions.—Power to disallow questions should be effectively exercised by reference to Secs. 146, 148, 150, 151 and 152 of the Evidence Act by excluding improper and impermissible questions. The examination of the witnesses should not be protracted and the witness should not feel harassed. The cross-examiner must not be allowed to bully or take unfair advantage of the witness. Though the trials in India are adversarial, the power vesting in the Court to ask any question to a witness at any time in the interest of justice gives the trial a little touch of its being inquisitorial. Witnesses attend the Court to discharge the sacred duty of rendering aid to justice. They are entitled to be treated with respect and it is the Judge who has to see that they feel confident in the Court. In *Ram Chander* v. *State of Haryana*[5] Apex Court observed,

> "...to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest....", (SCC p. 193, para 2)

An alert Judge actively participating in Court proceedings with a firm grip on oars enables the trial smoothly negotiating on shorter routes avoiding prolixity and expeditiously attaining the destination of just decision. The interest of the counsel for the parties in conducting the trial in such a way so as to gain success for their respective clients is understandable but the obligation of the Presiding Judge to hold the proceedings so as to achieve the dual objective—Search for truth and delivering justice expeditiously—cannot be subdued. Howsoever sensitive the subject-matter of trial may be ; the courtroom is no place of play for passions, emotions and surcharged enthusiasm.[6]

149. Question not to be asked without reasonable grounds.—No such question as is referred to in Sec. 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

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1. S. Pillay *v.* G.S.T. Shaik Thumby Sahib, A.I.R. 1940 Rang. 113 at p. 114.
2. R.R. Chari *v.* State, A.I.R. 1959 All. 149 at pp. 156-57.
3. Whitely Stokes, Vol. II, p. 927.
4. Wigmore, Vol. III, Sec. 928, p. 472.
5. (1981) 3 S.C.C. 191 : 1981 S.C. (Cri.) 683 : A.I.R. 1981 S.C. 1036.
6. **Makhan Lal Bangal *v.* Manas Bhunia, (2001) 2 S.C.C. 652 at pp. 665-66.**

Illustrations

(*a*) *A* barrister is instructed by an attorney or vakil that an important witness is a *dakait*. This is a reasonable ground for asking the witness whether he is a *dakait*.

(*b*) *A* pleader is informed by a person in Court that an important witness is a *dakait*. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a *dakait*.

(*c*) *A* witness, of whom nothing whatever is known, is asked at random whether he is a *dakait*. There are here no reasonable grounds for the question.

(*d*) *A* witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be reasonable ground for asking him if he is a *dakait*.

Comment

Suspicion as to forgery of document insufficient to exclude it.—Instruments, which are proved, ought not to be treated as worth nothing, on a mere possible suspicion of perjury and forgery.[1]

150. Procedure of Court in case of question being asked without reasonable grounds.—If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Comment

History of Secs. 149 and 150.—These sections were substituted while the Bill was in Committee for certain other sections in the original draft, which, said Sir J.F. Stephen in his speech on the passing on the Bill, "provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court, without written instructions. Speaking;...then, of the substituted sections, including Secs. 146 to 152, he said : "The object of these sections is to lay down, in the most distinct manner, the duty of counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character.....[2]

Lawyer to ask question if without instructions.

Object of Secs. 146 to 152.

In *Sullivan* v. *Norton*,[3] it has been decided that an advocate in this country cannot be proceeded against either civilly or criminally for words uttered in his office as advocate.

Westropp, C.J., in the Full Bench case of *Reg.* v. *Kashinath Dinkar*,[4] lays down fully and satisfactorily the position of counsel and his privilege :

Counsel—Position and privileges.

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1. Kali Chunder Chowdhry *v.* Shib Chunder Bhadoory, 15 W.R. (P.C.) 12 : 6 B.L.R. 501 at p. 507.
2. *Proceedings of the Legislative Council of India*, pp. 237-38 of the *Supplement of the Gazette of India* of 30th March, 1872; *see* the second proviso to Sec. 165, *post*.
3. I.L.R. 10 Mad. 28.
4. 8 Bom. H.C.R. 126 Crown cases.

"No action is maintainable ...against the counsel ...for words spoken in a Court of Justice. If they be fair comments upon the evidence, and be relevant to the matter in issue, then, unless express malice be shown, the occasion justifies them."[1]

"It belongs to every subject of this realm in all Courts of Justice to assert and defend his rights, and to protect his liberty and life by the free and unfettered statement of every fact, and make use of every argument and observation that can legitimately—that is, according to the rules and principles of our law—conduce to these important ends. Every man has this right, and may exercise it in his own person—he may commit its exercise to counsel, who takes it as his delegate; its nature and character is not altered by this delegation...and it is the duty of counsel towards their clients to use their own judgment and experience and discretion and as the result, whatever be their instructions, to exclude all topics and observations of which the case does not properly admit. Subject to its just and necessary limits, this right, when duly exercised and directed to its proper purposes, should not be fettered or impeded...."[2]

Right of individual to protect life, etc.

Duty of counsel towards his client.

Counsel to use his discretion

The advocate's words and acts ought only to be guided by a sense of duty—duty to his client—and by a constant recourse to his own sense of right to guard against the abuse of the powers and privilege entrusted to him.[3]

Counsel to be guided only by sense of duty to client.

Where a pleader was prosecuted for the use of defamatory words in the course of his address (calling the witnesses "loafers") during the trial of a suit, and convicted under Sec. 500, I.P.C. ; *held*, reversing the conviction and sentence, that, in the absence of express malice (which was not to be presumed) the pleader was protected by exception to Sec. 499, I.P.C.[4]

Malice of counsel not to be presumed.

Court to be cautious to deprive counsel of the protection.

.....A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows : He is not called upon to consider whether the facts which he is dealing are true or false. What he has to do is to argue as best as he can, without degrading himself in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client....Far more than a Judge, infinitely more than a witness, he wants protection on the ground of benefit to the public."[5]

Counsel to argue from facts and not from his knowledge.

The case in *In re Nagarji Trikamji*[6] has been followed in *Upendra Nath* v. *Emperor*[7] where it has been held that the Court ought to presume good faith on the part of the pleader and not to hold him criminally liable, unless there is satisfactory evidence of actual malice, and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose.

Court to presume good faith on part of counsel.

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1. Hudson *v.* Scarlet, 1 B. & Ad. 232.
2. *Per* Lord Chief Justice Blackburn, in Butt *v.* Jakson, 10 Ir. Law Rep. 120 at p. 123.
3. Per Collins, C.J., in Sullivan *v.* Norton, I.L.R. 10 Mad. 28.
4. *In re* Nagarji Trikamji, I.L.R. 19 Bom. 340.
5. *Per* Brett, M.R. (Lord Esher), in Munster *v.* Lamb, 11 Q.B.D. 588 at p. 603.
6. I.L.R. 19 Bom. 340.
7. I.L.R. 36 Cal. 375.

The Court is entitled to ask whether he made the charge on instructions and if so on whose. It is not sufficient for counsel in such cases even to plead instructions, they are not justified in making charges of fraud and crime, unless they are personally satisfied that there are reasonable grounds for putting them forward.[1]

Counsel what not to state.

Counsel for prisoner should not state matter which he does not propose to prove by evidence or suggest in cross-examination of prosecution witnesses.[2]

Pleader not liable for legitimate comments.

In a suit for rent the defence pleader, while commenting on certain exhibits, used the expression, that "the plaintiff (a lady) forged documents by means of fraud". *Held* that there was no malice and the pleader was not liable for making legitimate comments on the case. What the pleader did was in the professional discharge of his duty and in good faith for the protection of the interest of his client.[3]

151. Indecent and scandalous questions.—The Court may forbid any questions or inquiries which it regards indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Comment

Scope.—An advocate in the discharge of his duties to his client must not be hampered by any fear of offending the opposite-party or any witness.

As pointed out by Subramania Iyer, J., in *Zamindar of Tuni* v. *B.P. Benyayya*[4] "what is relevant cannot be scandalous".[5] Therefore indecent and scandalous questions can be put if they directly relate to the facts in issue and also if it is necessary to be known in order to determine whether or not the facts in issue existed. It has to be pointed out therefore, that these exceptions are vital, and if in any given case the Court is satisfied that even an indecent or scandalous questions may have a bearing upon a fact in issue, the same cannot be forbidden.[6]

152. Questions intended to insult or annoy.—The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Comment

Degrading questions.—These sections are in general accord with English law. "If a woman," says Sir J. F. Stephen, in his *General View of the Criminal Law of England*, "prosecuted a man for picking her pocket, it would be monstrous to inquire whether she had not had an illegitimate child ten years before, though circumstances might exist which might render such an inquiry".

View of English law.

This section forbids scandalous and indecent questions and nothing can be more scandalous than a wife proclaiming her infamy from the witness-box, but

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1. Donald Watson *v.* Peary Mohan Dass, I.L.R. 40 Cal. 898 : 18 C.W.N. 185.
2. Emperor *v.* Nagendra Nath Sen Gupta, 19 C.W.N. 923 : 21 C.L.J. 396.
3. Shiva Kumari Debi *v.* Becharam Lahiri, 25 C.W.N. 835.
4. I.L.R. 22 Mad. 155 at p. 159.
5. *In re* G. Vasantaha Pai, A.I.R. 1960 Mad. 73 at p. 75 : I.L.R. (1959) Mad. 958 : 72 M.L.W. 585 : (1960) 1 M.L.J. 21.
6. Prakash Rajaram *v.* State of Maharasthra, (1975) 2 Cr. L.J. 1297 at p. 1300 : 1974 Mah. L.J. 416.

the latter part of the section expressly provides that if such questions relate to matters in issue, they shall be allowed.[1] If a question is merely intended to insult or annoy and is offensive in form, the Court has power to forbid the same as is clear from Sec. 152, Evidence Act.[2] Taylor on the *Law of Evidence*[3] observes as follows :

> "....The mere indecency of disclosure will not exclude them, where the evidence is *necessary* for the purpose of civil or criminal justice;...But where the parties have impertinently interested themselves in a question, tending to violate the peace of society by exhibiting an innocent third person in a ridiculous light, or to disturb his peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers[4] or contracts respecting the sex of a third person[5] or upon the question whether an unmarried woman has had a child."[6]

The exclusion provided in sub-sections (2) and (3) in Sec. 148 and in Secs. 141 and 152 indicate the principles on which the Court should proceed in protecting witnesses from reckless and unjustifiable interrogation.

Court's powers under Secs. 151 and 152.

Section 149 deals with questions not to be asked without reasonable grounds and the illustrations thereto are very important. They show the scope of the reasonable grounds which justify such questions and ought to guide legal practitioners of our Courts. Sections 151 and 152 empower a Court to forbid indecent and scandalous questions and questions intended to insult or annoy or needlessly offensive in form.

Duty of Court to forbid questions pertaining to certain matters.

It is the duty of the Court to see that not only such questions should not be answered but that they should not be asked ; for the moment such a question is asked half the mischief is done though no answer is compelled.

Limitation on Court's power to interpose.

Object to put question not to be disclosed.

There is however one limitation in the exercise of this power by Courts because first of all it is not desirable that the Court should be interposing frequently and asking the advocate to explain the line of his defence. This will force the hand of the advocate to prematurely disclosing his object in putting the question and this would put the witness on guard and the effectiveness of the cross-examination will be completely destroyed.[7]

In this connection, it must be stated that the offensive cross- examination and insulting of the witness which used to be the fashion in the Old Bailey and in Magisterial Courts has been fast disappearing.[8]

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1. Rozario *v.* Ingles, I.L.R. 18 Bom. 468 at p. 470.
2. Prakash Rajaram *v.* State of Maharashtra, (1975) 2 Cr. L.J. 1297 at p. 1300 (Bom.) : 1974 Mah. L.J. 416.
3. 10th Ed., p. 675, Sec. 949.
4. No wager is now recoverable, 8 & 9 Vict., Cap. 109 ("The Gaming Act, 1845"), Sec. 18 ; 55 Vict., Cap. 4 ["The Betting and Loans (Infants) Act, 1892]". *See* Higginson *v.* Simpson, (1877) 2 C.P.D. 76 ; Diggle *v.* Higgs, (1877) 2 Ex. D. 422 ; Hampden *v.* Walsh, (1876) 1 Q.D.B. 189 ; Read *v.* Anderson, (1884) 10 Q.B.D. 160 (C.A.) ; Trimble *v.* Hill, (1879) 5 App. Cas. 342 (P.C.).
5. Da Costa *v.* Jones, (1778) 2 Cowp. 729.
6. Ditchburn *v.* Goldsmith, (1815) 4 Camp. 152. If the subject of the action is frivolous, or the question impertinent, and this is apparent on the record, the Court will not proceed at all in the trial. Brown *v.* Leeson, (1792) 2 H. Bl. 43 ; Henkin *v.* Gerss, (1810) 2 Camp. 408. But *see* Hussey *v.* Crickett, (1811) 3 Camp. 168.
7. Harnam Singh *v.* Emperor, A.I.R. 1931 Sind 38 ; Abbas Ali *v.* Emperor, A.I.R. 1933 Lah. 667 : 143 I.C. 479 : 34 P.L.R. 536.
8. Ayeasha Bi *v.* Peerkhan Sahib, A.I.R. 1954 Mad. 741 at p. 750.

Counsel when justified to ask defamatory, etc. questions.

The question as to under which circumstances a counsel or pleader is justified in asking defamatory or scandalous questions has engaged the attention of the Calcutta High Court in several cases, *viz. Upendra Nath Bagchi* v. *F.A. Savi*;[1] *Weston* v. *Peary Mohan Das*;[2] *Fakir Prasad Ghose* v. *Kripasindhu Pal Bhuti*[3] and *Banerjee* v. *Emperor*.[4]

Advocate to put questions within limits.

In the interests of his client, in the interest of justice, and in order to discredit the witness he is cross-examining, the advocate is entitled to put questions within the limits his good sense might dictate or indicate.[5]

Presumption of good faith of counsel in asking questions.

The presumption in the case of pleaders asking questions in cross-examination is that such questions are put in good faith for the protection of his client's interests within the exception to Sec. 499.[6]

Extent of immunity of an advocate.

It is necessary to make a few observations regarding the extent of immunity. It was observed by Mookerjee, A.C.J., in *Satish Chandra* v. *Ram Dayal*[7] :

> "In this country questions of civil liability for damages for defamation and questions of liability to criminal prosecution for defamation do not, for purposes of adjudication, stand on the same basis...."

Basis different for civil or criminal liability from defamation.

The responsibility of a lawyer for putting defamatory questions is different from the responsibility of the client-accused for putting the questions. This has been made clear by Bardswell, J., in *Bashyam Ayyangar* v. *Andal Ammal*.[8]

Scope of lawyer's privileges in cross-examination.

The scope of a lawyer's privileges as stated by Wallace, J., in *Anwarruddin* v. *Fathim Bai*,[9] was applied. Similarly, Newsam, J., in *Seshagiri Rao* v. *Sadulla*[10] held in regard to a question put by an advocate in cross-examination the presumption is that it was asked under instructions and good faith and the advocate is privileged. Pearson and M.C. Ghose, JJ., held in *Narayana Chandra* v. *Harish Chandra*,[11] that a pleader asking the questions in cross-examination under instructions from his client is protected from a charge under Sec. 500, I.P.C. Similarly, Baker and Broomfield, JJ., in *Tulsidas* v. *Billimoria*[12] held that in India the Courts ought to presume that the advocate acted in good faith and upon instructions and ought to require the other party to prove express malice.

Good faith in imputation how determined.

Quite different would be the case in the case of party— accused who claimed the benefit of Exception 9 to Sec. 499, I.P.C., and he has to prove that he made the imputation in a good faith for the

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1. I.L.R. 36 Cal. 375 : 13 C.W.N. 340.
2. A.I.R. 1914 Cal. 396.
3. A.I.R. 1927 Cal. 303.
4. A.I.R. 1927 Cal. 823.
5. Rev. Father P. Mesaric *v.* Rai Ramani Mohan Banerjee Bahadur, A.I.R. 1938 Cal. 766 at pp. 766-67 : 42 C.W.N. 1113 : 178 I.C. 253.
6. Narayan Chandra Ganguli *v.* Harish Chandra Saha, A.I.R. 1933 Cal. 186 at p. 185 ; Muhammad Taqi *v.* M.A. Ghani, A.I.R. 1945 Lah. 97.
7. I.L.R. 48 Cal. 388 : A.I.R. 1921 Cal. 1 : 59 I.C. 143 : 22 Cr. L.J. 31 (S.B.).
8. 1934 M.W.N. (Cr.) 81.
9. A.I.R. 1927 Mad. 379.
10. 1937 M.W.N. (Cr.) 243 (1).
11. A.I.R. 1933 Cal. 185.
12. A.I.R. 1932 Bom. 490.

protection of his interest.[1] The truth of the imputation need not be proved by an accused person claiming the privilege of the exception.[2]

Imputation on reasonable grounds protected.

Questions may be asked for which there are only reasonable grounds for thinking that imputations contained in them are well founded and it is by no means necessary before the question is asked that the person asking it should be in a position to establish the truth of the imputations beyond all doubt. It is difficult to believe that anything which will be permissible to be put under the Evidence Act can be punishable under the Penal Code.[3]

Judge not to record irrelevant scandalous matter.

It is one of important functions of the Trial Judge to see that scandalous matters are not introduced into the record unless they are relevant for the proper decision of the case.[4]

Aggravated sentence on the ground of baseless accusation of outrageous conduct of police etc.

It is extremely common for advocates for the defence to argue that the prosecution story is an entire concoction on the part of the police. Where the contention is raised on the direct instructions of the client the accused has added to the heinousness of the offence with which he is charged by a baseless accusation of outrageous conduct on the part of the police or other prosecutors. This is a circumstance of aggravation in awarding the sentence.

Lawyers when guilty of professional misconduct by accusing police, etc. of outrageous conduct.

Where the suggestion is made by the legal practitioner without reasonable cause, the legal practitioner is guilty of the grossest professional misconduct.[5]

153. Exclusion of evidence to contradict answers to questions testing veracity.—When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested he may be contradicted.

Illustrations

(*a*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether in a former transaction, he had not made a fraudulent claim. He denies it.

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1. *Per* Rajamannar, J. (as he then was) in Anthoni Udayar *v.* Velusami Thewar, A.I.R. 1948 Mad. 469.
2. Karuppanna Goundan *v.* Kuppuswami Mudaliar, 1935 M.W.N. (Cr.) 69 (Pandurang Row, J.).
3. Rebecca Mondal *v.* Emperor, A.I.R. 1947 Cal. 278 at pp. 279-80 : 50 C.W.N. 545 : 228 I.C. 13.
4. Mst. Mohammad Sultan Begam *v.* Sarajuddin Ahmad, A.I.R. 1936 Lah. 183 at p. 185 : 38 P.L.R. 337: 161 I.C. 300.
5. Banslochan Lal *v.* Emperor, A.I.R. 1930 Pat. 195 at p. 199.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c*) *A* affirms that on a certain day he saw *B* at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it. Evidence is offered to show that *A* was on that day at Calcutta.

The evidence is admissible, not as contradicting *A* on a fact which affects his credit, but as contradicting the alleged fact that *B* was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d*) *A* is asked whether his family has not had a blood feud with the family of *B* against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

SYNOPSIS

1.	Principle	... 4886	4.	Testing credit	... 4887
2.	Section must be strictly construed and narrowly interpreted	... 4887	5.	Two exceptions	... 4888
3.	Basis of the section	... 4887	6.	Bias or partiality	... 4888
			7.	Scope of illustration	... 4888

1. Principle.— The rule, limiting the right to call evidence to contradict witnesses on collateral questions, excludes all evidence of facts which are incapable of affording any reasonable presumption or inference, as to the principal matter in dispute.[1]

Evidence of which facts to be excluded.

The law, as stated by Phipson on *Evidence*, 8th Ed. at page 472 is—

> "A party may not, in general, impeach the credit of his opponent's witnesses by calling witnesses to contradict him on irrelevant matters, and his answers thereon will be conclusive."

Right to contradict opponent's witness.

Similar statement of law would be found in Taylor's *Law of Evidence*, paras. 1435 and 1438.

In *Piddington* v. *Bennett and Wood Proprietary Ltd.*,[2] the High Court of Australia laid down that if a question in cross-examination affects only the credit of the witness and is not relevant to the matters actually in issue, the witness's answer cannot be contradicted by other evidence except in certain exceptional cases.[3]

Witness's answer when not to be contradicted.

It is permissible under instructions to cross-examine a witness as to his lack of work, his habits of consuming opium or his livings on the profits of a brothel; but the examination of further witnesses to disprove his answers is not allowed, save as shown in Sec. 153.[4]

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1. Koziejhulan *v.* His Highness the Aga Khan, 6 B.H.C.R. 93 at p. 96.
2. 63 C.L.R. 533.
3. Ram Bali *v.* State, A.I.R. 1952 All. 289 at p. 292.
4. Maung San Myin *v.* Emperor, A.I.R. 1930 Rang. 49 at pp. 50-51.

The object of Sec. 153 is to prevent trial being spun out to an unreasonable length.[1]

2. Section must be strictly construed and narrowly interpreted.—Sections 153 and 155, Indian Evidence Act, must be strictly construed and narrowly interpreted. Section 153 does not go far beyond the case of *Attorney-General* v. *Hitchcock*,[2] on which doubtless it was based.[3]

Strict construction of Secs. 153 and 155.

3. Basis of the section.—Section 153 is based on the decision rendered by Pollock, C.B. in *Attorney General* v. *Hitchcock*[4] in which the learned Judge observed that,

> "a witness may be contradicted as to anything he denies having said provided it be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which if answered in a particular way, would contradict a part of the witness's testimony, and if it is neither the one nor the other of these, it is collateral to though in some sense it may be considered as connected with, the subject of enquiry."

The rule limiting the right to call evidence to contradict a witness on collateral issues excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute.[5]

The basic requirement for adducing such contradictory evidence is that the witness, whose impartiality is sought to be contradicted with the help of such evidence, should have been asked about it and he should have denied it. Without adopting such a preliminary recourse it would be meaningless, if not unfair, to bring in a new witness to speak something fresh about a witness already examined.[6]

As the general rule of evidence is one of prohibiting evidence on collateral issues and since it is only by way of exception that such evidence can be permitted, the Court must guard that the defence evidence falls strictly within the exception.[7]

4. Testing credit.—"With respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, may be broadly laid down," says Mr. Taylor, "that if the questions relate to *relevant* facts, the answers may be contradicted by independent evidence; if to *irrelevant*, they cannot."[8] The Indian Evidence Act adopts the same principle. The exceptions to the rule are taken from English law—the *first* from the 25th section of the Common Law Procedure Act, 1854,[9] the *second*, being in

Contradiction of answers of relevant questions permissible.

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1. Markby on *Evidence*, p. 108.
2. (1847) 1 Ex. 91 : 11 Jur. 478 : 16 L.J. Ex. 259.
3. Bhogilal Bhikachand *v.* The Royal Insurance Co. Ltd., A.I.R. 1928 P.C. 54 at p. 63 : 26 A.L.J. 377 : 32 C.W.N. 593 : 54 M.L.J. 545 : 47 C.L.J. 550 : 30 Bom. L.R. 818.
4. 1847 (1) Exch. 91.
5. **Vijayan *v.* State represented by Inspector of Police, (1999) 4 S.C.C. 36 at p. 40 : 1999 (2) Crimes 7 at p. 10 (S.C.) : A.I.R. 1999 S.C. 1311 : 1999 Cr. L.J. 2037 (S.C.).**
6. **State of Karnataka *v.* K. Yarappa Reddy, 2000 Cr. L.J. 400 at p. 405 : 1999 (4) Crimes 171 : 1999 (3) K.L.T. 456 (S.C.).**
7. *Ibid*; **Vijayan *v.* State, (1999) 4 S.C.C. 36 : 1999 A.I.R. S.C.W. 1003 : A.I.R. 1999 S.C. 1311 : 1999 Cr. L.J. 2037 (S.C.), relied on.**
8. Paragraphs 1295, 1438, 8th Ed.
9. 17 & 18 Vict., c. 128.

accordance with a strongly intimated opinion of the Barons of the Exchequer in the case of the *Attorney-General* v. *Hitchcock*.[1]

If a witness be questioned on cross-examination respecting the commission of crimes by him on some former occasion, his answers must (except in the case of an actual conviction), be taken as conclusive.[2] This rule extends to parties to the record, when giving testimony, as well as to other witnesses. Collateral imputations can neither be disproved on the one hand, nor supported on the other, by independent evidence.[3]

The rule is founded on two reasons : first, that a witness cannot be expected to come prepared to defend, by independent proof, all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues.[4]

5. Two exceptions.—Section 153 of the Evidence Act provides two exceptions. The first exception is that if a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Evidence to contradict answer to relevant questions not permissible or when permissible.

Where, a witness was asked in the cross-examination whether he was under police surveillance or whether he was an active criminal and he denied both, it was held that no evidence to contradict him would be admissible. Exception (1) had no application. The evidence, therefore, that was sought to be introduced was not admissible at all under Sec. 153 of the Indian Evidence Act.[5]

Evidence to contradict the denial of being under police surveillance, etc. not permissible.

6. Bias or partiality.—Facts showing that the witness is biased or partial in relation to the parties or the cause may be elicited on cross-examination; or if denied, independently proved;[6] e.g. that a female witness is the kept mistress of the party calling her,[7] or that the witness had subborned false witnesses against the opposite party,[8] or has had quarrels with, or expressed hostility towards him.[9] So, the fact that the witness has accepted a bribe to testify may, if denied, be proved,[10] though a previous admission by the witness that he had been offered a bribe cannot.[11]

Independent proof of partiality of witness permissible.

7. Scope of illustration.—Illustration (*c*) to Sec. 153 shows that the admissibility of the testimony does not depend on the cross-examination of the witnesses to be contradicted.[12]

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1. Welsby, Hurlstone, and Gordon's Exch. Rep 94-102.
2. Goodard *v.* Part, (1855) 24 L.J. Ch. 783.
3. Tolman and Ux. *v.* Johnstone, (1860) 2 F. & F. 66 (Cockburn, C.J., after consulting the other Judges) ; *see* also Baker *v.* Baker, (1863) 32 L.J.P. & M. 145 ; Taylor's *Evidence*, 10th Ed., para. 1438, pp. 1041-42.
4. Attorney-General *v.* Hitchcock, (1847) 16 L.J. Ex. 259 (Parke and Alderson, B.B.) ; Alcock *v.* Royal Exchange Insurance Co., (1849) 18 L.J.Q.B. 121, forms no real exception to the above rule.
5. Kamal Kanto Das *v.* State, A.I.R. 1959 Cal. 342 at p. 347.
6. Attorney-General *v.* Hitchcock, 1 Ex. 91.
7. Thomas *v.* David, (1836) 7 C. & P. 350.
8. The Queen's case, 2 Brod, & Bing. at pp. 311, 315.
9. R. *v.* Shaw, 16 Cox. 503.
10. Attorney-General *v.* Hitchcock, 1 Ex. 90.
11. *Ibid* ; Phipson, 10th Ed., para. 1558, p. 603.
12. R. *v.* Sukharam Mukhundji, 11 B.H.C.R. 166 at p. 169.

154. Question by party to his own witness.—The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

SYNOPSIS

1. Scope ... 4889
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3. Discretion of Court ... 4894
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5. Leading questions, when allowed by party to his own witness ... 4898
6. Hostile witness ... 4899
7. Evidence of hostile witness not to be rejected as a whole ... 4902
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10. Necessity of party giving evidence on his own behalf ... 4904
11. Practice of first examining defendant as witness disapproved ... 4904
12. Tendering for cross-examination ... 4905
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14. Commissioner cannot exercise discretion ... 4905
15. Value of evidence of hostile witness ... 4906
16. Turning hostile of one set of the family member/witness by itself cannot be permitted to destroy the other set of dependable prosecution evidence ... 4909
17. Merely giving unfavourable testimony cannot be enough to declare a witness adverse ... 4910
18. A party will not normally be allowed to declare his own witness hostile unless the Court is satisfied ... 4910
19. The expression "hostile witness" has no statutory origin—It is actually forwarded from English law ... 4911

1. Scope.—Section 154 says nothing about declaring a witness hostile; it allows a party with the permission of the Court at its discretion to cross-examine his own witness in the same way as the adverse party; ordinarily a party calling his witness is not allowed to ask him these questions but this ordinary rule is relaxed in Sec. 154; the purpose of such relaxation can only be to find out if the witness is one of truth and can be relied on, because cross-examination is the most powerful and effective instrument for bringing out and testing truth; but that is far from saying that a witness is hostile whenever his testimony is such that it does not support the case of the party calling him; such a view would seriously undermine the independence, integrity and dignity of a witness in a court of law.[1] As Sir Lawrence Jenkins delivering judgment of the Privy Council in *Baikunatha* v. *Prasannamoyee*[2] observes Evidence Act : cross-examination by a party of his own witness, means he can be asked (*a*) leading questions, (*b*) questions relating to his previous statements in writing, and (*c*) questions which tend to test his veracity to discover who he is and what is his position in life or to shake his credit.

Party when entitled to cross-examine his own witness.

Declaration of witness as hostile.

It is well settled that a witness can be declared hostile in course of his evidence during the trial, when he resiles from his earlier statements made before the police during the investigation of the case. A witness cannot be declared hostile, if he makes some statements prejudicial to the prosecution case in his cross-examination. A formal witness who simply proves his signature on the seizure list and the material exhibits cannot be declared hostile.[3]

The evidence given by a witness who has been declared hostile deserves to be scrutinised carefully not only at the time of writing the judgment but even at the time when the witness is in the witness-box and being examined. It is the duty of the prosecution to put questions to the hostile witness which are relevant for

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1. Tulsiram Shaw *v.* R.C. Pal Ltd., A.I.R. 1953 Cal. 160 at p. 161 ; Krutibas Sahu *v.* Madhab Das, A.I.R. 1961 Orissa 48 at p. 49.
2. 27 C.W.N. 797 (P.C.) at p. 799.
3. Shyam Kishore Narayan Sinha *v.* State of Bihar, 1994 (1) B.L.J.R. 264 at p. 265.

the purpose of ascertaining whether he is speaking the truth or for upholding the prosecution version and in case where the statement given by the witness in the Court is contradictory with the statement given by the witness to the police under Sec. 161, Cr. P.C. It is the duty of the prosecution to bring contradiction on record by confronting the witness with his previous statement made to the police and if the prosecutor fails to perform his duty then it is the duty of the Court before whom the witness is being examined to put such questions as are necessary for ascertainment of truth to the witness under Sec. 165 of the Evidence Act.[1]

It would be usual for a Judge to look into the statement made before the investigating officer to see whether the witness was actually resiling from the position taken during investigation.[2]

Court to decide witness hostile and allow party to cross-examine him.

It is entirely for the Court to decide whether in given circumstances a witness has turned hostile and whether permission should be granted to the party calling him to cross-examine him.

It is not right, to proceed on the basis that whatever is stated by a witness which is not in favour of the case of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him.[3]

Court bound to consider the entire evidence.

Whether obtained by invoking Sec. 154 in the Evidence Act or the proviso in Sec. 162 of the Code of Criminal Procedure the Court is duty bound to consider the entire statement of a witness for concluding as to what extent it establishes the case against the accused. Be that as it may, where a party feels the necessity of putting to its own witness questions by way of cross-examination and obtains evidence by invoking Sec. 154 of the Evidence Act or the proviso in Sec. 162 of the Code, the Court has to apply judicial caution and has to be more careful in examining the testimony.[4]

The evidence of a so-called hostile witness is not completely effaced. All that is required is that there must be some kind of corroborative evidence which would lend assurance to his trustworthiness and inspire confidence in his testimony.[5]

Characterising a witness as hostile does not completely efface his evidence. The evidence remains admissible and there is no legal bar to base a conviction upon his testimony. What is involved in such cases is only a rule of caution that there should be corroboration by other reliable evidence.[6]

In *Bikram Ali* v. *Emperor*,[7] the Public Prosecutor with the leave of the Court asked the witness whether *S* had stated that the three accused had committed the dacoity and the answer was : "Yes, he said so," Cuming, J., said :

> "He was not cross-examining his own witness but with the permission of the Court was asking him leading questions. That is not necessarily to cross-examine."

Lord Williams, J., said :

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1. State of Rajasthan *v.* Bhera, 1997 Cr. L.J. 1237 at p. 1245 (Raj.).
2. Lalu *v.* State, A.I.R. 1960 Cal. 776 at p. 778 : 64 C.W.N. 161.
3. State of Mysore *v.* Raju Shetty, A.I.R. 1961 Mys. 74 at p. 78.
4. Tara Chand Rampal *v.* State, 1974 Cr. L.J. 1346 at p. 1357 (Delhi) ; *see* also Azhad *v.* The State, 1985 All. L.J. 384.
5. Vijay *v.* State (Delhi Administration), 1985 (1) Crimes 31 at p. 33 (Delhi).
6. George *v.* State, 1988 (1) K.L.T. 256 at p. 257.
7. A.I.R. 1930 Cal. 139 : 1930 Cr. C. 139 : 124 I.C. 66 : 31 Cr. L.J. 601 : I.L.R. 57 Cal. 801.

"Sections 143 and 154, Evidence Act, read together do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge."

Prosecution not to put leading questions to the witness.

In connection with these observations it would be useful to refer to the observations of Rankin, C.J., in the case of *Profulla Kumar Sarkar* v. *Emperor*[1] :

"Upon this I would make two observations. First, the reason why Sec. 154 does not say that with the permission of the Court a party may cross-examine his own witness is simply that this would in strictness be a contradiction in terms. Cross-examination means examination by the adverse party as distinct from the party who calls the witness (Sec. 137). This is I think the whole explanation of the use of the phrase :

'put any questions to him which might be put in cross-examination by the adverse party.'

Meaning of cross-examination.

In England the law is different upon the point.

In England the exercise of the discretion of the Court is conditional on the adverse demeanour of the witness, whereas Sec. 154, Evidence Act, gives an unqualified discretion to the Judge apart from any question of the hostility or otherwise of the witness. In the opinion of the Referring Judges in *Profulla Kumar Sarkar* v. *Emperor*[2], the reason why the Court in India is given a much wider discretion than in England is in all probability to avoid the conflict which had existed in England over the words "hostile and "adverse"[3]. Section 142 is intended to provide for cases different to those contemplated by Sec. 154. The distinction between the object of these two sections, is that Sec. 154 provides for the cross-examination of the witness by the adverse party for the purpose of contradicting answers given by the witness or to test the witness's veracity or to drag the truth from him. Section 142 clearly does not deal with such a case. It merely deals with leading questions as defined by Sec. 141. It cannot be imagined that the Legislature had in view any questions to which objection must be taken by the adverse party.[4]

Court is given wider discretion under Sec. 154.

Different purposes of Secs. 142 and 154.

Inference of hostility is a matter for the Court to decide and can only be drawn from the answer given by the witness.

Court to decide inference of hostility.

The discretion allowed by Sec. 154, Evidence Act, should not be exercised without sufficient reason, and the reason should be stated[5] because—

Court when and how to exercise discretion under Sec. 154.

Ordinarily, when it is made to appear to the Court that a witness has resiled from the statement made by him during investigation it should permit the cross-examination of such a witness under Sec. 154.[6]

Section 154 does not in terms, or by necessary implication confine the exercise of power by the Court before the examination-in-chief concluded or to

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1. A.I.R. 1931 Cal. 401 at p. 404 : 53 C.L.J. 427 : 35 C.W.N. 731 : I.L.R. 58 Cal. 1404.
2. A.I.R. 1931 Cal. 401 : 1931 Cr. C. 497 : 131 I.C. 575 : 32 Cr. L.J. 768 : I.L.R. 58 Cal. 1404 (F.B.).
3. Ammathayarammal *v.* Official Assignee, Madras, A.I.R. 1933 Mad. 137 at p. 140 : 144 I.C. 629 : I.L.R. 56 Mad. 7 : 64 M.L.J. 308 : 37 M.L.W. 233.
4. *Ibid* at p. 142.
5. Emperor *v.* Suar Gola, A.I.R. 1934 Pat. 533 at p. 535.
6. State *v.* Balchand, A.I.R. 1960 Raj. 101 at p. 103.

any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the Court to exercise the power when the circumstances demand. The Court can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief.[1]

Accused when to cross-examine the statement of hostile witness in cross-examination.

2. Nature of the examination.—Although the party calling a witness need not declare the witness to be hostile, he should give sufficient reasons to satisfy the Court that it is proper in the circumstances to exercise its discretion and permit the person who calls a witness to put question to him in the nature of cross-examination. The party who calls a witness can contradict him only in the manner as provided in Sec. 145 of the Evidence Act. Merely because permission is given under Sec. 154 of the Evidence Act, the nature of the examination of a witness by the party who calls him is not changed from examination-in-chief to cross-examination.[2]

Party calling a witness need not declare him to be hostile.

Contradiction of his own witness by party to be as under Sec. 145.

There is nothing in the Evidence Act showing that a witness has to be or can be declared hostile. When the prosecution feels that the witness called for the prosecution is not telling the whole truth or that he suppresses truth, two courses are open. One course is to request the Court under Sec. 154 of the Evidence Act to permit the prosecution to put to the witness questions which might be put in cross-examination by the other side. If that permission is granted, then the prosecution will naturally be entitled to put such questions and will also be entitled to contradict the witness with his or her police statement as provided by the proviso to sub-section (1) of Sec. 162 of the Criminal Procedure Code. The other course open is not to make any such request under Sec. 154 of the Evidence Act but only to request the Court as laid down by the proviso to sub-section (1) of Sec. 162, Cr.P.C., to permit the prosecution to contradict the witness in the manner provided by Sec. 145 of the Evidence Act, 1872. When the first course is adopted, then in a loose sense, it is said that the prosecution wants to declare the witness hostile. If the second course is adopted, *viz.* to contradict the witness with his police statement as laid down in the proviso to sub-section (1) of Sec. 162, Cr. P.C. then only it can be said, and that too in a loose sense that the prosecution does not want to declare the witness hostile. In view of this, it is difficult to understand how the learned Public Prosecutor made a request to the Trial Court to permit him to put questions which may be put in cross-examination without declaring the wtiness hostile, and how the learned Trial Judge granted that request.[3]

Permission to put questions which can be put in cross-examination without declaring the witness hostile—Whether could be justified.

Section 154 speaks of permitting a party to put to his own witness "questions which might be put in cross-examination." It is not necessarily tantamount to "cross-examining" the witness. "Cross-examination" strictly speaking means cross-examination by the adverse party as distinct from the party calling the witness.[4] That is why Sec. 154 uses the phrase "put any questions to him which

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1. Dahyabhai Chhaganbhai Thakkar *v.* State of Gujarat A.I.R. 1964 S.C. 1563 at p. 1569 : (1964) 1 Guj. L.R. 911.
2. State *v.* Mohan Hira, A.I.R. 1960 Guj. 9.
3. Koli Nana Bhana *v.* State of Gujarat, 1986 Cr. L.J. 571 at p. 574 (Guj.).
4. Section 137, Evidence Act, 1872.

might be put in cross-examination by the adverse party." Therefore, neither the party calling him, nor the adverse party is, in law, precluded from relying on any part of the statement of such a witness.[1]

Declaring a witness hostile is nothing uncommon in a criminal trial, but in a case such as at one at hand those who had failed to rush to rescue the victim of sexual assault, but had arrived at the scene soon after the incident have turned hostile to depose to the minimal facts. The reason is not far to seek the defence stand taken by the accused that they had been falsely implicated as they were active workers or supporters of a particular political group or party. No union or party can afford to tolerate such monstrous assault, the witnesses who have turned hostile, should also be made to realise that rapist who violates the personal integrity of a girl and leaves an indelible mark on her soul cannot escape punishment even by negative support given by such hostile witnesses. The message is loud and clear. Those who are tempted to give such negative support, for whatever reasons should desist from it and move towards upholding the values of social life. Law expects of them to come forward to help the helpless victims and not to side the perpetrators of such crimes which leads to erosion of values.[2]

The Evidence Act 1872 nowhere provides for "declaring a witness hostile" nor allows a person to "cross- examine" his own witness. "Cross examination" means examination of the witness by the adverse party. To say that one may cross-examine his own witness is, in the face of the definition of the word "cross-examination" as aforesaid, a contradiction in terms, as stated by Ranking, C.J., in *Profulla Kumar* v.*Emperor*.[3] Under Sec. 154, however, the Court may allow a person to put to his own witness such questions as might be put in cross-examination by the adverse party. But, not that grant of such permission does not mean that the witness is "hostile" or "unfavourable" or "adverse witness" and therefore, a liar. In *Sat Paul* v. *Delhi Administration,*[4] the Supreme Court has highlighted this aspect when it said :

> "The grant of such permission does not amount to an adjudication by the Court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable" the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Court."

However, it should be remembered that the only object of cross-examination of a witness or putting in examination-in-chief with the permission of the Court questions of the kind allowed only in cross-examination, is not to discredit the witness but also to bring out evidence which would advance the case of the cross-examiner or the person calling the witness, as the case may be.

It is by now well settled that merely because a witness has been dealt with under Sec. 154 of the Evidence Act, 1872, his evidence does not become unreliable or unacceptable. The Court will have to assess his evidence as any other witness's evidence. Thereupon, the Court may accept it in whole or in part.[5]

An unhealthy practice, almost irretrievable by now, has grown up to label the evidence of a witness as "cross-examination" after the Court has in its

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1. Sat Paul *v.* Delhi Administration (1976) 1 Cr. L.J. 295 at p. 308 A.I.R. 1976 S.C. 294.
2. **Nagen Bharali *v.* State of Assam, 1999 (1) Crimes 251 at p. 265 (Gau.).**
3. A.I.R. 1931 Cal. 401 (F.B.).
4. A.I.R. 1976 S.C. 294 at p. 305.
5. *See* Sat Paul *v.* Delhi Administration, A.I.R. 1976 S.C. 294.

discretion permitted the party calling a witness to put to him questions which might be put in cross-examination. Strictly speaking Sec. 154 of the Indian Evidence Act does not lay down that a party calling a witness can also cross-examine him ; it merely says that the Court may, in its discretion permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. "Cross-examination" is the right of the adverse party. The examination of a witness by the party who calls him is called his examination-in-chief and it remains his examination-in-chief even in spite of his having been asked questions by the party calling him, which otherwise could be asked only in cross-examination by the adverse party (Section 137, former clause). It is only the examination by the adverse party which is called his cross-examination (Sec. 137 latter clause).

Then according to the terms of Sec. 138 of the Indian Evidence Act a witness is first examined-in-chief then (if the adverse party so desires) cross-examined. "It would therefore be readily seen that there is no scope for labelling a party of examination-in-chief of a witness as cross- examination.[1]

3. Discretion of Court.—The Appellate Court cannot lightly interfere with discretion exercised by the Trial Court under Sec. 154.[2]

Appellate Court not to interfere lightly with Trial Court's discretion under Sec. 154.

The provison relating to cross-examination by a party of his own witness is contained in Sec. 154, Evidence Act, which vests absolute discretion in the Court to permit the person to put questions to his own witness by way of cross-examination. The discretion is not fettered in any manner so as to confine it to be exercised only at a particular stage. The different stages in the examination of a witness as contained in Secs. 137 and 138 of the Evidence Act, have nothing to do so far as the powers of the Court under Sec. 154 are concerned since neither the scheme of the sections nor the words thereof lend themsleves to any such limitation. A clever witness in his examination-in-chief may faithfully conform all what he stated earlier to the police or in the committing Court but in the cross-examination may introduce the statements in a subtle way contradicting in effect what he stated in the examination-in-chief and if his design is obvious, the Court can during course of his re-examination permit the person calling him as a witness to put questions to him by way of cross-examination.[3]

Stages mentioned in Secs. 137 and 138 do not fetter the discretion.

It is not necessary, as pointed out by the Privy Council in *Baikuntha* v. *Prasanna*,[4] to make any formal declaration that a witness is hostile before granting permission under Sec. 154 of the Evidence Act.

The general or basic principles governing the exercise of discretion under Sec. 154 have been the subject of consideration in the *State* v. *Subbappa*.[5]

The only purpose of a party leading evidence is to lend support to his case. It will, therefore, not be wrong or unfair to proceed on the footing that in citing a witness and examining him on his side, he expects or at any rate entertains the hope that the evidence of the said witness will lend some support to his case.

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1. Bansilal *v.* State of Madhya Pradesh, 1981 J.L.J. 143 at p. 149.
2. Munsar Ali *v.* Union Territory of Tripura, A.I.R. 1964 Tripura 45 at p. 47.
3. State of Orissa *v.* Ashok Kumar Panigrahi, 1989 (68) C.L.T. 97 at pp. 101, 102.
4. A.I.R. 1922 P.C. 409 : 27 C.W.N. 797.
5. (1960) 38 Mys. L.J. 887 at pp. 895 and 896 : (1961) 2 Cr. L.J. 653 at p. 656.

Purpose of the Court in conducting the trial

The purpose of the Court in conducting the trial is to make the best attempt that is humanly possible to discover the truth. The task of the Court in recording the examining, or assessing evidence is to discover the truth as far as it is humanly possible to do so. It is with this in view that the Court should exercise its discretion under Sec. 154 of the Evidence Act.

The Court would be right in permitting the cross-examination by the very party who called that witness only if it has reason to believe that the witness may be in some manner or the other unwilling to speak the truth or not disposed to speak the truth and that therefore it is necessary to submit his evidence to the test of cross-examination by the very party calling him.

In normal cases where it can fairly be assumed that a party calling a witness represents to the Court that he is a trustworthy witness, an occasion for the party calling him to seek permission under Sec. 154 of the Evidence Act can arise only where he unexpectedly gives an answer which is adverse to his case. Even there, it is not enough if the party feels that the witness is hostile to him; it is necessary that the Court should come to entertain an opinion that the witness has such hostile *animus* against the party calling him as to be inspired by a desire to speak the untruth or not to speak the truth.

Hence, in such cases, an element of surprise of the type mentioned above becomes the starting point for a consideration by the Court of the question whether it should exercise its discretion under Sec. 154 and permit the party calling a witness to cross-examine him.

Permission under Sec. 154 can hardly be refused.

It is with reference to such cases that Rowland, J., observed in *Sachidanand Prasad* v. *Emperor*,[1] that permission under Sec. 154 could hardly be refused when any witness makes an unexpected statement to the case of the prosecution.

A party will not normally be allowed to cross-examine its own witness and declare him hostile, unless the Court is satisfied that the statement of a witness exhibits an element of hostility or that he has resiled from the material statement which he made before an earlier authority or when the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. Before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, there must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing. Before permitting the prosecution to cross examine the prosecution witness the Judge will have to examine the statement made by the witness before the Investigating Officer to find out whether the witness is really hostile to the party calling him. He may have to consider the manner in which the witness answers the question, his demeanour while answering questions to examine whether he is attempting to tamper the case of the prosecution. The discretion of granting permission is a judicial discretion and is required to be exercised regarded as hostile only if the Court is of the opinion that the witness is hostile to the party calling him and that he is not desirous of telling the truth.[2]

Mukherjee, J., in *Surendra Krishna Mandal* v. *Rani Dasi*,[3] states that a witness should be regarded as adverse and liable to cross-examination by the party calling

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1. A.I.R. 1933 Pat. 488 at p. 492.
2. State of Karnataka *v.* N. Somasekhar, 1993 (3) Crimes 763 at p. 764 (Kant.).
3. A.I.R. 1921 Cal. 677 : I.L.R. 47 Cal. 1043.

him only when, in the opinion of the Court, he bears hostile *animus* to the party calling him and further that a hostile witness in the real sense is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth.[1]

Evidence of what a witness had said previously cannot be given without previous cross-examination of the witness as to such statements. Such a procedure is not permissible under Secs. 154 and 155.[2]

The Court has discretion to permit examination of a witness under Sec. 154 of the Evidence Act when it is satisfied from the manner in which the witness gives evidence that he is not desirous of telling the truth and that it is necessary to give such permission to elicit the truth. Inconsistent or contradictory statements of the witness are not the only ground for permitting examination under Sec. 154 of the Act. The Evidence Act leaves the matter entirely to the discretion of the Court and such discretion is unqualified and unfettered to be exercised liberally for extracting the truth.[3]

Reasons to be recorded for permission.

The Trial Court by permitting the witness to be cross-examined without recording any reasons for doing so does not validly exercise its discretion under Sec. 154 of the Evidence Act.[4]

Liberal exercise of discretion.

Whether it be the grant of permission under Sec. 142 to put leading questions, or the leave under Sec. 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the Court.[5] The discretion conferred by Sec. 154 on the Court is unqualifed and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the Court from the wtinesses's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement or otherwise, thinks that the grant of such permission is expendient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the Court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable".[6]

Considerations for the exercise of discretion.

A witness is not necessarily hostile because in the process of unfolding the truth he happens to depose something going against the party calling him as a witness. A witness's primary allegiance is to the truth and not to the party calling him. Before a Court allows a party calling a witness to put to him questions which might otherwise be put only in cross examination by the adverse party, Court should mark the conduct including attitude demeanour, unwillingness to give ready answers or to disclose the truth or exhibit hostile or unfriendly feelings and the like of the witness.[7]

4. Cross-examination of a party's own witness.—The Court can, in its discretion, permit the person who calls a witness to cross examine him but such a witness cannot be cross-examined by the other complainants who had not called him as their witness.[8]

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1. Sivamurthy Swamy *v.* Agodi Songanno, A.I.R. 1969 Mys. 12 at pp. 13, 14, 15.
2. Lalu *v.* State, A.I.R. 1960 Cal. 776 at p. 778 : 64 C.W.N. 161.
3. Phanindra Nath Dey *v.* Bholanath Banerjee, A.I.R. 1982 Cal. 397 at p. 399.
4. Madan Lal *v.* State, 1981 Cr. L.J. 514 at p. 515.
5. *See* the observations of Sir Lawrence Jenkins in Baikuntha Nath *v.* Prasanamoyi, A.I.R. 1922 P.C. 409.
6. Sat Paul *v.* Delhi Administration, (1976) 1 Cr. L.J. 295 at p. 306 : A.I.R. 1976 S.C. 294.
7. Banshilal *v.* State of Madhya Pradesh, 1981 J.L.J. 143 at p. 148.
8. Giriraj Singh *v.* State, A.I.R. 1965 All. 131 at p. 135 : 1964 A.L.J. 335 : 1964 A.W.R. (H.C.) 213.

A perusal of this provision makes it quite clear that this section allows a party, with the permission of the Court at its discretion, to cross-examine his own witness in the same way as the adverse party. Ordinarily a party calling his witness is not allowed to ask him these questions but this ordinary rule is relaxed in this section. The purpose of such relaxation is only to find out if the witness is one of truth and can be relied on, because cross-examination is the most powerful and effective instrument for bringing out and testing the truth.[1]

Discretion of Court when to allow cross-examination of the witness by his party.

The section does not lay down that a witness must be declared hostile before he can be cross-examined and it leaves the matter entirely in the discretion of the Court. In *Nga Nyein* v. *Emperor*,[2] Otter, J., stated that the mere fact that a witness in the Sessions Court made a statement differing from his previous statement before committing Magistrate did not, of itself, justify the employment of the power given by Sec. 154.[3]

Court when to exercise discretion to allow the party to cross-examine his witness.

Although Sec. 154, Evidence Act, gives the Court an unfettered discretion to allow cross-examination of a witness by the party calling him, it ought not to exercise its discretion unless during the examination-in-chief of the witness something happens which makes it necessary for the facts to be got from the witness by means of cross-examination.[4]

Judge to permit the cross-examination of the witness making adverse statements.

Where one's own witness unexpectedly makes statements adverse to his interest, it is common fairness that the Judge should permit cross-examination.[5] The defence may by leading questions in cross-examination elicit facts in support of their defence from the prosecution witness, though the facts thus elicited have no relation to facts to which the witnesses testified in their examination-in-chief ; with regard to such matters the Court may permit the prosecution to cross-examine the witness even though he was originally called by them.[6] Where the accused were compelled to call prosecution witnesses as witnesses, for the defence, it was held that the accused were entitled to cross-examine them.[7]

It will not be proper to reject the evidence of the witness who was allowed to be cross-examined by the prosecution only because his statement is favourable to the accused about the occurrence.[8]

Party to satisfy the Court before cross-examination.

Although the party calling a witness need not declare the witness to be hostile, he should give sufficient reasons to satisfy the Court that it is proper in the circumstances to exercise its discretion and permit the person who calls a witness to put questions to him in the nature of cross-examination.[9]

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1. **Samir Das *v.* State of Tripura, 1999 Cr. L.J. 953 at p. 955 (Gau.).**
2. A.I.R. 1933 Rang. 57 : 142 I.C. 87 : 34 Cr. L.J. 286 : I.L.R. 11 Rang. 4.
3. Mohan Banjari *v.* Emperor, A.I.R. 1933 Nag. 384 at pp. 385-86.
4. Ammathayarammal *v.* Official Assignee, High Court, Madras A.I.R. 1933 Mad. 137 at p. 141 : I.L.R. 56 Mad. 7 : 64 M.L.J. 208 : 37 M.L.W. 233 : 144 I.C. 629.
5. Suryanarayan *v.* Yarlagadda Naidoo, 6 C.W.N. 513 (P.C.).
6. Amrita Lal Hazra *v.* King-Emperor, I.L.R. 42 Cal. 957 : 19 C.W.N. 676 : 21 C.L.J. 331.
7. Sheoprakash Singh *v.* W.D. Rawlins, I.L.R. 28 Cal. 594.
8. Ashique Khan *v.* State of Bihar, 1974 Cr. L.J. 724 at p. 725 (Pat.).
9. State *v.* Mohan Hira, A.I.R. 1960 Guj. 9.

Cross-examination after taking the Court's permission.

Simply because permission has been granted to cross-examine a witness by itself is not enough to discredit the witness.[1] *Sarjug Prasad* v. *State*,[2] it is said :

".....Reference may be made in this connexion to *Emperor* v. *Haradhan*.[3] The true rule is that either party may rely upon the evidence of such a witness, and the Court can come to its own conclusion after a consideration of the whole of his evidence."

That a party can cross-examine even a witness tendered by it cannot be disputed in view of *Manzurul Haque* v. *State of Bihar*.[4]

In *Bhanuprasad Hariprasad Dave* v. *State of Gujarat*[5] there were two investigations. Because of the second investigation, in respect of most of the prosecution witnesses, the police diary contained two statements, one recorded by the Deputy Superintendent of Police and the other by the Superintendent of Police.

Held that it was true that, in view of the provisions of Bombay State Commissioner of Police Act, 1969, the first investigation was not in accordance with law, but yet it was in no sense *non est*. The statements recorded by the Deputy Superintendent of Police in the course of his investigation, were still statements recorded by a police officer in the course of investigation. Witness going back on the statements alleged to have been made by them during the first investigation could be cross-examined.

5. Leading questions, when allowed by party to his own witness.—Section 154 of the Evidence Act confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. It is, however, well-settled that the discretion must be judiciously and properly exercised in the interest of justice. The law on the subject is well settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed. It may be rather difficult to lay down a rule of universal application as to when and in what circumstances the Court will be entitled to exercise its discretion under Sec. 154 of the Evidence Act and the matter will largely depend on the facts and circumstances of each case and on the satisfaction of the Court on the basis of those circumstances.[6] Leading questions are usually allowed to be put by a party to his own witness, when such witness shows himself to be not only adverse but *hostile* to the party calling him.[7]

Witness when hostile.

A witness is hostile, if he tries to defeat the party's case by suppressing the truth.[8] The permission to treat a wtiness as hostile and allow his cross-examination is a matter solely in the discretion of the Court.[9]

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1. Sahdeo Tanti *v.* Bipti Pasin, A.I.R. 1969 Pat. 415 at p. 416.
2. A.I.R. 1959 Pat. 66.
3. A.I.R. 1933 Pat. 517.
4. 1958 Pat. L.R. 18 : A.I.R. 1958 Pat. 422 : I.L.R. (1958) 37 Pat. 274.
5. A.I.R. 1968 S.C. 1323 at pp. 1325-26.
6. Rabindra Kumar Dey *v.* State of Orissa, A.I.R. 1977 S.C. 170 at pp. 176, 177.
7. Markby on *Evidence*, p. 108.
8. Kulachand Sahai *v.* Queen-Empress I.L.R. 13 Cal. 53 at p. 56.
9. Radha Jiban Mustafi *v.* Tara Mani Das, 12 Moo. I.A. 380.

In America a rule prevails which is converse of the above. A Judge may in his discretion prohibit leading questions from being put to an adversary's witness who shows a strong interest or bias in favour of the cross-examination party. The Indian Evidence Act does not contain any similar provision.[1]

American law as to cross-examination of hostile witness.

The proper inference to be drawn from contradictions in witnesses' evidence—contradictions not in details, but in the whole texture, of the story—is not that they are witnesses hostile to this side or to that, but they are witnesses who ought not to be believed unless supported by other satisfactory evidence.[2] A party when called by his opponent cannot, as of right, be treated as hostile, the matter being solely in the discretion of the Court.[3] A witness is considered adverse, when in the opinion of the Judge he bears a hostile *animus* to the party calling him and not merely when his testimony contradicts his proof. When a witness is treated as hostile and cross-examined by the party calling him, this must be done to discredit the witness altogether and not merely to get rid of part of his testimony.[4] It may be an unfriendly act to let out the truth but it is not necessarily a hostile act.[5] It is not open to the prosecution to put a question to a prosecution witness, which could only have been allowed in cross-examination without first getting permission to cross-examine him.[6] But it has been held by the Privy Council that there is nothting in this section as to declaring a witness hostile.[7] In England it has been held that the Court's discretion in such matters is absolute and is not open to appeal.[8]

Inference from contradictions of witnesses.

Witness when considered adverse.

Prosecution prohibited to put questions in the form of cross-examination to witness if not declared hostile.

6. Hostile witness.— The fact that the witness has become hostile has to to be established by eliciting information such as could give an indication of hostility.[9]

A witness can become hostile only when he makes a statement contrary to the case taken by the party who has summoned him. It is then open to the party examining him to pray to the Court to declare him hostile and seek the permission of the Court under Sec. 154 of the Evidence Act for cross-examining him. The party may then through the cross-examination elicit, from him the proof of his case.[10]

There is very high authority for the proposition that the evidence of a hostile witness cannot in part be relied upon and the rest of it discarded or rejected.[11] This case has been followed ever since 1881 and only in one case, namely in the case *Bradley* v. *Ricardo*[12], it was not followed. Where the witness is declared hostile, so

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1. Kulachand Sahai *v.* Queen-Empress, I.L.R. 13 Cal. 53.
2. *Ibid.*
3. Luchiram *v.* Radha Charan, 34 C.L.J. 107 : I.L.R. 49 Cal. 92, distinguishing 12 M.L.A. 380.
4. Surendra *v.* Ranee Dasi, I.L.R. 47 Cal. 1043 : 24 C.W.N. 860 ; E. *v.* Satyendra, 37 C.L.J. 173.
5. Fouzdar Rai *v.* Emperor, 3 Pat. L.J. 419 : 44 I.C. 33.
6. Jagdeo Singh *v.* King-Emperor, I.L.R. 1 Pat. 758 : 71 I.C. 117 : 25 Cr. L.J. 69.
7. Baikuntha Nath Chattoraj *v.* Prasannamoyi, 27 C.W.N. 797 : 44 M.L.J. 699 (P.C.).
8. *See* Rice *v.* Howrah, (1886) 16 Q.B.D. 681 : 55 L.J.Q.B. 311.
9. Saraswathamma *v.* Bhadramma, A.I.R. 1970 Mys. 157 at p. 159.
10. Ram Ratan Mishra *v.* Smt. Bittan Kaur, A.I.R. 1980 All. 395 at p. 397.
11. *See* Alexander *v.* Gibson, 2 Camp. 556 : 11 R. R. 797.
12. 8 Bing. 57 : 1 M. & Scott. 133 : 1 L.J.C.P. 36; *see* also Agasti Mahananda *v.* Ramaprasad Padhi, 35 Cut. L.T. 794 at p. 795—It is now well settled that even if a witness is hostile, his entire evidence is not to be discarded. It is for the Court to go through the entire evidence and see what part of his evidence is acceptable.

that leave to cross-examine is granted to the party calling him, it is necessary that the Judge should explain to the jury that the evidence of such a witness should be rejected and left out of account in the minds of the jury.[1]

There is nothing in Sec. 154 of the Evidence Act, to warrant an inference that only when any previous statement of the witness is available and if he is alleged to have departed from that the Court can declare that witness hostile.[2]

Scope of cross-examination of hostile witness.

Where witnesses go back on their statements it is the duty of the Public Prosecutor to formally ask the leave of the Court to cross-examine the offending witness with regard to the evidence he has already given which is complained about and also, if necessary, to put questions to him to discredit his testimony generally.[3]

Court to allow or not the party to cross-examine his witness.

A discretion is given to the Court to allow or not to allow a person to cross-examine his own witness as hostile.[4]

Effect of declaring witness hostile on his evidence.

At one time it was thought that to declare a witness hostile had the effect of disqualifying the prosecution and even the defence from relying on the evidence of such a witness. This doctrine was developed in a series of decisions of the Calcutta High Court. But after a contrary view had been taken in the Patna High Court in the case in *Sohrai Sahu* v. *Emperor*,[5] those decisions were overruled by a Full Bench in *Profulla Kumar Sarkar* v. *Emperor*,[6] and the law as stated in *Sohrai Sahu* v. *Emperor*[7] was followed and further explained in *Emperor* v. *Haradhan*.[8]

Leave to declare witness hostile not to be given lightly.

As a corrollary to the earlier view, it was said in some cases that leave to declare a witness hostile should not lightly be given. *See* observation in *Parmeswar Dayal* v. *Emperor*[9] and *Emperor* v. *Suar Gola*.[10] The former of these cases was considered and not followed in *Emperor* v. *Haradhan*.[11] The circumstances in which a witness may be cross-examined by the party calling him are not laid down in Sec. 154, Evidence Act, which leaves the matter entirely to the discretion of the Court and there is no legal objection to such permission being freely granted.

It is well established now that the evidence of a hostile witness in the real sense of the term cannot be discarded or rejected as unworthy of acceptance. Part of it could be believed. It becomes the function of the Court to see from the answers elicited in the cross-examination if the witness was resiling from earlier statement only with a motive.[12]

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1. Panchanan Gogai *v.* Emperor, A.I.R. 1930 Cal. 276 at p. 278.
2. Sahdeo Tanti *v.* Bipti Pasin, A.I.R. 1969 Pat. 415 at p. 416.
3. Samarali *v.* Emperor, A.I.R. 1936 Cal. 675 at pp. 675-76.
4. Emperor *v.* Radhey Shyam, A.I.R. 1944 Oudh 296.
5. A.I.R. 1930 Pat. 247 : 1930 Cr. C. 515 : 124 I.C. 836 : 31 Cr. L.J. 721 : I.L.R. 9 Pat. 474 : 11 Pat. L.T. 148.
6. A.I.R. 1931 Cal. 401 : 1931 Cr. C. 497 : 131 I.C. 575 : 53 C.L.J. 427 : 35 C.W.N. 731 : I.L.R. 58 Cal. 1404 : 32 Cr. L.J. 768 (F.B.).
7. A.I.R. 1930 Pat. 247 : 1930 Cr. C. 515 : 124 I.C. 836 : 31 Cr. L.J. 721 : I.L.R. 9 Pat. 474 : 11 Pat. L.T. 148.
8. A.I.R. 1933 Pat. 517 : 1933 Cr. C. 1166 : 146 I.C. 993 : 35 Cr. L.J. 240 : 14 Pat. L.T. 494.
9. A.I.R. 1926 Pat. 316 : 941 I.C. 705 : 27 Cr. L.J. 657 : 7 Pat. L.T. 567.
10. A.I.R. 1934 Pat. 533 : 1934 Cr. C. 1189 : 152 I.C. 1021 : 36 Cr. L.J. 262 ; 16 Pat. L.T. 95.
11. 14 Pat. L.T. 494.
12. State of Karnataka *v.* Krishnappa, 1994 (1) All India Cri. L.R. 765 at p. 771.

The evidence of hostile witness is not necessarily to be rejected either in whole or in part and the mere fact that a witness is declared hostile does not make him an unreliable witnesss so as to exclude his evidence from consideration altogether.[1]

Merely because a witness did say something which did not accord with the evidence of the police witnesses particularly would be absolutely no reason why he should have been allowed to be cross-examined by a party which had called him as a witness.[2] From the mere fact that a witness before the Sessions Court makes statements relating to a part of the prosecution case different from what he made before the Magistrate does not necessarily make him hostile.[3]

Statement differing in part from that before Magistrate not to make witness hostile.

The inference of the hostility of a witness can be drawn only from the answers given by him and to some extent from the demeanour.[4]

Hostility of witness when to be inferred.

Even if a party calling a witness wants to treat him as hostile, his opinion as to the hostility or otherwise of the witness or the truth or otherwise of his evidence, is not final and not binding on the Court.

Opinion of the party calling witness not material in declaring him hostile.

There is nothing in the Law of Evidence which lends support to the general proposition that a party is always bound by the evidence of a witness whom he produces. No part of the statement of such witness amounts to an admission on behalf of the party producing him. Nor is there any rule of law that a party is precluded from saying that a witness produced by him is not speaking the truth upon some particular point, unless he files a petition under Sec. 154 of the Evidence Act declaring him hostile.[5]

If the evidence given by a witness is adverse to the case of the party calling him, the Court has the power and duty of deciding whether or not to believe him. It is, therefore, not right to proceed on the basis that whatever is stated by a witness which is not in favour of the case of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him.[6]

Court not bound to believe adverse evidence of witness as admission by the party.

Where a witness makes a statement in favour of the accused directly contrary to a pervious statement against the accused, it may be reasonably inferred that he has been won over, and it is desirable that his veracity should be tested by cross-examination.[7]

Reasonable inference of witness becoming hostile.

Section 154 says nothing about declaring a witness hostile ; it allows a party with the permission of the Court at its discretion to cross-examine his own witness in the same way as the adverse party; ordinarily a party calling his witness is not

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1. Kunwar *v.* State of U.P., 1993 Cr. L.J. 3421 at p. 3445 ; *see* also S.K. Srivastava *v.* State of M.P., 1994 (1) All-India Cr. L.R. 493.
2. Province of Bihar *v.* Rameshwar Prasad Singh, A.I.R. 1945 Pat. 136 at p. 139 ; P. Ratnasabapathy Goundan *v.* Public Prosecutor, A.I.R. 1936 Mad. 516.
3. Nayeb Sahhana *v.* Emperor, A.I.R. 1934 Cal. 636 at p. 639.
4. *In re* Inja Vengala Reddy, A.I.R. 1956 A.P. 26 at p. 29.
5. *See* Baburam *v.* Emperor, A.I.R. 1939 All. 754; Madan Mohan Acharya *v.* State of Orissa, (1990) 32 O.J.D. 106 at p. 108 (Cr.).
6. State of Mysore *v.* Raju Shetty, A.I.R. 1961 Mys. 74 at p. 78.
7. Mohan Banjari *v.* Emperor, A.I.R. 1933 Nag. 384 at p. 386.

allowed to ask him these questions but this ordinary rule is relaxed in Sec. 154; the purpose of such relaxation can only be to find out if the witness is one of truth and can be relied on; but that is far from saying that a witness is hostile whenever his testimony is such that it does not support the case of the party calling him.[1]

The statment of a hostile witness can be accepted to the extent that it fixes the scene of occurrence, the time of occurrence as well as proves the presence of prosecution witness.[2]

The decision in *Bhagwan Singh* v. *State of Punjab*,[3] show that the previous statement of a hostile witness can be used to contradict his evidence by complying with the formalities of Sec. 145 of the Evidence Act.

But, in *Nisar Ali* v. *State of Uttar Pradesh*,[4] it was held that the maxim *"falsus in uno falsus in omnibus"* does not occupy the status of a rule of law, that it is merely a rule of caution and is not what may be called "a mandatory rule of evidence".[5] As such it is not as though the evidence of a witness is liable to be rejected on the ground that he was treated as hostile.[6] It is clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him as unreliable witness so as to exclude his evidence from consideraton altogether. In *Bhagwan Singh* v. *State of Haryana*,[7] Bhagwati, J. speaking for the Supreme Court observed as follows :

The maxim *"falsus in uno falsus in omnibus"* is merely a rule of caution and not a rule of law.

> "The prosecution could have even avoided requesting for permission to cross-examine the witness under Sec. 154 of the Evidence Act. But the fact that the Court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."[8]

As to the practice of calling the opposite-party as one's own witnesses, *see* the observations of the Privy Council in *Kishori Lal* v. *Chunni Lal*[9] and *Lal Kunwar* v. *Chiranji Lal*.[10]

7. Evidence of hostile witness not to be rejected as a whole.—In *Profulla Kumar Sarkar* v. *Emperor*,[11] it was held that the evidence of a hostile witness is not to be rejected either in whole or in part. It is also not to be rejected so far as it is in favour of the party which called the witness nor is it to be rejected so far as it is in favour of the opposite-party.[12]

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1. Tulsiram Shaw *v.* R.C. Pal Ltd., A.I.R. 1953 Cal. 160 ; *see* Krutibas Sahu *v.* Madhab Das, A.I.R. 1961 Orissa 48 at p. 49.
2. Raja Ram *v.* State of Uttar Pradesh, 1978 Cr. L.J. 196 at p. 200.
3. 1952 Cr. L.J. 1131 : A.I.R. 1952 S.C. 214.
4. A.I.R. 1957 S.C. 366.
5. *Vide* also Sarjug Prasad *v.* State, A.I.R. 1959 Pat. 66.
6. Aheibam Ningol Thongam Ongbi Thaba *v.* State of Manipur, A.I.R. 1967 Manipur 11 at pp. 16-17.
7. (1976) 1 S.C.C. 389 at pp. 391-392 : A.I.R. 1976 S.C. 202 at p. 203.
8. Rabindra Kumar Dey *v.* State of Orissa, A.I.R. 1977 S.C. 170 at p. 178.
9. I.L.R. 31 All. 116 (P.C.).
10. I.L.R. 32 All. 104 (P.C.); *see* also D. Benkita *v.* D. Bapayya, 21 I.C. 737 (Mad.) ; *In re* Rangaswami Iyengar, 21 I.C. 781 (Mad.) and Man Mink *v.* Shankar Das, 115 P.W.R. 1908.
11. 53 C.L.J. 427 : 35 C.W.N. 731 : I.L.R. 58 Cal. 1404 : A.I.R. 1931 Cal. 401.
12. Rama Naik *v.* State, A.I.R. 1965 Orissa 31 at p. 32 : 30 Cut. L.T. 517.

The mere fact that the Court gave the permission to the Public Prosecutor to cross-examine his own witness by declaraing him hostile does not completely efface the evidence of such witness. The evidence remains admissible in the trial and there is no legal bar to base conviction upon his testimony if corroborated by other reliable evidence.[1]

The Court has to consider the facts in each case and see whether, as a result of the witness being treated hostile, he stands thoroughly discredited or can still be believed in regard to a part of his testimony and, if the Court is satisfied that the credit of the witness has not been completely shaken, it can with due care and caution accept that part of the testimony of the witness which is found to be credit worthy and act upon the same.[2]

The legal position is clear that even though a witness is declared hostile, the Court can accept and act upon that part of his evidence which appear to be truthful, if there is reliable evidence from independent source to lend some assurance to the truth of the same. A witness who makes different statements at different times has no regard for truth. When the witness does not come up to the mark in his general regard for truth, then even if he makes consistent allegation in regard to certain facts, if would be plainly unsafe to rely implicitly on that evidence.[3]

When a witness's credit is sought to be impugned under the provisions of Secs. 145 and 155 (*c*) of the Evidence Act his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence, as the case may be. No immediate order of summary nature can or should be made and the right of cross-examination or re-examination according to the circumstances should not be denied as it may well be that on the exercise of such right his credit might be repaired, restor or re-established.[4]

It is now a well-settled principle of law that though a witness has been declared hostile, her statement could not be discarded *in toto* merely, because on certain points she has chosen not to support the prosecution. The above view finds support from the observations of their Lordships of the Supreme Court as reported in *Syed Akbar* v. *State of Karnataka*.[5]

...."Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him his evidence cannot, as a matter of law, be treated as washed off the record altogether, it is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the

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1. **Anil Rai *v.* State of Bihar, 2001 Cr.L.J. 3969 at p. 3981 (S.C.) : 2001 (2) A.L.D. (Crl.) 446 (S.C.).**
2. Benodalpati Arogyanadham *alias* Hari *v.* State of Andhra Pradesh, 1985 (2) Cr. L.C. 436 at pp. 441-42 , 443 (A.P.) ; Madho Ram Shakye *v.* State of U.P., 1984 (1) Crimes 629 at pp. 633, 634 (All.) ; Chamara Padhani *v.* State, 1983 Cr. L.J. 1706 at p. 1708 (Orissa).
3. K. Kunhappan *v.* State of of Kerala, 1985 M.L.J. (Cr.) 296 at p. 299.
4. Dato Mokhtar Bin Hashim *v.* Public Prosecutor, 1983 (2) Crimes 657 at p. 668 (Malaysia F.C.).
5. A.I.R. 1979 S.C. 1848 : 1979 Cr. L.J. 1374.

witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence *in toto*."[1]

It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.[2]

Where the hostile witness was deliberately trying to conceal the truth and was out to help the appellant by saying that he was insane and, therefore, he had not committed the offence it was held that much reliance cannot be placed on his testimony where he has tried to save the appellant on the ground of insanity. Therefore, from his evidence it cannot be gathered that the appellant was suffering from legal insanity at the relevant time.[3]

8. Accused treating prosecution witness as his own witness.—In a case it was held that the mere fact that the accused had been compelled to treat the witness for the prosecution as his own witness did not change his character and that he was entitled to cross-examine him.[4]

When a prosecution witness turns hostile by stating something which is destructive of the prosecution case, it is entitled to pray that the witness be treated as hostile and that in such a case, the Court must allow the public prosecutor to treat the witness as hostile.[5]

9. Plaintiff calling defendant as his witness.—A plaintiff calling defendant as his witness is entitled to cross-examine such witness.[6]

10. Necessity of party giving evidence on his own behalf.—As to the necessity for a party to give evidence on his own behalf *see Subbaji* v. *Shidapa*.[7]

11. Practice of first examining defendant as witness disapproved.—It is not only illegal, but improper and unfair for Courts to permit the defendant, at the very outset of the case to be put in the witness-box, nominally as plaintiff's witness, to be cross-examined in the presence and hearing of the plaintiff.[8]

Court not to permit examination of defendant at the outset of the case.

It would be impossible to formulate any comprehensive rule as to when the Court may exercise its discretion in favour of party seeking to cross-examine. One observation however is permissible. The object of calling witnesses is to elicit the facts, and if the facts to be elicited are such as ought to be elicited from a witness, and if they cannot be elicited without cross-examining him it would be difficult to say that the discretion was wrongly exercised. There can be no question as a matter of law of rejecting the evidence of such a witness either so far as it is in favour of the party calling the witness or so far as is in favour of the adverse party.[9]

No comprehensive rule as to when the Court to exercise the discretion to allow party to cross-examine his witness.

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1. Raj Bahadur *v.* State, 1996 Cr. L.J. 2364 at p. 2369 (Delhi); *see* also Kehar Singh *v.* State, A.I.R. 1988 S.C. 1883 : 1989 Cr. L.J. 1.
2. **Koli Lakhmanbhai Chanabhai *v.* State of Gujarat, 1999 (4) Crimes 256 at p. 259 (S.C.): 2000 (2) G.L.R. 1151 (S.C.).**
3. State *v.* Lailanand Pathak, 1977 Cr. L.J. 513 at p. 519.
4. Sheoprakash Singh *v.* W.D. Rawlins, I.L.R. 28 Cal. 594 at p. 596.
5. State of Orissa *v.* Ashok Kumar Panigrahi, (1989) 68 C.L.T. 97 at p. 103.
6. *See* 12 M.I.A. 380 at p. 393.
7. I.L.R. 26 Bom. 392 at pp. 394-95.
8. 116 P.W.R. 1908.
9. Profulla Kumar Sarkar *v.* Emperor, A.I.R. 1931 Cal. 401 at p. 410 : 53 C.L.J. 427. 35 C.W.N. 731 : I.L.R. 58 Cal. 1404.

12. Tendering for cross-examination.—There is no warrant for a procedure, by which a Judge permits a witness, whose evidence-in-chief he has not heard to be treated at once as hostile witness and cross-examined by the side which called him.[1]

Judge not to allow the witness to be cross-examined by party before his examination-in-chief.

It is only when a witness has been called by a party that the other party as soon as the examination-in-chief is closed has a right to cross-examine him.[2]

"Tedering for cross-examination" can cover two types of cases. There is a type of case where witnesses of a secondary importance who have been examined before the committing Magistrate are not called before the Sessions Court and then in fairness to the defence, it tenders these witnesses for cross- examination. But the phrase "tendering for cross-examination" has also been used in this country in cases where the prosecution discard a witness examined before the committing Magistrate on the ground that, in its opinion, he is not likley to prove himself to be a witness of truth. In such cases, the prosecution makes the witness available to the defence so that the defence may examine him, if it likes. In such a case, the witness is really examined-in-chief by the defence and not cross-examined. But in order that a witness may be dealt with in that way, it is clearly necessary that the leave of the Court contemplated by Sec. 154, Evidence Act, should be asked for and obtained.[3]

Two types of cases covered by the phrase "tendering for cross-examination".

13. Attesting witness.—The fact that one of the attesting witnesses had turned hostile is not sufficient ground for not producing him. The party producing the document can undoubtedly obtain the Court's permission to cross-examine the witness. See *Peda Manikyam* v. *Periagadu*.[4] In the case in *Surendra Bahadur Singh* v. *Behari Singh*,[5] one of the five attesting witnesses had been examined by the plaintiffs but as his evidence was held to be unreliable, it was held by their Lordships that the provisions of Sec. 68, Evidence Act, had not been complied with.[6]

Non-compliance with Sec. 68.

Two important points must be borne in mind : *first*, that a witness is considered adverse when, in the opinion of the Judge, he bears a hostile *animus* to the party calling him and not merely when his testimony contradicts his proof and, *secondly*, when a witness is treated as hostile and cross-examined by the party calling him, this must be done to discredit the witness altogether and not merely to get rid of part of his testimony. These principles had all been disregarded in the examination-in-chief and cross-examination of the *panda* and the doctor, who were examined on commission at Puri.

Two important points with regard to witness.

Held that consequently very little reliance can be placed upon the assertions of the *panda* and the doctor.[7]

14. Commissioner cannot exercise discretion.—In case of witness examined on commission, the Commissioner is not entitled to exercise the discretion vested in the Court under Sec. 154 of the Indian Evidence Act.[8]

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1. Abdul Latif *v.* Emperor, A.I.R. 1941 Cal. 533 at p. 534 : 45 C.W.N. 763.
2. Manzurul Haque *v.* State of Bihar, A.I.R. 1958 Pat. 422 at p. 425.
3. Dhirendra Nath *v.* State, A.I.R. 1952 Cal. 621 at pp. 626, 627. N.B. Section 209 of the Cr. P.C., 1973 does not contemplate examination of witnesses by the committing Magistrate.
4. A.I.R. 1932 Mad. 148 : 135 I.C. 532.
5. A.I.R. 1939 P.C. 117 : 181 I.C. 216 : I.L.R. (1939) Kar. P.C. 222 : 1939 C.W.N. 450 (P.C.).
6. Kali Charan *v.* Suraj Bali, A.I.R. 1941 Oudh 89 at p. 90.
7. Surendra Krishna Mandal *v.* Rance Dossee, A.I.R. 1921 Cal. 677 at pp. 682, 683 : 24 C.W.N. 860.
8. *Ibid.*

15. Value of evidence of hostile witness.—In *In re Rangaswamy Iyengar*,[1] it was held that a party calling his opponent as a witness is not bound by all the statements made by him as such a witness is clearly hostile to the person calling him.

Allahabad High Court view regarding the value of adverse evidence.

A reference may be made to a decision of the Allahabad High Court in *Baburam* v. *Emperor*,[2] where it has been observed that no part of the statement of such a witness amounts to an admission on behalf of the party producing him.[3]

Party is not bound by the statement of his witness.

Similarly, in the case of *Jalal Din* v. *Nawab*,[4] Beckett, J., has remarked that there is no rule of law that a party must be bound by the statement of his witness. It was held in *Surendra Krishna Mandal* v. *Ranee Dossee*[5] that the legal result of discrediting the statements of hostile witnesses only on certain points was to discredit the evidence *in toto* of the witnesses.

Cross-examination of prosecution witness by the prosecution discredits him altogether.

Where the witness went back on the story of the prosecution and was permitted to be cross-examined on behalf of the prosecution it was held that when a witness, who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution, the result of that course being adopted is to discredit that witness altogether and not merely to get rid of a part of his testimony.[6]

It appears that the various High Courts have so far taken into consideration the evidence of the hostile witnesses for whatever it is worth and seeking corroboration for basing certain conclusions on the statements found in the evidence of such witnesses. The Supreme Court judgment in *Jagir Singh* v. *State (Delhi Administration)*[7] would not possibly permit the High Court to do so, as is evidenced from the case in *Khijiruddin* v. *Emperor*.[8]

Calcutta High Court view as to rejection or otherwise of the evidence of hostile witness.

In the Full Bench case in *Profulla Kumar Sarkar* v. *Emperor*,[9] it was laid down overruling the earlier decisions, that there is no such rule of law that the evidence of a witness who has been treated as "hostile" must be rejected either in whole or in part, or that it must be rejected so far as it favours the party calling the witness or so far as it favours the opposite-party.

Purpose of cross-examination of hostile witness.

In *Mokbul Khan* v. *Emperor*,[10] the the learned Judges said, 'In other words, a party cannot be allowed to say that his witness is a truthful witness so far as a part of his evidence is concerned but an untruthful witness so far as some other portion is concerned'. The theory so stated is fallacious.[11]

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1. 21 L.C. 781 (Mad.).
2. A.I.R. 1937 All. 754.
3. Nand Kishore *v.* Brijbehari, A.I.R. 1955 Raj. 65 at p. 67 : I.L.R. (1954) Raj. 822.
4. A.I.R. 1941 Lah. 55.
5. A.I.R. 1921 Cal. 677 : I.L.R. 47 Cal. 1043 : 33 C.L.J. 34 : 24 C.W.N. 860.
6. Jagir Singh *v.* State (Delhi Administration), A.I.R. 1975 S.C. 1400 at p. 1403.
7. A.I.R. 1975 S.C. 1400.
8. A.I.R. 1926 Cal. 139.
9. A.I.R. 1931 Cal. 401 : 131 I.C. 575 : I.L.R. 58 Cal. 1404 : 32 Cr. L.J. 768 : 53 C.L.J. 427 : 35 C.W.N. 731 (F.B.).
10. A.I.R. 1928 Cal. 690 : 114 I.C. 793 : 30 Cr. L.J. 350 : I.L.R. 56 Cal. 145 : 32 C.W.N. 872.
11. *See* also Romesh Chandra Das *v.* Messrs. National Tobacco Co. of India Ltd., Calcutta, A.I.R. 1940 Cal. 536 at pp. 538-39 : 44 C.W.N. 999 : 191 I.C. 535 ; Purusottam Naik *v.* Chakardhar Das, A.I.R. 1959 Orissa 9.

Implication of rejection to cross-examine hostile witness.

The refusal by the Magistrate to allow a witness to be cross-examined as hostile does not necessarily imply that he considers him to be a truthful witness.[1] In a case simply because a witness has been declared hostile by the prosecution does not amount to saying that the value of his testimony given in cross-examination has been done away with. This was laid down by a Division Bench of the Patna High Court in *Emperor* v. *Haradhan*.[2] That case is also an authority for the proposition that the evidence given by a witness who has been declared hostile is not to be brushed aside, but has to be considered for what it is worth.[3] It has been widely believed that to give leave to cross-examination is tantamount to a declaration by the Court itself that the witness is worthless and unreliable. This is a complete reversal of the true principle.[4] The evidence of witnesses who have been declared hostile is evidence in the case in the same manner and to the same extent as that of any other witnesses whether called by the prosecution or by the defence.[5] The evidence of a hostile witness to be read with circumspection and if rules of caution warrant acceptance of his evidence in part as credible, there should be no hesitation in admitting that portion as good evidence. It is a mistaken notion of the law to maintain that the evidence of a hostile witness must be brushed aside completely.[6]

Evidence of hostile witness to be considered as a whole.

Evidence of hostile witness to be read with circumspection.

Merely because permission is given under Sec. 154 of the Evidence Act, the nature of the examination of a witness by the party who calls him is not changed from examination-in-chief to cross-examination.[7] Evidence of the witness declared hostile by the Court has to be read and considered as a whole.[8] Broadly speaking the value of his evidence would depend upon all the circumstances and would not merely because of the cross-examination become suspect.[9] The true rule is that either party may rely upon the evidence of such a witness, and the Court can come to its own conclusion after a consideration of the whole of his evidence.[10] If a witness is turned hostile, it does not mean that his entire statement is to be discarded. The rule of prudence is that this statement has to be considered with due care and caution. In other words explicit reliance cannot be placed upon him but if he is duly corroborated by other evidence, his statement can certainly be availed of in favour of the prosecution or in favour of the accused as the case may be.[11]

Circumstances to determine value of evidence of hostile witness.

Either party may rely on the evidence of hostile witness.

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1. State *v.* Genda Lal, A.I.R. 1950 M.B. 89 at p. 101.
2. A.I.R. 1933 Pat. 517 : 146 I.C. 993 : 14 P.L.T. 494.
3. Baijnath Mahto *alias* Baijnath Gope *v.* Emperor, A.I.R. 1946 Pat. 109 at p . 109.
4. Emperor *v.* Haradhan, A.I.R. 1933 Pat. 517 at p. 521. 14 P.L.T. 194.
5. Deodhari Koeri *v.* Emperor, A.I.R. 1937 Pat. 34 at p. 35; Sohraj Rao *v.* Emperor, A.I.R. 1930 Pat. 247 : 11 P.L.T. 148 : I.L.R. 9 Pat. 474 : 124 I.C. 836 ; Profulla Kumar Sarkar *v.* Emperor, A.I.R. 1931 Cal. 401 : 131 I.C. 575 : 53 C.L.J. 427 : 35 C.W.N. 731 : I.L.R. 58 Cal. 1404.
6. State *v.* Nagindra Singh, A.I.R. 1953 Pepsu 97 at pp. 97-98.
7. State *v.* Mohan Hira, A.I.R. 1960 Guj. 9.
8. Badri Nath *v.* State, A.I.R. 1953 J. & K. 41 at p. 43.
9. *In re* Kalusingh Motisingh, A.I.R. 1964 M.P. 30 at p. 38.
10. Sarjug Prasad *v.* State, A.I.R. 1959 Pat. 66 at p. 68.
11. Harpal Singh *v.* State of Himachal Pradesh, (1976) 1 Cr. L.J. 162 at pp. 164-165.

Court may depend on truthful part of evidence of hostile witness.

It is now a firmly settled principle that even in the case of a witness who has been permitted to be cross-examined the Court can depend upon that part of the testimony given by the witness which appears to be truthful evidence.[1]

A hostile witness may not to be rejected outright but the Court has at least to be aware that *prima facie*, a witness who makes different statements at different times has no regard for truth.

In the present case a witness was declared hostile because he had omitted to state the aforesaid important part of the prosecution story. It is significant to note that this witness did not refute any part of the prosecution story. He supported several parts of that story but chose to express ignorance about one part which was material one. He did not say that his father had not given the fatal blow to his mother and also did not attempt to explain how the injuries were sustained by the deceased. His silence on this point thus causes a gap but does not go to falsify this part of the prosecution story. But the witness is not to be treated as totally discredited on account of this silence. Those parts of his statements which are consistent with the prosecution story are worthy of belief. They receive support from the first information report which was lodged promptly at his instance.[2]

As a legal proposition it is now settled by the decisions of the Supreme Court that the evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had dubbed him hostile and had cross-examined him. One need say no more than reiterate what the Supreme Court said on this point in *Sat Paul* v. *Delhi Administration*[3] :

> "Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit-worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands, squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence *in toto*."[4]

The instant case is not one where the whole of the testimony of these witnesses was impugned in cross-examination by the prosecution. Their credit on material points, was hardly shaken. The Courts below, therefore, were not justified in brushing aside their testimony.[5]

It is abundantly clear that in criminal prosecution, even if a witness is cross-examined and contradicted with his previous statement with the leave of the Court by the party calling him, his evidence still remains admissible in the trial and conviction can be based upon that evidence, if corrobroated by other reliable evidence.[6]

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1. *In re* Saibanna Tippanna, A.I.R. 1966 Mys. 248 at p. 252 : 1966 Cr. L.J. 1157.
2. Madho Ram Shakya *v.* State of Uttar Pradesh, 1984 All. L.J. 275 at p. 280.
3. (1976) 2 S.C.R. 11 : A.I.R. 1976 S.C. 294 : (1976) 1 Cr. L.J. 295 at p. 308.
4. *See* also Bhola Nath *v.* State, 1976 Cr. L.J. 1409.
5. Syed Akbar *v.* State of Karnataka, A.I.R. 1979 S.C. 1848 at p. 1851.
6. Janardan Prasad *v.* State of Rajasthan, 1977 Cr. L.J. 68 at p. 73.

Use of contradiction in evidence of hostile witness for corroborating evidence of other witnesses.

One Santhanam Servai, P.W. 6, who was examined by the prosecution was treated as a hostile witness. The High Court acted on his testimony which according to it was "natural and convincing".

Indeed, after noticing a serious contradiction in the evidence of this hostile witness, the High Court proceeded to hold that the evidence of P.W's. 1 to 5 received "the strongest corroboration" from the contradiction in the evidence of P.W. 6. It is not easy to understand this approach. A hostile witness may not be rejected outright but the Court has at least to be aware that, *prima facie*, a witness who makes different statements at different times has no regard for truth. The Court should therefore be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence. Far from doing so, the High Court utilised a contradiction in the evidence of the hostile witness for corroborating the evidence of five other witnesses.[1]

16. Turning hostile of one set of the family member/witness by itself cannot be permitted to destroy the other set of dependable prosecution evidence.—Accordingly, the trial Court if acquits the accused merely because near and dear one do not support the prosecution, ignoring altogether other dependable piece of evidence available on the record, to that extent, appreciation of the evidence becoming patently defective was likely to result into miscarriage of justice. The vortex of embarrassing situation in which Bai Shardaben and Vinuben were unfortunately caught and placed, is indeed simply unbearable and breaking enough for any truthful witness to withstand while in witness-box and under such grilling situation, unless they turn-coat and become hostile to the prosecution, they will not be in a position to avoid and save themselves from the hostile future. Once again when such is the point blank, trying situation for any witness and they turn hostile, the same cannot be given any undue weight in favour of the accused merely because they did not support the prosecution. In fact, in such type of cases, the peculiar circumstance of the family members surprisingly turning hostile to the prosecution, in a way, in a given case, indirectly lends corroboration to the prosecution case to the effect that it was the accused and accused alone who had committed the alleged offences otherwise why indeed should such witnesses give their statement against the accused before the police (?) unless of course something is specifically alleged, brought out from the record and probabilized that the Investigating Agency with some ulterior motive had some definite axe to grind to deliberately create false statement of the family members to implicate the innocent accused. In other words, turning hostile of one set of the family member/witness by itself cannot be permitted to destroy the other set of dependable prosecution evidence which is otherwise sufficient enough to hold the accused guilty for the offence alleged against him. In this view of the matter, in the instant case also, merely because Shardaben and Vinuben did not support the prosecution that by itself cannot be permitted to cloud the judicial vision from having correct perspective from other dependable piece of evidence connecting accused with the crime alleged against him.[2]

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1. Karuppanna Thevar *v.* State of Tamil Nadu, A.I.R. 1976 S.C. 980 at p. 984.
2. State of Gujarat *v.* Balubhai Madhabhai Zala, 1995 Cr. L.J. 2588 at p. 2590-91 (Guj.) ; *see* also Subbiramani *v.* State, 1995 Cr. L.J. 3382 (Mad.).

17. Merely giving unfavourable testimony cannot be enough to declare a witness adverse.—A distinction must be drawn between a true witness and a hostile witness. If exhibition of hostile *animus* were the sole test of declaring a witness adverse, the object would be frustrated in many instances. A shrewd and composed witness might, by concealing his real sentiments or hostile attitude, give unfavourable evidence and make statements contrary to the facts, known to him. Merely giving unfavourable testimony cannot also be enough to declare a witness adverse, for he might be telling the truth which goes against the party calling him. He is hostile if he tries to injure the party's case by prevaricating or suppressing the truth. The Court has by this section been given a very wide discretion and is at liberty to allow a party to cross-examine his witness. When his temper, attitude and demeanour in the witness box show a distinctly antagonistic feeling or a mind hostile to the party calling him.[1]

A party calling its own witness may claim permission of the Court to cross-examine him under Sec. 154 of the Evidence Act and the Court is conferred with a discretion to permit the person. Undoubtedly it is a matter pertaining to judicial discretion. It is, however, a trite law that the contingent of cross-examination of the witness by the party calling him and allowed to be cross-examined does not make him unreliable witness so as to exclude his evidence from consideration altogether. The evidence remains admissible in trial and it can also be acted upon on scrutiny if the evidence is found to be reliable. It is also an accepted principle of law that before a Court exercises discretion in declaring a witness hostile there must be some material to show that the said witness has resiled from his earlier statement or is not speaking the truth or otherwise exhibited the element of hostility and has changed sides and shifted his loyalty to the adversary.[2]

The trial Court materially erred in treating this witness as a hostile witness only on the ground that the Public Prosecutor after obtaining the permission had asked a question with regard to the role played by the accused Nos. 4 and 6 on the basis of his police statement. In our view, there was no reason for the learned Judge to treat this witness as not supporting the prosecution case. On the contrary, this would mean that the witness was truthful and he has not supported his police version with regard to the identification of accused Nos. 4 and 6. From this also he cannot be dubbed as a liar to whom no credence can be given as held by the learned Sessions Judge. *Held* the approach of the Sessions Judge in treating this witness as a hostile witness and terming him as a liar is, to say the least, wholly unjustified and unreasonable.[3]

18. A party will not normally be allowed to declare his own witness hostile unless the Court is satisfied.—The discretion is conferred upon the Court to permit cross-examination of his witness and it does not contain any conditions or guidelines which may govern exercise of such discretion. But, it is always expected that the Courts have to exercise such discretion judicially and properly in the interest of justice. A party will not normally be allowed to cross-examine his own witness and declare the same hostile unless the Court is satisfied that the statement of witness exhibits an element of hostility or that he is resiled from a material statement or where the Court is satisfied that the witness is not speaking the truth

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1. **Dadabuddappa Gouli** *v.* **Kalu Kanu Gouli, A.I.R. 2000 Kant. 158 at pp. 159-60.**
2. Dhanu *v.* State of Tripura, 1999 Cr. L.J. 1231 at pp. 1239-40 (Gau.).
3. **Kothakalava Naga Subba Reddy** *v.* **Public Prosecutor, High Court of A.P., 2000 Cr. L.J. 3452 at p. 3457 (S.C.).**

and it may be necessary to cross-examine him to get out the truth. There must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him. Merely because the witness speaks about the truth which may not suit the party on whose behalf he is deposing the same and favourable to the other side, the discretion to allow the party concerned to cross-examine its own witness cannot be exercised.[1]

Permission to cross-examine its own witness.

It is clear that the Court is endowed with power and jurisdiction to grant permission to a party to cross-examine its own witnesses and such permission can be granted at any stage of the proceedings. But the said discretion is required to be exercised in judicious manner. But it is difficult to lay down a rule of universal application as to when and in what circumstances the Court will be entitled to exercise its discretion.[2]

It is also clear that it is not as if such permission could be granted by the learned Sessions Judge merely because a witness says something which is not stated by him in the examination-in-chief. It is not as if a witness is expected to state and repeat the very same version in the cross-examination and if that is so, the whole purpose of cross-examination would be lost. It is not as if the Court would grant permission to a party to examine its own witness on the simple ground that there is some deviation either in examination-in-chief or in the cross-examination which may have an adverse bearing on the story of the prosecution. Permission may be granted by the Court only if it satisfied that the witness has exhibited an element of hostility to the party for whom he or she is deposing.[3]

19. The expression "hostile witness" has no statutory origin—It is actually forwarded from English law.—The provisions are not merely confined to application before Criminal Courts; but are equally applicable before the Civil Courts as well. No doubt, in civil cases previous statements as available in criminal cases may not be existing. That, however, is no reason to disallow a party from cross-examining his witness invoking power under Sec. 154. It may also not be correct to say that a witness can be cross-examined only after declaring him as hostile. The expression 'hostile witness' has no statutory origin; it is actually forwarded from English law. The grant of permission for cross-examining a witness which will include putting leading questions to the witness is a matter of discretion of the Court. That discretion is a judicial discretion which might be liberally exercised, though it cannot be done in a casual or routine manner.

The effect of allowing cross-examination is not to wipe off the effect of the version given in chief examination. The purpose is to test the veracity of the witness and the discretion has to be exercised with care and circumspection. The purpose of such cross-examination need not necessarily be to convince the Court that the credit of the witness has been shaken and it is for the Court to consider his evidence as whole with sufficient caution and then decide whether to accept his version at all and if so, which part of it.[4]

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1. **S. Murugesan *v.* S. Pethapenmal, A.I.R. 1999 Mad. 76 at p. 78.**
2. Public Prosecutor, A.P. High Court *v.* Thummala Janardhana Rao, 1998 Cr. L.J. 4450 at pp. 4454-55 (A.P.).
3. *Ibid.*
4. **Thankamani *v.* Prabhakaran, 2001 (1) Ker. L.T. 776 at p. 779.**

In *Gura Singh* v. *State of Rajasthan*,[1] Supreme Court observed :

The terms "hostile", "adverse" or "unfavourable" witnesses are alien to the Indian Evidence Act. The terms "hostile witness", "adverse witness", "unfavourable witness", "unwilling witness" are all terms of English Law. The rule of not permitting a party calling the witness to cross-examine are relaxed under the common law by evolving the terms "hostile witness and unfavourable witness". Under the common law a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and an unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. In India the right to cross-examine the witnesses by the party calling him is governed by the provisions of the Indian Evidence Act, 1872. Section 142 requries that leading questions cannot be put to the witness in examination-in-chief or in re-examination except with permission of the Court. The Court can, however, permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the Court in its discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The Courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Sec. 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness."

155. Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(2) by proof that the witness has been bribed, or has [2][accepted] the offer of a bribe, or has received any other corrupt inducement to give his evidence ;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

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1. **2001 Cr. L.J. 487 at pp. 492-93 (S.C.) : A.I.R. 2001 S.C. 330 : (2001) 2 S.C.C. 205 : 2001 (1) A.L.D. (Crl.) 396** ; Sat Paul *v.* Delhi Administration, A.I.R. 1976 S.C. 294 : 1976 Cr. L.J. 295 referred.
2. Subs. by Act 18 of 1872, Sec. 11, for "had.".

Illustrations

(*a*) *A* sues *B* for the price of goods sold and delivered to *B*.

C said that he delivered the goods to *B*.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to *B*.

The evidence is admissible.

(*b*) *A* is indicted for the murder of *B*.

C says that *B*, when dying, declared that *A* had given *B* the wound of which he died.

Evidence is offered to show that, on a previous occasion, *C* said that the wound was not given by *A* or in his presence.

The evidence is admissible.

SYNOPSIS

1. Scope of the section ... 4913
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11. Shaking credit of a witness by proof of former inconsistent statement ... 4918
12. Clause (4)—Evidence as to immoral character of the prosecutrix ... 4919

1. Scope of the section.—Section 155 cannot be construed as an exception to Sec. 52.

Sections 146 and 155 distinguished.

Further, Secs. 155 and 146 are not in conflict with each other. Section 146 permits questions injuring the character of a witness to be put to him in cross-examination. Section 155 lays down a different method of discrediting a witness by allowing independent evidence to be adduced.[1]

Section 155 whether includes Sec. 145.

Section 145 appears to be included in Sec. 155, Evidence Act. One of the methods mentioned in Sec. 155 of impeaching the credit of a witness is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted and in this sense the whole of the ground covered by Sec. 145 is included in Sec. 155, Evidence Act.[2]

Section 145 does not control Sec. 155.

It is obvious therefore that Sec. 145, Evidence Act, does not control the provisions of Sec. 155 which is much wider.[3]

Section 155 restricts evidence.

The importance of the section lies in this, that it, by implication, restricts the evidence, which may be given to impeach a witness's credit, to that specified in the section.[4]

Credit of witness when shaken.

The credit of a witness can be said to have been shaken only if it can be shown that he is not a man of veracity, and not that he is of bad moral character.[5]

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1. Guntaka Husseniah *v.* Busetti Yerraiah, A.I.R. 1954 A.P. 39 at p. 40.
2. Mohammad Sarwar *v.* Emperor, A.I.R. 1942 Lah. 215 at p. 216 : 44 P.L.R. 269 : I.L.R. (1943) Lah. 397.
3. Ramratan *v.* State, A.I.R. 1956 Raj. 196 at p. 198 : I.L.R. (1956) 6 Raj. 762 : 1956 R.L.W. 319.
4. Mark, on *Evidence*, p. 109.
5. R.R. Chari *v.* State, A.I.R. 1959 All. 149 at pp. 156-57 : 1959 Cr. L.J. 268.

2. English and Indian law.—The rule of English law on this point is that the credit of a witness may, amongst other ways, be impeached by evidence of facts, contradictory of the evidence given by him. The express provision of the Indian law is less extensive. The witness's credit, it is provided, can only be impeached in certain specified ways mentioned in this section.[1]

Indian law less extensive than English law relating to discrediting witness.

3. Clause (1)—By the evidence of persons.—It was laid down by Lord Ellenborough in *R.* v. *Watson*,[2] that the only modes of *impeaching the credit* of a witness are by cross-examination, by producing the record of his conviction of some infamous crime or by adducing general evidence that he is unworthy of belief upon his oath.[3]

Under this clause, the adverse party or with the consent of the Court, the party who calls him, may call witnesses to testify that they believe him to be unworthy of credit not give reason for such belief in their examination-in-chief. If such question and answer relate to facts in issue or relevant facts, evidence may always be given to contradict such answer.

Evidence when permissible or not to contradict witness.

Sections 146 to 153 show how witnesses are allowed to be tested for their veracity. The credit of witnesses may be impeached also under Sec. 155, but Sec. 155 does not allow evidence of a witness's general bad character to be brought in.[4]

4. Clause (2)—Accepted the offer of a bribe.—In the case of *Attorney-General* v. *Hitchcock*,[5] a witness was asked in cross-examination whether he had not said that the officers of the Crown had *offered* him £20 to give evidence. He denied that he had ever said so, and the Court held that evidence was not admissible to contradict him.[6] But the fact of a witness having accepted a bribe, or the promise of a bribe, is a ground upon which the credit of a witness may very reasonably be impeached, and the second clause of the above section embodies this view.[7]

5. Persons associated with traps.—In cases of bribe, it is either circumstantial evidence or the evidence of trap-witnesses which is usually available. The testimony of police officers and of persons associated with traps deserves consideration by Courts in the light of all the attending circumstances and if it impresses the Court as credible, it can safely be accepted for basing conviction thereon.[8]

6. Clause (3)—Contradicting a witness.—It may be important to distinguish between *contradicting a witness and impeaching the credit of a witness.* Mr. Taylor states (Sec. 1324, Sec. 1470, 8th Ed.) the first of the modes in which the *credit of a witness may be impeached* to be, that witnesses may be called to *disprove* such of the facts stated by him, whether in his direct or cross-examination as are material to the issue. It has been already shown that where these facts are relevant, the Evidence Act assumes that evidence may be given to contradict; and while

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1. 11 B.H.C. 166 at p. 169 ; *see* also Whitley Stokes, Vol. II, p. 832.
2. 2 Stark 149.
3. *See* also Spencely *v.* De Wilott, 7 East 108.
4. Maung San Myin *v.* Emperor, A.I.R. 1930 Rang. 49 at pp. 50-51.
5. 1 Exch. Rep. 91.
6. The following case carried this rule to its extreme limits R. *v.* Burke, 8 Cox's Criminal Cases 44.
7. *See* Boojilal *v.* Royal Insurance, A.I.R. 1928 P.C. 54 : 28 M.L.W. 276 : 27 A.L.J. 377 : 32 C.W.N. 593 : 54 M.L.J. 545 : 108 I.C. 1 : 47 C.L.J. 550 : 30 Bom. L.R. 818.
8. Ram Sarup Charan Singh *v.* State, A.I.R. 1967 Delhi 26 at pp. 27, 28.

declaring generally that evidence may not be given to contradict the answers to questions, which are relevant to the inquiry only in so far as they tend to shake the credit of a witness by injuring his character, the Act makes two exceptions,[1] to this rule (Exceptions 1 and 2, Sec. 153). It is not the fact that, in all cases and under all circumstances the testimony of a witness as to relevant facts can be contradicted by evidence disproving such facts. In *R.* v. *Hilditch*,[2] it was laid down that evidence, which is a confirmation of the original case, cannot be given as evidence in reply ; and that the only evidence which can be given in reply is that which goes to cut down the defence without being confirmation of the original case. Mr. Taylor, says ".....In deciding upon the admissibility of evidence called in reply regard must be had to the circumstances of the individual case, and considerable latitude will necessarily be granted to the Judge in the exercise of his discretion."[3]

7. When party may discredit his own witness.—The credit of a witness may be impeached not only by the adverse party, but also, *with the consent of the Court, by the party who calls him.* This provision is analogous to that contained in the previous section which allows a party under certain circumstances to cross-examine his own witness. "The question how far a party is at liberty to discredit his own witness," says Mr. Taylor, "is one which....has been settled by the Legislature. The Common Law Procedure Act of 1854 contains, in Sec. 22, the following salutary, though ill-drawn, enactment on this subject : 'A party producing a witness shall not be allowed to impeach his credit by *general evidence* of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse (i.e. *hostile*, as contra-distinguished from being merely *unfavourable*), contradict him by other evidence, or by leave of the Judge, prove that he has made at other times, a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he had made such statement'." This enactment has been in great part borrowed from the New York Civil Code. In India proof may be given of former statements made by the witness and inconsistent with any part of his evidence which is liable to be contradicted. If such statement were made in writing, or reduced into writing, the witness's attention must have been called to those parts of it which are to be used for the purpose of contradicting him, before such proof can be given.[4] If they are verbal merely, and not in writing, there is no express similar restriction in the Act.

"It occasionally happens," says Mr. Day,[5] "that a witness called under a belief that he will prove a certain fact, turns round upon the party calling him, and proves directly the reverse. The party calling the witness was not *precluded from proving by other testimony what the witness had negatived; but whether he ought to be allowed to discredit his own witness*, either by impeaching his character or by showing that he had previously made statements at variance with the evidence given by him, was a point upon which the decisions of the Courts were conflicting." That evidence to discredit ought to be admitted under such circumstances was strongly

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1. The words 'liable to be contradicted' in Cl. (1) of Sec. 155 can scarcely be limited to the two exceptional cases, which form the exceptions to Sec. 153.
2. 5 C. & P. 299.
3. Sections 357-359 ; Secs. 385-387, 8th Ed., and *see* the authorities there referred to.
4. Section 145 *ante*.
5. *Common Law Practice*, p. 203.

argued by Lord Denman, in the case of *Wright* v. *Beckett*.[1] His arguments convinced the English Law Commissioners of 1850.

8. Liable to be contradicted.—The words "which is liable to be contradicted" mean "which is relevant to the issue."[2] If the former statement be in writing, then the procedure provided in Sec. 145 must be followed, before the said statement can be allowed to be proved under this clause. If it be verbal, then similar procedure should be followed.[3]

A statement to police officer investigating a case cannot be used as evidence either for,[4] or against (Sec. 162, Cr. P.C.), the accused. However, the police officer who recorded the statement of any person in whose hearing can be examined with regard to it with the view of impeaching the credit of the witness.[5] In *Prakash Chand* v. *State*,[6] the witnesses, who were treated as hostile by the prosecution were confronted with their earlier statements to the Police and their evidence was rejected as it was contradicted by their earlier statements. It was held that such use of the statements is permissible under Sec. 155 of the Evidence Act and the proviso to Sec. 162(1) of the Code of the Criminal Procedure read with Sec. 145, Evidence Act. A police officer cannot be compelled to refresh his memory from such a document.[7] A police officer cannot by recording in his diary the depositions of witnesses protect them from being used by the accused.[8] Section 155 permits the credit of a witness to be impeached in certain ways. Clause (3) of Sec. 155 permits credit of a witness being impeached by proof of former statement inconsistent with any part of his evidence which is liable to be contradicted. It does not appear that the former statement must be signed in order that it may fall under the scope of Sec. 155(3) of the Indian Evidence Act. Thus, it is clear that the Trial Court was in error in brushing aside the case diary contradictions on the ground that they are unsigned statements.[9]

J made certain statement to *H* relating to the commission of an offence. *Held* that *J*'s previous statement to *H* can be proved by the evidence of *H*, to contradict *J*.[10]

Statement of a witness recorded in a diary prepared under Sec. 47-A of the Calcutta Suburban Police Act, can be used to contradict the evidence given by him before the Magistrate.[11]

FIR can ordinarily be used only for the purpose of corroborating contradicting or discrediting (under Secs. 145, 155 and 157 of the Evidence Act) its author if examined, and not any other witness.[12]

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1. 1 Moody and Robinson's Rep. 414.
2. *Per* Wilson, J., in Khadijah Khanum *v.* Abdul Kazim Shirazi, I.L.R. 17 Cal. 344.
3. *See* notes under "Previous Verbal Statements" under Sec. 145, *ante* and Mst. Amir Begum *v.* Mst. Begam, 9 P.W.R. (1914) : 22 I.C. 861.
4. Rajhni Singh *v.* Empress, I.L.R. 9 Cal. 458 : 11 C.L.R. 571.
5. Reg. *v.* Uttamchand Kapurchand, 11 Bom. H.C. Rep. 120 ; Queen-Empress *v.* Sitaram Vithal, I.L.R. 11 Bom. 657 ; Queen-Empress *v.* Ismail Valad Fattaru, I.L.R. 11 Bom. 659 ; Queen-Empress *v.* Madho, I.L.R. 15 All. 25 ; Bikao Khan *v.* Empress, I.L.R. 16 Cal. 610 and *In the matter of* Mohammed Ali Haji *v.* Empress, I.L.R. 16 Cal. 612.
6. A.I.R. 1979 S.C. 400 at p. 403.
7. *In the matter of petition of* Kali Charan Chunari, I.L.R. 8 Cal. 154 : 10 C.L.R. 51.
8. Sheru Sha *v.* Queen-Empress, I.L.R. 20 Cal. 642.
9. Narayanan *v.* Krishnan, A.I.R. 1981 Cr. L.J. 563 at p. 567.
10. Emperor *v.* Dina Bundhu, 8 C.W.N. 218.
11. Suresh Chandra Ghose *v.* Emperor, 74 I.C. 261 at p. 262 : 24 Cr. L.J. 757.
12. Shanker *v.* State of Uttar Pradesh, A.I.R. 1975 S.C. 757 at p. 758.

9. Former judgment cannot be used to impeach the testimony of a witness.—The credit of a witness may be impeached as provided under Sec. 155 of the Evidence Act. The fact that a witness was not believed in a judgment in another case cannot be used against him in a subsequent case. The former judgment cannot be given in evidence for the purpose of impeaching the credit of a witness. Judgments in other cases are relevant under Secs. 40 to 43 of the Evidence Act. As the judgments in other cases are relevant only under Secs. 40 to 43 of the Evidence Act, the credit of a witness cannot be impeached by confronting him with a judgment in another case.[1]

10. Former statements can be used only for discrediting the witness and not as substantive law.—A witness made a statement to two persons. His previous statements were filed as evidence against the accused. *Held* that the former statement referred to could be used only under this clause for discrediting the evidence of the witness and not as substantive against the accused.[2] Where the misconduct alleged against an advocate was that he had advised his client to bribe a witness, and the client when examined did not admit it, and two witnesses were examined to impeach the credit of the client, *held* that even if the statement of two witnesses was admissible under Cl. (3) of Sec. 155, the same would not prove the truth of the statement of the client-witness which he had made in the course of conversation with the two witnesses.[3] The only use that can be made of previous statements would be to contradict or corroborate evidence given on oath at the trial.[4]

Advocate's professional misconduct—Admissibility of evidence.

The plaintiff put in evidence an entry in a *Koran* in proof of her date of birth, and, in the cross-examination of a witness for the defence, she put to him a letter. Their genuineness was denied. *Held* that evidence to impeach the credit of witness might be given as regards the *Koran* but not as regards the letter, the reason being that no substantive evidence was given about it before the plaintiff's case was closed.[5]

Impeaching the credit of a witness—Evidence in reply.

With a view to impeach the credit of a person making statements to the police, the police officer himself, or any other person in whose hearing the statements were made, can be examined.[6] A statement made by a witness to a police officer investigating a case, may be proved at the trial to contradict such witness.[7] A prisoner is not entitled to insist that a memorandum made by a police officer shall, be referred to by the latter for refreshing his memory.[8]

Statements made to the police.

In a case where a prosecution witness is permitted to be cross-examined either denies a statement made in the course of the investigation or admits it the use of that police statement comes to an end. But, in a case where a prosecution witness when cross-examined by the prosecution, beyond admitting that he made a police statement adds that what he stated before the police is the truth, that

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1. Krunakaran *v.* Sreenivasan, 1988 (1) K.L.T. 505 at p. 506.
2. Emperor *v.* Cherath Choyi, I.L.R. 26 Mad. 191.
3. *In the matter of* Bomanjee *v.* Cowasjee, I.L.R. 34 Cal. 129 (P.C.). : 5 C.L.J. 123 : 11 C.W.N. 370.
4. *In re* Malaya Goundan, (1912) M.W.N. 872 : 66 I.C. 326 (Mad.).
5. Khadijah Khanum *v.* Abdool Kurreem Sheraji, I.L.R. 17 Cal. 344.
6. 12 B.H.C. 120.
7. Queen-Empress *v.* Madho, I.L.R. 15 All. 25 ; *see* also I.L.R. 11 Bom. 657 ; Bikao Khan *v.* Queen-Empress, I.L.R. 16 Cal. 610.
8. Empress *v.* Kali Chure Chumari, I.L.R. 8 Cal. 154 [11 B.H.C.R. 120 (D)].

statement which he makes about the truth of what he told the police can have little utility.[1]

Police diary.

A police diary is a privileged document, and neither of the parties has any right to ask for its production. Statement of witness taken by an investigating police officer although misdescribed as a "diary", can be used as evidence for the purpose of contradicting those witnesses or the police officer. So the accused is entitled to the production of such documents.[2]

A statement by *A* to *B* was reported at the *thana* by the latter and there recorded. *Held* that, though the evidence of *A* could be contradicted by the evidence of *B* proving the statement made to him by *A*, it could not be contradicted by what the police recorded as the first information.[3]

Examination of police officer to discredit witness.

It is not illegal to examine a police officer for the purpose of impeaching the credit of a witness who gave a statement to the police officer different from, and inconsistent with, his subsequent statement.[4]

11. Shaking credit of a witness by proof of former inconsistent statement.—Section 155 is controlled by Sec. 145 and is not independent of it.[5] As laid down by their Lordships of the Privy Council in *Bal Gangadhar Tilak* v. *Shrinivas Pandit*,[6] and in *Jagrani Kunwar* v. *Durga Prasad*,[7] if a party wants to rely on a previous statement of a person who has gone into the witness-box in order to contradict him, it is the duty of such person to put that letter to the party or the witness and to give him an opportunity to explain it.[8]

In *Muktawandas* v. *Emperor*,[9] a slightly different view was taken and it was held that Sec. 145 of the Evidence Act should be limited to previous written statements of a witness only.

In *Muktawandas Ajabdas* v. *Emperor*,[10] it has been observed that—

Section 145 not to control Sec. 155.

"Section 145 does not control Sec. 155 and hence questions proposed to be put to prosecution witnesses about oral statements made to them by other witnesses are legally admissible."

In *Emperor* v. *Aftab Mohd. Khan*,[11] it was held that if there was a report which had no reference at all to the investigation it was a document admissible for the purpose of corroborating the evidence of its maker.[12] There is an earlier decision of the Calcutta High Court in *Mani Mohan Ghose* v. *Emperor*,[13] which by implication may be thought to lay down a different rule.

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1. *In re* Saibanna, Tippanna, A.I.R. 1966 Mys. 248 at pp. 255-56.
2. Mahomed Ali Hadji *v.* Queen-Empress, I.L.R. 16 Cal. 612.
3. 8 C.W.N. 216 at p. 221.
4. (1905) A.W.N. 64.
5. Gopi Chand *v.* Emperor, A.I.R. 1930 Lah. 491 at p. 495.
6. A.I.R. 1915 P.C. 7 : 29 I.C. 639 : 42 I.A. 135 : I.L.R. 39 Bom. 441 (P.C.).
7. I.L.R. (1914) 36 All. 93 : 22 I.C. 103 : 41 I.A. 76 (P.C.).
8. Rani Amrit Koer *v.* Gur Charan Singh Nabha, A.I.R. 1934 All. 226 at p. 234; State *v.* Minaketan Patnaik, A.I.R. 1957 Orissa 262 at p. 277.
9. A.I.R. 1939 Nag. 13 : I.L.R. 1939 Nag. 109 : 1938 N.L.J. 434 B. at A.
10. 1938 N.L.J. 434 : I.L.R. (1939) Nag. 109 : A.I.R. 1933 Nag. 13.
11. A.I.R. 1940 All. 291 : 1940 A.L.J. 206 : 1940 A.W.R. (H.C.) 85.
12. *See* also Tika Ram *v.* State, A.I.R. 1957 All. 755 at p. 758 : 1958 A.W.R. 182 : 1958 A.L.J. 104.
13. 35 C.W.N. 623 : I.L.R. 58 Cal. 1312 : 135 I.C. 289 : A.I.R. 1931 Cal. 745.

Statements made in first information reports are admissible to impeach the credit of a witness who made them or to corroborative the testimony of the witnesses who made them. They are not substantive evidence in the case relevancy of the statements before.[1]

In *Ponnuswami Goundan* v. *Kalyanasundara Ayyar*,[2] it was held that the prior deposition of an attesting witness is not available as substantive evidence, but could only be utilized to contradict or corroborate his present statements, under Sec. 157, Evidence Act.

Statements in the previous trial put in by the prosecution for the purpose of contradicting a witness cannot be used as substantive evidence of identification of a person.[3]

Where the girl who wrote the letter herself gave evidence, it can only be used in cross-examination for the purpose of discrediting her if what she had written was inconsistent with her evidence.[4]

There is no rule of evidence which prevents a defendant from deposing that while he was engaged in conversation with the witness a tape-recorder was in operation, or from producing the said tape-recorder in support of the assertion that a certain statement was made in his presence.[5]

Evidence based on conversations on telephone is admissible provided the identity of the person with whom the witness spoke or the person whom he heard speaking is satisfactorily established.[6]

The phonographic reproduction of sound is generally admissible in evidence upon the trial by showing the manner and the circumstances under which it was secured.[7]

In *S. Partap Singh* v. *State of Punjab*,[8] Supreme Court has held that if in any particular case there is a well-grounded suspicion that a tape-recording has been tampered with that would be a ground for the Court to discount wholly its evidentiary value.

12. Clause (4)—Evidence as to immoral character of the prosecutrix.—On indictments for rape, or attempt to commit that crime evidence of general bad character admissible though the woman be not called as a witness and though, if called, she be not asked, on cross-examination, any questions tending to impeach her character for chastity.[9]

Section 140 of the Evidence Act permits that "witnesses to character may be cross-examined and re-examined". Section 155 of the Act permits the adverse party to impeach the credit of a witness in the modes enumerated in the section. The first mode envisaged is by adducing evidence of persons who testify that they believe the witness to be unworthy of credit. Questions to elicit indecent or scandalous imputations from witnesses in the guise to shake the credit of another witness or party should not have been permitted. Section 151 of the Act saddles

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1. Ram Naresh *v.* Emperor, A.I.R. 1939 All. 242 at p. 244 : I.L.R. (1939) All. 377 : 1939 A.L.J. 107 : 1939 A.W.R. (H.C.) 190.
2. A.I.R. 1930 Mad. 770 at pp. 770, 771 : 125 I.C. 231.
3. Samser Ali *v.* Emperor, A.I.R. 1947 Cal. 342 at p. 343 : 50 C.W.N. 206 : 222 I.C. 421.
4. Judah *v.* Isolyne Shrojbashini Bose, A.I.R. 1945 P.C. 174 at p. 175 : 1945 M.W.N. 634.
5. Rup Chand *v.* Mahabir Prasad, A.I.R. 1956 Punj. 173 at p. 174 : 58 Punj. L.R. 441.
6. Andrews *v.* United States, 105 Am. L.R. 322.
7. Boyne City G. & A.R. Co. and V. Anderson, 117 Am. Sr. 642.
8. A.I.R. 1964 S.C. 72 at p. 86.
9. Tayler, 8th Ed., Sec. 363.

every trial Court with the power to forbid such questions "although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue". (The second and third modes envisaged in Sec. 155 are not relevant in this context). The 4th mode prescribed in the section applies to a limited class of cases. It is : "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character".[1]

Section 155, sub-section (4), Evidence Act, refers to such evidence as that general reputation of prosecutrix was that of a prostitute or that she had the general reputation of going about and committing immoral acts with a number of men.[2]

156. Questions tending to corroborate evidence of relevant fact, admissible.—When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

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1. Scope and importance of section—English law and practice.—"This section, in effect, declares evidence of certain facts to be admissible, the practice in England....has been against the admission of such evidence."[3]

Admission of evidence for testing witness's truthfulness.

"This section provides for the admission of evidence given for the purpose not of proving a relevant fact but of testing the witness's truthfulness.[4]

Corroborative evidence of unchallenged statement not necessary.

It was impossible to treat statements by witness (a clerk or broker employed by the plaintiffs) as corroborating his own evidence.[5] It is not incumbent on a party to give corroborative evidence of statements not challenged by the other party.[6] It seems to be a dangerous precedent to convict a man on evidence of people who were found to be untruthful without any corroboration.[7]

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1. State of U.P. *v.* Raghubir Singh, (1997) 3 S.C.C. 775 at pp. 778-79.
2. Wahid Ali *v.* Emperor, A.I.R. 1932 Cal. 526 : 36 C.W.N. 356 : 138 I.C. 373.
3. Markby on *Evidence*, pp. 109-10.
4. Cunningham, *Evidence*, Sec. 156 at p. 316.
5. Lim Yam Hong & Co. *v.* Lam Choon & Co., A.I.R. 1928 P.C. 127 at p. 128.
6. Moulvi Mohd. Ibramull Huq *v.* Wilke, (1907) 11 C.W.N. 946.
7. Hari Krishna *v.* Emperior, A.I.R. 1916 Cal. 98 at p. 99.

Unproved receipts for rent which a widow alleged was being paid by her husband as sub-tenant are admissible to corroborate her statement.[1]

2. Corroboration.— Corroboration, in order to be of any value, must be on material particulars.[2]

3. What can amount to corroboration.—Any fact will be corroboration which renders it more probable that the witness's testimony is true on any material point.[3] Corroborative evidence must be independent testimony which affects the accused by connecting him, or tending to connect him, with the offence.[4]

4. Corroborative evidence.—In *Ram Subhak Ojha* v. *Commissioner of Police*,[5] Constable had made some statements which amounted to admission. Further, apart from the admission, evidence was led to prove the charges against the Constable. That evidence appealed to the disciplinary authority. *Held* that even though the admission was treated as supporting the evidence against the Constable, that did not vitiate the proceeding.

5. First Information Report.—The maker of the first information report comes in the witness-box and where a person narrates the events of which he has personal knowledge and then further makes a statement that he had made the same narration in first information report the last portion of the statement of the witness is admissible under Sec. 156, Evidence Act, as corroborating the testimony of the witness.[6]

157. Former statements of witness may be proved to corroborate later testimony as to same fact.—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

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1. Ambika Singh *v.* State, A.I.R. 1961 All. 38 at p. 41.
2. Smt. Sarladevi Pathak *v.* Birendrasingh Kilendar of Kareli, 1961 M.P.L.J. 1361 at p. 1370.
3. Thomas *v.* Jones, (1920) All. E.R. 462 at p. 467 : (1921) 1 K.B. 22 at p. 33.
4. Senat *v.* Senat, (1965) 2 All. E.R. 505 at pp. 507-8.
5. A.I.R. 1967 Cal. 381 at p. 382 : (1966) 2 Lah. L.J. 722.
6. State of Rajasthan *v.* Shiv Singh, A.I.R. 1962 Raj. 3 at p. 9.

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1. Principle.—This section is based on the principle that if there is consistency between the previous statement and present statement of a witness, it may be considered a ground for believing him.[1]

2. Why corroborative evidence is admitted.—The section declares certain former statements of witnesses to be relevant. Perhaps the former statement might but for this section, have been objected to as hearsay.[2] It has been the practice in India, from an early period, to admit the kind of evidence mentioned in this section.[3] According to the practice in England, evidence of prior statement is not generally admissible to corroborate a witness. But, under this Act, statement is admissible.[4] The statement which may be proved under the section in order to corroborate, may be verbal or in writing. In India, the statement made immediately after the occurrence and before they can be tampered with by the police or others, are important to the ascertainment of truth.[5]

Law and practice before this Act.

English law.

Practices in India.

The narration of the incident to so many independent witnesses without any discrepancy soon after the incident was also correctly, admitted by the trial Court under Sec. 157 of the Evidence Act as corroborative of prosecutrix's testimony.[6]

3. To corroborate.—Previous statements of witnesses are admitted only to corroborate their present evidence at the trial and they are not substantive evidence.[7]

4. Fact.—The word "fact" in this section does not mean merely "event" but also a continuing fact such as possession.[8]

5. Importance of this evidence in criminal cases.—This kind of evidence is highly useful in criminal cases, where there is a suggestion that a witness is telling a made-up story.[9] "It is often important to inquire, even on the examination-in-chief, what statement a witness, and particularly a complainant, made immediately after the commission of the offence.[10]

6. Reason of the rule.—The force of any corroboration by means of previous consistent statements must evidently depend upon the truth of the proposition that he who is consistent deserves to be believed.[11]

7. Scope and application of section.—Section 157 only relates to corroboration. It provides that former statement of a witness may be proved to corroborate the testimony as to the same fact.[12]

Where in a case the prosecution witnesses have told the Court that the complainant had mentioned all the details of the incident within a short while

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1. Thakurji *v.* Parmeshwar Dayal A.I.R. 1960 All. 339 at p. 347.
2. Markby on *Evidence*, p. 110.
3. *Ibid*.
4. Whitley Stokes, Vol. II, p. 832 ; *see* also Markby on *Evidence*, p. 110.
5. *See* Illustrations (*j*) and (*k*) to Sec. 8, *ante*.
6. **State of Karnataka *v.* Manjanna, A.I.R. 2000 S.C. 2231 at p. 2234 : 2000 Cr. L.J. 3471 (S.C.) : (2000) 6 S.C.C. 188.**
7. Oates *v.* King-Emperor, 38 C.L.J. 163 : 76 I.C. 417.
8. Muthalagiri Reddy *v.* Pappi Naicken, 25 I.C. 510 (Mad.).
9. Markby on *Evidence*, p. 110.
10. Whitley Stokes, Vol. II, pp. 832, 833.
11. R. *v.* Mallappa, 11 B.H.C. 196 at p. 198.
12. Arun Kumar Banerjee *v.* State, A.I.R. 1962 Cal. 506 at p. 508 ; contra *see* Padan Pradhan *v.* State, 1982 Cr. L.J. 534 (Orissa).

after it took place and apart from the evidence of the prosecution witnesses about what they saw there was the statement of complainant to her husband immediately after the incident. It must be held that the statement was admissible under Sec. 157 of the Indian Evidence Act and has a corroborative value.[1]

Section 157 applies to a case where a witness is sought to be examined with reference to his earlier statements.[2]

Essentials for the applicability of this section.

It is clear that there are only two things which are essential for this section to apply. The first is that a witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact.

Requirements of this section for its application.

What Sec. 157 requires is that the witness to be corroborated must give evidence in Court of some fact. If that is done, his testimony in Court relating to that fact can be corroborated under Sec. 157 by any former statement made by him relating to the same fact, and it is not necessary that the witness to be corroborated should also say in his statement in Court that he made some statement at or about the time when the fact took place to such and such person.[3]

Section 157, Evidence Act, came up for construction before the Supreme Court in *Dwarka Nath* v. *Lalchand*.[4] It was a case under the UP Court of Wards Act, 1912. The Supreme Court laid down in that decision that two circumstances, which are alternative, are conditions precedent to the proof of an earlier statement under Sec. 157. The first is that the statement must have been made at or about the time when the fact took place. *Secondly*, it must have been made before an authority legally competent to investigate into the fact.

In *Nameshwar* v. *State of Rajasthan*,[5] it has been laid down that where the condition prescribed by the expression" at or about the time" by Sec. 157 of the Evidence Act is fulfilled, a previous statement by an accomplice of a complainant is legally admissible in India as corroboration. However, the weight to be attached to it constitutes a different matter. The Supreme Court has further observed that there cannot be a hard and fast rule about the "at or about" condition laid down in Sec. 157. That main test is whether the statement was made as early as could reasonably be expected in the circumstances of the case and before there was any opportunity for tutoring or concoction. Now the facts herein show that immediately after accused No. 1 shot at Vela Dera he became unconscious. He was removed to the Civil Hospital at Mandvi where he regained his consciousness. His statement was recorded by the Honorary Magistrate immediately thereafter in the Civil Hospital at Mandvi. These facts show that the statement was recorded soon after the incident happened and at the first available opportunity when Vela Dera could make a statement. It appears that under the aforesaid circumstances there was no opportunity to tutor him nor was there any opportunity for anyone to concoct anything.[6]

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1. Sheikh Zakir *v.* State of Bihar, 1983 Cr. L.J. 1285 at p. 1289 (S.C.).
2. Public Prosecutor, Andhra Pradesh *v.* Kuraba Sanjeevamma, A.I.R. 1959 A.P. 567 at p. 568.
3. Ramrattan *v.* State of Rajasthan, A.I.R. 1962 S.C. 424 at pp. 426-27.
4. A.I.R. 1965 S.C. 1549.
5. A.I.R. 1952 S.C. 54.
6. State of Gujarat *v.* Naran Gigu Sangar, (1976) 17 Guj. L.T. 574 at pp. 576-77 ; *see* also Raj Karan Singh *v.* State, 1984 U.P. Cr. p. 221.

Exceptions under Sec. 162, Cr.P.C., etc.

In order that this section may apply, the statements must either be made before any person legally competent to investigate the fact or it must have been made at or about the time when the fact took place.[1] This section, must be taken subject to the exception contained in Sec. 162, Cr. P.C.[2]

Ordinarily before corroborative evidence is admissible the evidence sought to be corroborated must have been given.[3]

Court's discretion.

The Court has no doubt a discretion to allow evidence to be given under Sec. 157 out of the regular order, but such discretion should be rarely used and only for very special reasons.[4] It is not clear that such a discretion is given by Sec. 136, Evidence Act.[5]

This section can never be invoked to let in statements made by somebody else as evidence for the purpose of corroboration of a witness examined in the case.[6]

Date of birth in an application or affidavit.

In *Har Chand* v. *Dewan Singh*,[7] it has been held that a verified application formerly made by a guardian, containing his wards' date of birth, is admissible under Sec. 157 of the Evidence Act. Such an application would be of some use only for corroborating the testimony of the guardian who verified the same.[8]

Can a person corroborate himself.

It is settled law that a person cannot corroborate himself. But if, in support of a person's evidence, it is proved from another source that he did make statement of a kind similar to his evidence then the fact thus proved may be taken as corroborative of such person's statement.[9]

8. Section cannot come into play for admitting hearsay evidence.—Under Sec. 60 of the Act, oral evidence must, in all cases whatever be direct...It is no doubt true that if *J*'s evidence was only to the effect that he was told a particular fact, *viz.*, about *sarpanch* having told that there was a scuffle between *K* and *V*, and if that fact about *sarpanch* saying so, were at issue, it can be taken as proved as he had heard the *sarpanch* saying so, in view of Sec. 60 of the Indian Evidence Act. But if *sarpanch* had referred to a talk he had with some other person such as the accused and if then spoke to some third person and the thrid person so saying in Court would become hearsay type of evidence as it would not fall under Sec. 60 of the Indian Evidence Act wtih regard to the fact sought to be established in the case. Now such evidence can become admissible under Sec. 157 of the Indian Evidence Act, inasmuch as it is sought to corroborate the testimony of witness who had so told him. But that can arise only if the *sarpanch's* evidence of such fact is to be corroborated. If, therefore, the *sarpanch* does not refer to any such talk he had with the accused in his evidence before Court, there cannot arise any question of corroboration, and Sec. 157 of the Indian Evidence Act cannot come into play for admitting such evidence.[10]

Evidence of *sarpanch*.

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1. Oriental Government Security Life Assurance Co. Ltd. *v.* Narasimhachari, I.L.R. 25 Mad. 183 at p. 210 : 11 M.L.J. 379.
2. 2 C.W.N. 702 at p. 712.
3. Shwe Kin *v.* Emperor, 3 L.B.R. 240 : 5 Cr. L.J. 411.
4. *Ibid.*
5. *Ibid.* : C.W.N. xxi, F.
6. Ambika Charan *v.* Kumud Mohan Chaudhury, A.I.R. 1928 Cal. 893 at p. 896.
7. A.I.R. 1929 All. 550.
8. Gopi Nath *v.* Satish Chandra, A.I.R. 1964 All. 53 at p. 60.
9. King *v.* Nga Myo, A.I.R. 1938 Rang. 177 at p. 179 (F.B.).
10. Kanbi Vaghii Savji *v.* State of Gujarat, A.I.R. 1968 Guj. 11 at pp. 12-13.

9. Application of the rule to accomplice evidence.—The corroboration by former statements mentioned in this section can scarcely be said to answer the purpose of which the juries are advised by Judges to require the evidence of an accomplice to be confirmed. Hence the rule requiring confirmation of it as to the prisoner, by some independent reliable evidence.[1]

The nature and extent of corroboration necessary in such a case has been laid down in *Rameshwar* v. *State of Rajasthan*.[2]

Corroboration to come from independent sources.

The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

Corroboration need not be direct evidence.

The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. A statement fulfilling the requirement of Sec. 157, Evidence Act is legally admissible in India as corroboration. The weight to be attached to it is, of course, another matter.[3]

10. Former statements.—The word "statement" has been used in a number of sections of the Act in its primary meaning of "something that is stated" and that meaning should be given to it under Sec. 157 also unless there is something that cuts down that meaning for the purposes of that section.[4]

Meaning of the word "statement".

The words "former statement" in Sec. 157 mean a previous statement of the witness who is to be corroborated made on another occasion.[5]

The former statement above referred to may be either written or verbal, on oath or in ordinary conversation.[6]

If statements of Court witnesses are admissible in evidence.

In *Moti Singh* v. *State of Uttar Pradesh*,[7] the High Court relied upon the statements of Court witnesses recorded by a Magistrate at the hospital. *Held*, that in this it was in error. Their previous statements could not be used as independent evidence in support of the other prosecution evidence.

11. Testimony of a witness.—This section refers to the corroboration of the testimony of a "witness" so that ordinarily before corroborative evidence is admissible, the evidence sought to be corroborated must have been given.[8] Depositions of witnesses recorded before the committing Magistrate when admitted in evidence under Sec. 288, (Omittted in Cr. P.C. 1973) Cr. P.C., at the trial in the Sessions Court, stands exactly on the same footing as a deposition given in that Court and constitutes "the testimony of a witness" under this section.[9]

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1. R. *v.* Mallappa, H.B. H.C. 196 at p. 197 : I.L.R. 10 Cal. 973.
2. 1952 S.C.A. 40 : 1952 S.C.J. 46 : 1952 S.C.R. 377 : A.I.R. 1952 S.C. 54.
3. State of Bihar *v.* Srial Kejriwal, A.I.R. 1960 Pat. 459 at pp. 466-67 : 1960 B.L.J.R. 565.
4. Bhogilal Chunilal Pandya *v.* State of Bombay, A.I.R. 1959 S.C. 336 at p. 357 : 1959 S.C.J. 240.
5. Harendra Kumar Mondal *v.* Emperor, A.I.R. 1938 Cal. 125 at p. 128 : 66 C.L.J. 196 : 174 I.C. 36.
6. Whitley Stokes, Vol. II, p. 931.
7. A.I.R. 1964 S.C. 900 at p. 904 : 1963 A.L.J. 647.
8. Nistarinee Dassee *v.* Rai Nundo Lall Bose, 5 C.W.N. xvi notes ; *see* also Shew Kin *v.* E., 3 L.B.R. 240 : 5 Cr. L.J. 411.
9. *In re* Velliah Kane, I.L.R. 45 Mad. 766 : *see* also Narayan Ganpati Patil *v.* State, A.I.R. 1959 Bom. 552 at p. 553 : I.L.R. (1959) Bom. 1251 : 1959 Bom. L.R. 447.

Stage at which corroborative evidence may be given.

The question as to whether the evidence of the person who executes the warrant requires corroboration depends on the facts and circumstances of each case.[1]

12. The words "at or about the time" must receive a pragmatic and liberal construction.—The words "at or about the time" in Sec. 157 of the Evidence Act are the crucial words to judge the time when the statement was made. Whether the statement was made at or about the time of the incident can be decided on the facts of each case. No hard and fast rule can be laid down for it. However, those words "at or about the time" in Sec. 157 must receive a pragmatic and liberal construction. The principle is that the time interval between the incident and the utterance of the statement should not be such as to afford occasion for reflection or even contemplation. If the time interval was so short as between the two that the mind of the witness who made the statement was well connected with the incidence without anything more seeding into, such statement has a credence, and hence can be used, though not as substantive evidence, as corroborating evidence, on the principle adumberated in Sec. 157 of the Evidence Act.[2]

The expression "at or about the time when the fact took place" in Sec. 157 of the Evidence Act should be understood in the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in Sec. 157 of the Act. The test to be adopted, therefore, is this : Did the witness have the opportunity to concoct or to have been tutored?[3]

Section 157 of the Evidence Act permits the Court to use any former statement made by a witness before any person relating to a fact if it was made "at or about the time when the fact took place." The interval between the occurrence and the time of PW 1's reporting to his father, did not cross the boundaries envisaged by the words "at or about the time when the fact took place" in Sec. 157 of the Evidence Act.[4]

In *Lokeman Singh* v. *State of W.B.*[5] Supreme Court observed :

> "The positional importance of PW 24 (Md. Hadis Khan) as a witness for the occurrence is significant. The incident happened in his own house and in his presence. He would thus be one of the most natural witnesses to speak about what happened in front of him. We are not told of any cause for the PW 24 to have any bias against the appellant Naso for falsely implicating him nor are we told of any difficulty for PW 24 to identify Naso as one among the assailants particularly when the witness ascribed a specific serious role to that accused. His evidence has secured corroboration from the testimony of his

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1. State of Gujarat *v.* Jaganbhai Bhagwanbhai, A.I.R. 1966 S.C. 1633 at p. 1635 : (1966) 7 Guj. L.R. 800 : (1966) 2 S.C.J. 725.
2. Nathuni Yadav *v.* State of Bihar, A.I.R. 1997 S.C. 1808 at p. 1811 : 1997 (1) Crimes 81 ; Rameshwar *v.* State of Rajasthan, A.I.R. 1953 S.C. 54 relied on.
3. State of Tamil Nadu *v.* Suresh, A.I.R. 1998 S.C. 1044 at pp. 1049-50: 1998 Cr. L.J. 1416 : (1998) 2 S.C.C. 372 : 1997 (4) Crimes 414 (S.C.); ***see* also State of Himachal Pradesh *v.* Ram Dass, 1999 Cr. L.J. 2802 (H.P.).**
4. **Mahabir Singh *v.* State of Haryana, (2001) 7 S.C.C. 148 at p. 160 : 2001 Cr.L.J. 3945 at p. 3951 ;** State of Tamil Nadu *v.* Suresh, A.I.R. 1998 S.C. 1044 : 1998 Cr.L.J. 1416 : (1998) 2 S.C.C. 372 : 1997 (4) Crimes 414 (S.C.)
5. **(2001) 5 S.C.C. 235 at p. 241,** *vide* State of T.N. *v.* Suresh, (1998) 2 S.C.C. 372 : 1998 S.C.C. (Cri.). 751.

father PW 21, Abdul Latif who said that his son told him that the Deputy Commissioner of Police took shelter in his house and that appellant Naso and some other persons (whose names were also mentioned) assaulted him. Such evidence of PW 21 is admissible under Sec. 157 of the Evidence Act as a corroborative material."

"Immediate complaint" when can be admitted as corroborative.

Section 157 is a general exception to the common law rule of evidence that hearsay evidence is inadmissible. In England such statements made by witnesses are only admitted in the case of sexual offences against women and children. An "immediate complaint" made by the person assaulted can be admitted as corroborative of the complainant's credibility and as showing consistency of conduct. This is well established in *Reg.* v. *Lillyman*[1] and *Rex* v. *Osborne.*[2]

In *Reg.* v. *Kiddle,*[3] there was a delay of three to four hours ; in *Reg.* v. *Lillyman,*[4] the period is stated to be "very shortly after". In *Reg.* v. *Rush,*[5] Wright, J., rejected a complaint made "a day after the offence was committed". In *Reg.* v. *Ingrey,*[6] Lord Russel of Kilowen rejected a complaint made a few days after. The Court of Criminal Appeal in *In re John Lee,*[7] ruled that it must depend upon the circumstances of each case whether it could be said that the complaint was made "on the first reasonable opportunity which offers itself". The wording of Sec. 157, Evidence Act, is to the effect that a statement must be made "at or about the time when the fact took place". There is a dearth of authority as to the meaning of "at or about the time". *Mangat Ravi* v. *Emperor*[8] shows that proximity of time must be established. In *Emperor* v. *Ramchandra Roy,*[9] there was an interval of 20 hours between the event and the statement sought to be put in as evidence of corroboration. The Bench considered that this interval was too long and refused to admit this statement. "At or about the time" must mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it present itself. Delayed statements are in his Lordship's opinion inadmissible. The section says that the statement must be made "at or about the time" not "at any time after the event".[10]

Duty of the prosecution.

Duty is case on the prosecution to establish the proximity of time between the taking place of the fact and the making of the statement.[11]

Criterion for evidence of corroborative value.

To be evidence of corroborative value the evidence should be by persons who had heard the occurrence before there was sufficient time for concoction. That is the criterion. The evidence of witnesses who came several hours after the occurrence has ordinarily got to be excluded.[12]

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1. (1896) 2 Q.B. 167.
2. (1905) 1 K.B. 551.
3. (1898) 19 Cox. C.C. 77.
4. (1896) 2 Q.B. 167.
5. (1896) 60 J.P. 777.
6. (1900) 64 J.P. 106.
7. (1911) 7 Cr. App. Rep. 31.
8. A.I.R. 1928 Lah. 647 : 110 I.C. 676.
9. A.I.R. 1928 Cal. 732 : I.L.R. 55 Cal. 879 : 111 I.C. 327.
10. *In re* S. Jesudas Appadurai Pillai, A.I.R.1945 Mad. 358 at pp. 358-59 : I.L.R. (1945) Mad. 821 : (1945) 1 M.L.J. 197 : 58 L.W. 111 : 1945 M.W.N. 114.
11. Mangat Rai *v.* Emperor, A.I.R. 1928 Lah. 647 at p. 650 : 29 P.L.R. 703 : 110 I.C. 676.
12. Bhupati Ghosh *v.* King, A.I.R. 1950 Cal. 327 at p. 327 : 54 C.W.N. 221.

The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction.[1]

So far as the statements of the ravished woman are concerned they can certainly be used to corroborate her under Sec. 157.[2]

Abduction.

A statement made by the abducted girl ten days or so after the alleged occurrence cannot possibly be admissible in evidence to corroborate the girl under Sec. 157, Evidence Act, because the statement would not be one made at or about the time when abduction took place.

Statement made to a person incompetent to investigate.

Had the statement however been made to a person legally competent to investigate the offence, then would it be admissible.

In *Emperor* v. *Ram Chandra Roy*,[3] the statement was made to District Judge. But the Bench held that as he had no power to investigate the commission of offence the case did not fall within Sec. 157, Evidence Act and as the statement was not made at or about the time of the occurrence it was inadmissible.[4]

13. Improvement and variations in the earlier and later statements.—The testimony of a witness cannot be held to be infirm merely on the ground of improvements and variations made by him in his earlier and later statements. It is the duty of the Court to remove the grain from the chaff.[5]

There is no bar to the use of different parts of a former statement for purposes of either contradiction under Sec. 145, or corroboration under Sec. 157 of the Evidence Act, in the same proceedings.[6]

14. Legally competent to investigate the fact.—In order that this section may apply, the statements must either be made before any person legally competent to investigate the fact, or it must be made at or about the time when the fact took place.[7] It is to be emphasized that the expression is "competent to investigate the fact and not the case".

A person legally competent must have power under some law.

In order that a person must be legally competent, he must have power under some law, statutory or otherwise.[8] A *sarpanch* is not a person legally competent to investigate the factum of identification within the meaning of Sec. 157 of the Evidence Act.[9]

The word "investigate" used in Sec. 157 of the Evidence Act is not to be understood in the narrow sense in which the word is used in the Criminal Procedure Code. It must carry its ordinary dictionary meaning in the sense of ascertainment of facts, sifting of materials, search for relevant data.[10]

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1. Rameshwar *v.* State of Rajasthan, A.I.R. 1952 S.C. 54 at p. 58 : 1952 S.C.R. 377.
2. Muhammad Afzal *v.* Crown, A.I.R. 1950 Lah. 151 at p. 154 ; Bachu *v.* King, A.I.R. 1949 Cal. 613 : but *see* Chamuddin Sardar *v.* Emperor, A.I.R. 1936 Cal. 18.
3. A.I.R. 1928 Cal. 732 : 29 Cr. L.J. 823 ; Inter in Tobarak Mondal *v.* King, A.I.R. 1949 Cal. 629.
4. Tobarak Mondal *v.* King, A.I.R. 1949 Cal. 629 at pp. 630-31 : 54 C.W.N. 8.
5. Maqsoodan *v.* State of Uttar Pradesh, A.I.R. 1983 S.C. 126 at p. 128.
6. Raj Karan Singh *v.* State of Uttar Pradesh, 1984 (2) Crimes 521 at pp. 524, 525 (All.).
7. Oriental Life Assurance Co. *v.* Narasimha, I.L.R. 25 Mad. 210.
8. *See* Kumaramuthu *v.* Emperor, A.I.R. 1919 Mad. 487 ; Emperor *v.* Ramchandra, A.I.R. 1928 Cal. 732 and Tobarak Mondal *v.* King, A.I.R. 1949 Cal. 629.
9. State *v.* Pareswar Ghasi, A.I.R. 1968 Orissa 20 at p. 24 : 33 Cut. L.T. 1193.
10. *See* Sarju *v.* State of West Bengal, (1961) 2 Cr. L.J. 71 (Cal.) ; State *v.* Pareswar Ghasi, A.I.R. 1968 Orissa 20 at p. 24 : 33 Cut. L.T. 1193.

"Investigate", meaning of

The expression "investigate" is not defined in the Evidence Act. The ordinary meaning of the word is to "enquire into".[1] Understanding it in the broad sense of "making inquiry into," the section requires that the statement should have been made before an *authority legally competent* to inquire into the fact. "Legally competent" must mean, "having power under some law, statutory or otherwise".[2] There is nothing in the Evidence Act to exclude the evidence of accomplices from the plain and express rule in Sec. 157. The former statement of an accomplice is, therefore, legally admissible to corroborate his testimony at the trial.[3] An Inspector of the Criminal Investigation Department is an officer legally competent to investigate the facts within the meaning of Sec. 157, Evidence Act.[4] Statements made by witnesses to a Sub-deputy Magistrate deputed to hold an investigation are admissible under this section.[5] As observed in *Veilaiah Kone* v. *King Emperor*,[6] a statement by a witness recorded by a Magistrate under Sec. 164, Cr. P.C., was admissible in evidence to corroborate the statement made by the witness.[7] In *Sheik Pinju* v. *State*,[8] the Court did not express any opinion whatsoever as to this point.

Accomplice evidence not excluded

Though the statement given to a Magistrate by someone under expectation of death ceases to have evidentiary value under Sec. 32 of the Evidence Act if the maker thereof did not die, such a statement has, nevertheless some utility in trials. It can be used to corroborate his testimony in Court under Sec. 157 of the Evidence Act which permits such use being a statement made by the witness "before any authority legally competent to investigate". The word "investigate" has been used in the section in broader sense. Similarly, the words "legally competent" denote a person vested with the authority by law to collect facts. A Magistrate is legally competent to record dying declaration "in the course of an investigation" as provided in Chapter XII of the Code of Criminal Procedure, 1973. The contours provided in Sec. 164(1) would cover such a statement also *vide Maqsoodan* v. *State of U.P.*[9] However, such a statement so long as its maker remains alive, cannot be used as substantive evidence. Its user is limited to corroboration or contradiction of the testimony of its maker.[10]

The words "legally competent" denote a person vested with the authority by law to collect facts.

Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before "any authority legally competent to investigate the fact" but its use is limited to corroboration of the testimony of such witness. Though a police officer is legally competent to investigate, any statement made to him during such investigation cannot be used for corroboration of the

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1. I.L.R. 25 Mad. 210.
2. *Per* majority in Muthukumaraswami Pillai Ann Seven *v.* King-Emperor, I.L.R. (1912) 35 Mad. 397 at pp. 525, 526 ; Kumaramuthu Pillai *v.* Emperor, A.I.R. 1919 Mad. 487 at p. 492.
3. *Ibid.*
4. *Ibid.*
5. Harendra *v.* Emperor, 40 C.L.J. 313.
6. A.I.R. 1923 Mad. 20.
7. Manar Ali *v.* Emperor, A.I.R. 1934 Cal. 124 at p. 125 ; Manik Gozi *v.* Emperor, A.I.R. 1942 Cal. 36.
8. A.I.R. 1952 Cal. 491.
9. A.I.R. 1983 S.C. 126.
10. Gentela Vijayavardhan Rao *v.* State of A.P., 1996 Cr. L.J. 4151 at p. 4154 (S.C.) : A.I.R. 1996 S.C. 2791 : (1996) 6 S.C.C. 241 : 1996 (3) Crimes 197 : 1996 S.C.C. (Cr.) 1290.

testimony of a witness because of the clear interdict contained in Sec. 162 of the Code. But a statement made to Magistrate is not affected by the prohibition contained in the said section.[1]

The statements made before the investigating agency during the course of investigation is not a substantive piece of evidence and the same should be construed only as a prior statement, which could be utilised by the parties concerned, either by way of corroboration or for contradiction, utilising the relevant provisions of the Indian Evidence Act.[2]

15. First Information Report and depositions.—The information given in writing or reduced to writing under Sec. 154, Cr. P.C., is generally known as the first information report, though the word "first" is not used in the Code of Criminal Procedure.[3]

Importance of examining the first information report.

In view of the notorious tendency in this country to improve upon the original statements of facts to strengthen the case as it proceeds it is of very great importance to know what was said at first, before there is time for facts to be forgotten or embellished. Fictitious importance should not however, be attached to it. First information report is not the all and end all of every criminal case and is not substantive evidence.[4]

The first information report as such is not substantive evidence. It may be used to corroborate the information under Sec. 157 of the Evidence Act.[5]

It was pointed out by the Supreme Court in *Nisar Ali* v. *State of Uttar Pradesh*[6]:

Supreme Court on evidentiary value of first information report.

"A first information report is not a substantive piece of evidence... It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses."[7]

The first information report can only corroborate or contradict the maker of it and not the prosecution case as a whole.[8]

In the case reported in *Moti Singh* v. *Emperor*,[9] it was held that—

What is first information report.

"If the police officer had commenced his investigation, any subsequent information given to him about the offence by any other person cannot be regarded as the first information report in the case..."[10]

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1. **Ramprasad *v.* State of Maharashtra, 1999 Cr. L.J. 2889 at p. 2892 (S.C.) : A.I.R. 1999 S.C. 1969 : (1999) 5 S.C.C. 30 : 1999 (5) Supreme 554 : 1999 (3) Crimes 96 (S.C.).**
2. Annadurai *v.* State, 1989 (2) Crimes, 315 at p. 320 (Mad.).
3. Mani Mohan Ghose *v.* Emperor, A.I.R. 1931 Cal. 745 : 33 Cr. L.J. 138 : 35 C.W.N. 623 : I.L.R. 58 Cal. 1312.
4. Emperor *v.* Dubai, A.I.R. 1942 Pat. 113 : 43 Cr. L.J. 90 ; Emperor *v.* Nazir Ahmad, A.I.R. 1945 P.C. 18 : 46 Cr. L.J. 413.
5. Aghuoo Nagesia *v.* State of Bihar, A.I.R. 1966 S.C. 119 at p. 123 : 1965 M.W.N. 216 : (1965) 2 S.C.A. 367 : (1965) A.W.R. (H.C.) 648 : 1965 B.L.J.R. 865 : 1965 M.P.L.J. 49 : (1966) S.C.J. 193 : 1966 S.C.D. 243 ; Mazidar Rahman *v.* State of Assam, 1977 Cr. L.J. 1293 at p. 1295.
6. 1957 S.C.R. 657 at p. 659 : A.I.R. 1957 S.C. 366.
7. *See* also A.W. Khan *v.* State, A.I.R. 1962 Cal. 641 at p. 645 ; Harnam Singh *v.* Emperor, A.I.R. 1936 Lah. 833.
8. Sagar Chandar Saha *v.* State, A.I.R. 1962 Cal. 85 at p. 86 ; Gundar Das *v.* State, A.I.R. 1952 Cal. 618 at p. 620.
9. 1948 A.L.J. 53 : A.I.R. 1948 All. 289.
10. *See* also Dr. Jainand *v.* Rex, A.I.R. 1949 All. 291 at p. 300.

In *Azimaddy* v. *Emperor*,[1] it was pointed out that the first information report if proved, may be of value as one of *res gestae*.[2]

A statement made to the police after the police have commenced an investigation should not be treated as a first information and should be inadmissible except for the purposes mentioned in Sec. 162, Cr. P.C.[3]

In *Emperor* v. *Aftab Mohd. Khan*,[4] their Lordships observed :

Section 162 (1), Cr.P.C.

> "We take the view that the words 'in the course of' in the context of this section import that the statements must be made as a step in a pending investigation to be used in that investigation. We do not think that the words 'in the course of' refer merely to that period of time which elapses between the beginning and the end of the investigation."

The view of the High Court at Patna is the same, *vide Emperor* v. *Lalji Rai*.[5] In the subsequent case of *Suba Chaudhury* v. *King*,[6] the ruling in *Emperor* v. *Aftab Mohd Khan*[7] was specifically followed.[8]

It cannot be said that because a person of the party of the accused goes first to the police station and says that some of the complainant's party has committed an offence, the real complaint against the accused must be kept off the record save on terms under Sec. 162, Cr. P.C.[9]

Where more than one person go to the police officer at the same time and make statements relating to the same offence. The police officer uses his common sense and records one statement as an information under Sec. 154. After doing that, if he chooses to record other statements, they will be in the nature of statements in the Court of the investigation.[10] It was pointed out in the case of *Gansa Uraon* v. *King-Emperor*,[11] it is possible for a sub-inspector to have more than one first information.

A report recorded by the officer-in-charge in his own name and on the basis of his own personal knowledge four days later cannot fall within Sec. 154, Cr. P.C.[12]

Procedure.

When it is wished to corroborate a witness by a previous deposition, or by a first information report, recorded under Sec. 154, Cr.P.C. these documents must be produced. Under this section the deposition of a witness given at a previous trial when

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1. A.I.R. 1927 Cal. 17.
2. Mabla Singh *v.* Emperor, A.I.R. 1931 Lah. 38 at p. 40.
3. Habib Khan *v.* Emperor, A.I.R. 1928 Pat. 634 at p. 636.
4. A.I.R. 1940 All. 291.
5. A.I.R. 1936 Pat. 11.
6. A.I.R. 1950 Pat. 44.
7. A.I.R. 1940 All. 291.
8. Tika Ram *v.* State, A.I.R. 1937 All. 755 at pp. 757-58—There is an earlier decision of the Calcutta High Court in Mani Mohan Ghose, A.I.R. 1931 Cal. 785 which by implication may be thought to lay down a different rule.
9. Osman Gani Mistry *v.* Emperor, A.I.R. 1930 Cal. 130 at p. 131 : 125 I.C. 111.
10. Mani Mohan Ghose *v.* Emperor, A.I.R. 1931 Cal. 745 at pp. 748-49 : 35 C.W.N. 623 : I.L.R. 58 Cal. 1312 : 135 I.C. 289.
11. I.L.R. 2 Pat. 517 at pp. 523 and 531 : A.I.R. 1923 Pat. 550 : 73 I.C. 561 : 24 Cr. L.J. 641.
12. Abdul Hamid *v.* State of Tripura, A.I.R. 1958 Tripura 1 at p. 8.

the accused person was absconding, was admitted in corroboration of the witness's evidence given at the subsequent trial.[1]

First Information Report when used as evidence.

The first information becomes valueless if drawn up by some person other than the proper one.[2]

The correct legal position regarding the first information report and the use to be made of it has been set out in the judgment of the Supreme Court in the case of *Nisar Ali* v. *State of Uttar Pradesh*.[3]

It is the elementary duty of the prosecution to put in the first information report in evidence, because it is the foundation on which the entire investigating machineries act. When the first information report is suppressed, it does not only create an adverse inference against the prosecution case, but a case of prejudice to the accused is also made out.[4]

A man can be contradicted by his own previous statement and if the provisions of law permitted, can be corroborated by his own previous statement made at or about the time of occurrence or otherwise as contemplated by Sec. 157 of the Evidence Act but a man cannot be contradicted by something for which he himself is not responsible. The first information report cannot be used to contradict the statements made by other witnesses.[5] It is well settled that unless a first information report can be tendered in evidence under any provision contained in Chapter II of the Evidence Act, such as a dying declaration falling under Sec. 32(1) as to the cause of the informant's death, or as part of the informant's conduct under Sec. 8, it can ordinarily be used only for the purpose of corroborating, contradicting or discrediting (under Secs. 157, 145 and 155, Evidence Act) its author, if examined, and not only other witness.[6]

First Information Report is not substantive evidence.

The first information report is not substantive evidence. It can be used for one of the limited purposes of corroborating or contradicting the makers thereof. Another purpose for which the first information report can be used is to show the implication of the accused to be not an after-thought or that the information is a piece of evidence *res gestae*. In certain cases, the first information report can be used under Sec. 32(1) of the Evidence Act or under Sec. 8 of the Evidence Act.[7]

Where the first information report was lodged within 35 minutes of the occurrence at the police station at a distance of two miles from the place of occurrence and in the aforesaid report the names of the accused as the culprits as well as the names of the eye witnesses were mentioned, it was held that this fact lends considerable corroboration to the testimony of maker of FIR regarding the participation of the accused appellants in the occurrence.[8]

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1. Queen-Empress *v.* Ishri Singh, I.L.R. 8 All. 672.
2. Peary Mohan Das *v.* D. Weston, 16 C.W.N. 145 at p. 178.
3. A.I.R. 1957 S.C. 366.
4. Ram Badan Rai *v.* State of Bihar, 1986 P.L.J.R. 105 at p. 109.
5. State of Gujarat *v.* Hirala Devji, A.I.R. 1964 Guj. 261 at p. 265 : (1964) 5 Guj. L.R. 255.
6. Shanker *v.* State of Uttar Pradesh, A.I.R. 1975 S.C. 757 at p. 758.
7. Damodar Prasad Chandrika Prasad *v.* State of Maharashtra, A.I.R. 1972 S.C. 622 at p. 625.
8. Dargahi *v.* State of Uttar Pradesh, A.I.R. 1973 S.C. 2695 at p. 2698.

16. Effect of alteration in Sec. 162, Cr. P.C.—This section should be read subject to the provisions contained in Sec. 162 of the Code of Criminal Procedure as amended by Act XVIII of 1923. The decisions in *Fanindra Narain* v. *Emperor*,[1] *Muthu Kumaraswami* v. *King-Emperor*,[2] and *Emperor* v. *Hammtaddi*,[3] which held that a police officer can orally depose to what the witness stated to him in order to corroborate him at the trial, though he cannot use the written record or put it in evidence, may now be considered obsolete. The Legislature has adopted the view taken in *Emperor* v. *Narayan*.[4]

Oral deposition by police officer.

Reading the present Secs. 161 and 162 of the Code, it is clear that the main object of the Legislature was to prohibit the use of the statements of prosecution witnesses as corroboration under Sec. 157 of the Evidence Act. The general provisions of the law with regard to the admissibility of statements made by accused persons like other admissions do not seem to be affected.[5]

Main object of Secs. 161 and 162 Cr.P.C.

From the cases that have been reported the following propositions may, as it seems, be deduced :

1st. The section applies both to statements which have been recorded under Sec. 161, Cr. P.C., as well as to statements which have not been so recorded.[6] *Contra*, the section applies only to recorded statements.[7]

2nd. The section does not apply to the statements of an accused person.[8]

3rd. (*a*) Prosecution cannot give evidence of identification before police by prosecution witnesses.[9]

(*b*) Prosecution cannot cross-examine a hostile prosecution witness by his statement before police.[10]

(*c*) Prosecution cannot corroborate a prosecution witness by his statement before police.[11]

(*d*) Prosecution cannot cross-examine a defence witness on such statement.[12]

4th. Even the Court under Sec. 165 of the Evidence Act cannot contradict any witness by such statement.[13]

5th. Prosecution is entitled to ask a prosecution or a defence witness whether he had made a particular statement before police.[14]

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1. I.L.R. 36 Cal. 281.
2. I.L.R. 35 Mad. 397 (F.B.).
3. I.L.R. 39 Bom. 58.
4. I.L.R. 32 Bom. 111 ; *see* also Queen-Empress *v.* Bhairab Chunder Chackerbutty, 2 C.W.N. 102. N.B. The position under Sec. 162 of the Cr. P.C. 1973 is similar.
5. Jagwa Dhanuk *v.* King-Emperor, A.I.R. 1926 Pat. 232 at pp. 236- 37.
6. 40 C.L.J. 313 : 30 C.W.N. 142 : 42 C.L.J. 524 : I.L.R. 6 Pat. 620 : 27 Cr. L.J. 326 : I.L.R. 6 Lah. 24 : I.L.R. 6 Lah. 171 : 89 I.C. 252.
7. I.L.R. 48 Mad. 640.
8. I.L.R. 4 Rang. 72 (F.B.) ; I.L.R. 7 Lah. 84 ; I.L.R. 5 Pat. 63 ; I.L.R. 5 Pat. 77 ; 26 Cr. L.J. 897 (Sind) ; 27 Cr. L.J. 456 (Sind) ; 27 Cr. L.J. 484 (Pat.); A.I.R. 1926 Lah. 88 ; I.L.R. 54 Cal. 237 : 44 C.L.J. 253 ; *contra*, 45 C.L.J. 15 : I.L.R. 48 Mad. 640.
9. 40 C.L.J. 313 : 42 C.L.J. 524.
10. 30 C.W.N. 503 : 26 Bom. L.R. 965.
11. 26 Bom. L.R. 965 : I.L.R. 6 Lah. 171.
12. 26 Bom. L.R. 965 ; *see* also 30 C.W.N. 142.
13. 42 C.L.J. 528.
14. I.L.R. 4 Pat. 204 : I.L.R. 53 Cal. 980.

6th. The statement, referred to in the proviso and of which the accused can get a copy, includes notes or memoranda of such statement.[1] For the stage of the trial at which the accused can ask for the copy.[2]

7th. When the deposition of a deceased witness is put in under Sec. 33 of the Evidence Act, Sec. 162, Cr. P.C., does not apply and the accused is not entitled to contradict the deposition under the proviso.[3]

It will be perceived that Sec. 162 (1), Cr. P.C., is an application of the rule against hearsay evidence contained in Sec. 60, Evidence Act. Section 162 (1), Cr. P.C., however, does more than re-state the rule contained in Sec. 60, Evidence Act, because repeals, by implication, Sec. 157, Evidence Act, so far as concerns statements made to a police officer in the course of an investigation.[4]

As has been indicated in the decision in *Badri Chaudhri* v. *King-Emperor*,[5] the provisions of the new Sec. 162 (1) of the Code of Criminal Procedure stringently exclude from use for any purpose in a criminal trial any statement to the police whether recorded or not recorded except to contradict within very strict limitations a statement made at the trial by a prosecution witness.[6]

Provisions of the section are controlled by Sec. 162, Cr.P.C.

The general provisions of the Evidence Act contained in Sec. 157 are controlled by the special provisions of Sec. 162, Cr. P.C.

If, therefore, a first information, falls under Sec. 162, Cr. P.C., it cannot be used except for the limited purpose mentioned therein.[7]

17. "In the course of".—In *Emperor* v. *Aftab Mohd. Khan*,[8] their Lordships were of the opinion that the words in the context of Sec. 162 import that the statement must be made as a step in a pending investigation to be used in that investigation, and that these words do not refer merely to that period of time which elapses between the beginning and the end of the investigation.

Their Lordships relied on a decision of Patna High Court in *Emperor* v. *Lalji Rai*.[9] In this case as well the view was taken that, where a report about the commission of an offence is given to the police at two different dates by two different persons, and one is earlier in point of time than the other, the latter report is not a statement made to a police officer in the course of an investigation and, therefore, can be used in evidence by the prosecution.

F.I.R. based on statement of accused.

It was common ground that investigation had not started when the sub-inspector recorded the statement of the accused. *Held* that the first information report which was instituted on the basis of the statement made by him was admissible in evidence.[10]

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1. 31 C.W.N. 490.
2. *See* I.L.R. 54 Cal. 307.
3. 31 C.W.N. 410 ; but *see* Sec. 158 of the Evidence Act which does not appear to have been considered.
4. Emperor *v.* Najibuddin, A.I.R. 1933 Pat. 589 at p. 592-93.
5. A.I.R. 1926 Pat. 20.
6. Ramyad Dusadh *v.* King-Emperor, A.I.R. 1926 Pat. 211 at pp. 212-13.
7. Mir Rahman *v.* Emperor, A.I.R. 1935 Pesh. 165 : 37 Cr. L.J. 225 ; *In re* M. Rangarajulu Naidu, A.I.R. 1958 Mad. 368 at p. 371 : 1958 M.W.N. 54.
8. A.I.R. 1940 All. 291 : 41 Cr. L.J. 647.
9. A.I.R. 1936 Pat. 11 : 36 Cr. L.J. 235.
10. Suba Chaudhury *v.* King, A.I.R. 1950 Pat. 44 at pp. 45, 46.

Investigation by the police, etc.

An investigation by the police does not always start immediately after the registration of the case by it. It commences with the first step taken by the police towards the ascertainment of the offence and the culprits thereof. If, after the first information report the complainant hands over a list of the stolen property to the sub-inspector, as soon as he arrives on the spot for investigation, such a list is a part of the first information report, and is admissible in evidence.[1]

A sub-inspector was told by the head constable that he had heard that there was a shooting case in the marriage house of C. The sub-inspector entered the substance of the information in the general diary and then went out to enquire into the matter. When he got to that house he took down a statement of the witness. *Held* that the statement was not inadmissible by reason of the provisions of Sec. 162 of the Code.[2] This case is very similar to the case of telgrams sent to a police station upon which the police naturally take action.[3]

18. Police diaries.—Police diaries are not admissible as substantive evidence or for corroborating the police officer, but are admissible only for the limited purpose of contradicting him.[4]

Use of ; prohibited in adducing evidence.

Section 162 of the Code of Criminal Procedure prohibits the use of the general or special diaries of the police for the purpose either of supporting the evidence of a prosecution witness or rebutting the argument of the counsel for defence. A consent or desire of the counsel for the defence cannot, however, legalize.[5]

A Magistrate can look into the general diary for the purpose of corroborating the case of the complainant.[6]

19. Private diaries.—A private diary regularly kept and containing records and facts contemporaneously made may be of some value. It can be used for contradicting or corroborating a witness or to refresh his memory as provided under Secs. 144, 157 and 159 of the Evidence Act. But such use does not make the document itself evidence. It may also come under Sec. 32 (2) if the requirements of that section are satisfied. But the entries in the diaries cannot be treated as evidence of the facts stated in it in favour of the person who has made it as against the opposite parties.[7]

20. Statement of witnesses recorded under Sec. 164, Cr. P.C.—The fact that the police had Sec. 164 statement recorded by the Magistrate would not by itself make his evidence suspect. Section 157 of the Evidence Act makes it clear that the statement recorded under Sec. 164 of the Criminal Procedure Code can be relied on for corroborating the statements made by the witnesses in the Committal Court. The Supreme Court has expressed its view that though the statements made under Sec. 164 of the Criminal Procedure Code are not evidence, it is corroborative of what has been stated earlier in the Committal Court.[8] The High Court was right in relying on the statement of the witnesses under Sec. 164

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1. Bhondu *v.* Rex, A.I.R. 1949 All. 364 at pp. 366-67 : I.L.R. (1949) All. 697 : 1949 A.L.J. 174 : 1949 A.W.R. (H.C.) 265 ; Autar *v.* Emperor, A.I.R. 1931 Oudh 74 ; Amrit Lal *v.* Emperor, A.I.R. 1933 Lah. 987.
2. *In re* Mylaswami Chetty, A.I.R. 1939 Mad. 66 at pp. 68-9 : (1938) 2 M.L.J. 750 : 1938 M.W.N. 905.
3. *Vide* Public Prosecutor *v.* Chidambaram, A.I.R. 1928 Mad. 791 : 28 M.L.W. 187 : 55 M.L.J. 231.
4. Achhaibat Singh *v.* Emperor, 61 I.C. 230 (Pat.) : 22 Cr. L.J. 374, referring to Queen-Empress *v.* Mannu, I.L.R. 19 All. 390 (F.B.) and Dal Singh *v.* King-Emperor, I.L.R. 44 Cal. 876 (P.C.).
5. Manna Lal *v.* King-Emperor, A.I.R. 1925 Oudh 1 at p. 8.
6. Asoke Prasanna Bal *v.* Emperor, A.I.R. 1930 Cal. 802 at p. 802 : 34 C.W.N. 651 : 129 I.C. 413.
7. Joseph *v.* Kuruvilla Philip, 1988 (1) K.L.T. 43 at p. 44.
8. *Vide* State of Rajasthan *v.* Kartar Singh, (1971) 1 S.C.R. 56.

as corroborating their subsequent evidence before the Committal Court.[1] The statement of alleged eye-witness recorded under Sec. 164, Cr. P.C., is not a substantive piece of evidence. It can be used only to corroborate or contradict him.[2]

To corroborate the statement admitted an evidence under old Sec. 288, Cr. P.C. the former statement of the witness given before the Investigating Officer under Sec. 164, Cr. P.C., is admissible in evidence.[3] Previous statements cannot be used to corroborate statements made prior to the trial.[4] A statement made under Sec. 164, Cr. P.C., can never be used as substantive evidence of the fact stated, but it can be used to support or challenge evidence given in Court by the person who made the statement.[5]

A statement made under Sec. 164, Cr. P.C., may be used to corroborate or contradict a statement made in the Court in the manner provided by Sec. 145, Evidence Act.[6]

Where statements of certain witnesses recorded by the Magistrate under Sec. 164, Cr. P.C. had been brought on the record merely for the purpose of corroborating the evidence given by them in Court they cannot be used for any other purpose whether by the Crown or on behalf of the accused.[7]

Corroboration of a previous statement of a witness.

In order that a previous statement of a witness can be used to corroborate the evidence given at an enquiry or trial, the necessary requisites of Sec. 157, Evidence Act, have to be complied with.[8]

The contention that if a Magistrate holding the test identification is not empowered to deal with the matter under enquiry he cannot prove the statements which were made before him under the provisions of Sec. 157, Evidence Act, is not well founded.[9]

Statements under Sec. 164 are not inadmissible merely because the Magistrate who recorded those statements was not examined.[10]

21. Dying declaration.—The statements written or verbal of relevant facts made by a person who is dead, is called a dying declaration, it is relevant under Sec. 32 of the Evidence Act, when the statement is made by the person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case, in which that person's death comes into question.[11]

When a person making a dying declaration chances to live, his statement may be relied on under this section to corroborate his testimony when examined

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1. Dhababal *v.* State of Tamil Nadu, A.I.R. 1980 S.C. 628 at p. 633.
2. Harbans Lal *v.* State, A.I.R. 1967 H.P. 10 at p. 11 ; Bisipati Padhan *v.* State, A.I.R. 1969 Orissa 289 at p. 291.
3. *In re* Velliah Kone, I.L.R. 45 Mad. 766, dissenting from Emperor *v.* Akbar Badoo, I.L.R. 34 Bom. 599.
4. Emperor *v.* Akbar Badoo, I.L.R. 34 Bom. 599.
5. Bhuboni Sahu *v.* King, A.I.R. 1949 P.C. 257 at p. 259 : 76 I.A. 147 : 1944 A.L.J. 283 : 51 Bom. L.R. 955 : 84 C.L.J. 146 : 53 C.W.N. 609 : 51 P.L.R. 311 : (1949) 2 M.L.J. 194 : 1949 M.W.N. 444.
6. Manik Gazi *v.* Emperor, A.I.R. 1942 Cal. 36 at p. 37 : 74 C.L.J. 208 : 197 I.C. 815.
7. Hari Ram *v.* Emperor, A.I.R. 1926 Lah. 122 at p. 124 : 89 I.C. 897.
8. *In re* C.W. Casse, A.I.R. 1948 Mad. 489 at p. 491 : (1948) 1 M.L.J. 404.
9. Samiuddin *v.* Emperor, A.I.R. 1928 Cal. 500 at pp. 501, 502 : 32 C.W.N. 615.
10. Emperor *v.* Lalji Ras, A.I.R. 1936 Pat. 11 at p. 13 : 16 P.L.T. 730 : 160 I.C. 181.
11. State of U.P. *v.* Maqsoodan etc., 1982 All. L.J. 1524 at p. 1527.

as the complainant in the case.[1] In the instant case statement of Ithabai was recorded by the Taluka Magistrate which was probably taken considering her condition to be serious as a prospective dying declaration. *Held* as under :

> "A statement under Sec. 32 of the Evidence Act though not relevant because in this case Ithabia survived could be treated as a former statement and could be used for corroboration under Sec. 157 of the Indian Evidence Act."[2]

When a person who has made a statement may be in expectation of death, is not dead, it is not a dying declaration and is not admissible under Sec. 32 of the Evidence Act. In the instant case, the makers of the statements are not only alive but they deposed in the case. Their statements therefore, are not admissible under Sec. 32, but their statements however are admissible under Sec. 157 of the Evidence Act as former statements made by them in order to corroborate their testimony in Court.[3]

22. Evidence as to identification out of Court.—Evidence of identification in the jail cannot be treated as substantive independent evidence in the trial. These statements are made in the course of extra-judical proceedings. When the person who made those statements are called as witnesses, then those statements become admissible, merely as evidence to corroborate or contradict their statements in Courts.[4]

Identification parades; statements made at.

Statements made by person at identification parades are nothing but statements under Sec. 164, Cr. P.C. These statements are not substantive evidence.[5]

Identification of stolen property during investigation.

In *Khabiruddin* v. *Emperor*,[6] it was held that any identification of stolen property in the presence of a police officer during investigation was a statement made to a police officer during investigation and was, therefore, within the scope of Sec. 162.

On statements made to police during investigation.

Even the fact of identification by the identifier himself apart from the communication thereof to another was considered to be within the ban of Sec. 162. This view was approved by the Supreme Court in *Ram Kishan Mithan Lal Sharma* v. *State of Bombay*.[7] In *Krishna Chandra* v. *Emperor*,[8] it has been very clearly laid down that the evidence of a test identification held by the police in course of investigation is inadmissible in law. In *Harendra Nath* v. *Emperor*,[9] it was held that a number of statements made to the Investigating Officer by witnesses at a time when they were purporting to identify an accused person by pointing him out were wrongly admitted in evidence. In *Keramat Mandal* v. *Emperor*,[10] at page 526 of the report there occurs this observation :

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1. Emperor *v.* Ram Sattu, 4 Bom. L.R. 434.
2. Namdeo Atmaram Ramteke *v.* State of Maharashtra, 1975 Mah. L.J. 36 at p. 39.
3. Maqsoodan *v.* State of Uttar Pradesh, 1983 Cr. L.J. 218 at p. 220 : A.I.R. 1983 S.C. 126 : 1982 All. L.J. 1524 : 1983 M.L.J. (Cr.) 405.
4. Nagina *v.* Emperor, 19 A.L.J. 947; Khetal *v.* Emperor, I.L.R. 45 All. 300.
5. Abdul Aziz *v.* Crown, A.I.R. 1950 Lah. 167 at p. 168.
6. 77 C.L.J. 407 : 48 C.W.N. 356 : 210 I.C. 409 : A.I.R. 1943 Cal. 644.
7. A.I.R. 1955 S.C. 104.
8. A.I.R. 1935 Cal. 311 : 1935 Cr. C. 462 : 158 I.C. 843 : 36 Cr. L.J. 1470 : I.L.R. 62 Cal. 918 : 39 C.W.N. 488.
9. A.I.R. 1925 Cal. 161 : 84 I.C. 451 : 40 C.L.J. 313 : 26 Cr. L.J. 307.
10. A.I.R. 1926 Cal. 302 : 92 I.C. 439 : 42 C.L.J. 524 : 27 Cr. L.J. 263.

"The statements that were made by the witness to the police officer and the fact of pointing out the places to him ought to have been kept back from the jury, as such facts were not brought out in evidence on behalf of the defence as provided by Sec. 162 of the Code."

The oral statements of witnesses recorded in the *panchanama* in the presence of the police at an identification parade in the course of investigation are admissible in evidence to corroborate the statements of those witnesses at the trial under Sec. 157, Evidence Act.[1] This view was taken by Kemp, J., in *Emperor* v. *Wahiduddin Hamiduddin*.[2]

23. Statement by victim of rape.—In a rape case the statement made by the complainant immediately after the occurrence is admissible as corroboration of the evidence of the complainant in Court.[3] Whether a corroboration should be considered sufficient or not is really a question of fact and the time which elapses between the occurrence and her statement has to be considered.[4]

24. Inquest report.—The statements contained in the inquest report are not substantive evidence.[5]

But where the Investigating Officer makes mention of injuries in the inquest report—a fact which he saw with his own eyes—it cannot be said that it should not read in corroboration of the evidence of the eye-witnesses.[6]

25. Post-mortem report.—The post-mortem report of the doctor is not substantive evidence. The doctor's statement in Court is alone the substantive evidence. In *Roghuni Singh* v. *Empress*,[7] *Bechar Prasad* v. *Jhuri*[8] and *Rangappa Goundan* v. *Emperor*[9] their Lordships held that the post-mortem report or a letter giving opinion of the doctor was not admissible without examination of the doctor.[10]

The post-mortem report is not evidence, even if it be used to corroborate the evidence of the medical officer. Before it can be used to corroborate, it is necessary for the doctor to describe all the injuries in his evidence.[11]

26. *Panchnama.*—A *panch* may see certain things and may himself reduce into writing what he has seen. The writing in such cases is called a *panchnama*. Again a *panch* may hear certain statement made to him and may himself reduce into writing what he himself had been told. In either of these cases a *panchnama* would not be hit by Sec. 162, Cr. P.C., because a *panchnama* having been reduced into writing by the *panch* himself is not a statement made to police officer. But if a *panch* sees or hears something and tells a police officer what he had seen or heard and the police officer then reduces into writing what the *panch* had told him of what he had seen or heard, then the *panchnama* would be hit by Sec. 162, Cr. P.C.

If the statement is made to a person who is not a police officer but in the presence of a police investigation officer, then it must be treated as having been

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1. Emperor *v.* Mahadeo Dewoo, A.I.R. 1946 Bom. 189 at p. 191 : 47 Bom. L.R. 992.
2. A.I.R. 1930 Bom. 158.
3. State of Orissa *v.* Pichika Paravatisam, A.I.R. 1963 Orissa 58 at p. 59 : Cut. L.T. 540 ; Bechu *v.* King, A.I.R. 1949 Cal. 613.
4. Parbati Debi *v.* State, A.I.R. 1952 Cal. 831 at pp. 833-34 : I.L.R. (1953) 2 Cal. 262.
5. Adi Bhumiani *v.* State, A.I.R. 1957 Orissa 216 at p. 218 : 23 Cut. L.T. 180.
6. Mukanda *v.* State, A.I.R. 1957 Raj. 331 at p. 335.
7. I.L.R. 9 Cal. 455.
8. A.I.R. 1936 All. 363 : 1935 A.L.J. 189 : 11 I.C. 49.
9. A.I.R. 1936 Mad. 426 : 1936 M.W.N. 110 : 43 M.L.W. 305 : 70 M.L.J. 447.
10. Hadi Kirsani *v.* State, A.I.R. 1936 Orissa 21 at p. 22 : 31 Cut. L.T. 823.
11. Govind *v.* State of Gujarat, A.I.R. 1937 Guj. 288.

made to him, and such a *panchnama* must also be treated under Sec. 162, Cr. P.C. A police officer may himself see or hear certain things and himself reduce into writing what he himself had seen or heard. In that case, if may be a statement of the police officer for the purpose of Sec. 157, Evidence Act. If a police officer records what he had heard, it would be hit by Sec. 162, Cr. P.C. But if the police officer reduces into writing what he himself had seen, it would not be hit by Sec. 162, Cr. P.C.[1]

A *panchnama* is not substantive evidence of the fact recorded therein.[2] Lists or memoranda or *panchnamas* can only be used by persons who sign them or prepared them to refresh their memory within the meaning of Sec. 159 of the Evidence Act.[3]

In *Emperor* v. *Mohanlal Bahabhai*[4] Chief Justice Beaumont has explained the nature and purpose of the document styled as *panchnama* as follows (p. 166) :

> ".....The *panchnama* is merely a record of what a *panch* sees, and the only use to which it can properly be put is that when the *panch* goes into the witness box and swears as to what he saw, the *panchnama* can be used as a contemporary record to refresh his memory."

These observations though made in the context of a *panchnama* pertaining to an identification parade, are applicable to all types of *panchnamas* made by the police during the investigation and bring out the nature and purpose of these documents. In Court's view, therefore, the primary and essential purpose of making such *panchnamas* is to make a record of things which occur in the presence of *panchas* and which are seen and heard by them and the purpose is never to convey or inform or impart knowledge to the police officer about the things that are seen or heard by them; the secondary purpose which is served by these *panchnamas* is that such record should serve as *aid memoir* to the *panchas* when they enter the witness-box in the Court at the time of the trial and depose about the things which they had seen and heard and such record having been made contemporaneously at about the time when the *panchas* had seen and heard the things, also serve the purpose of corroborating their evidence given at the trial. Undoubtedly, such *panchnamas* cannot take the place of substantive evidence but they merely corroborate the substantive evidence if given by the *panch* from the witness box at the trial. In other words, the use of such contemporary record being in the nature of previous statement made by the *panch* for corroborating the evidence of the *panch* is perfectly valid under Sec. 157 of the Evidence Act.[5]

27. Other instances of former statements, written or verbal, admitted as corroborative evidence.—A petition put in by a client for adjournment on the ground that his pleader's attendance could not be secured on account of *"hartal"* is admissible in a proceeding under the Legal Practitioner's Act to corroborate the evidence which the client as witness had already given.[6] Entries made in a diary of a deceased illiterate *chowkidar* may be used under this section to corroborate the actual writer or under Sec. 159 to refresh his memory.[7] Where an illiterate village *chowkidar* whose duty it is to keep a register of births and deaths, deposes to the birth or death of certain person, the entries in that register written up to his dictation under the proper date can be produced in

Adjournment applications.

Diary entries of the deceased.

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1. Miyahhai Pirbhai *v.* State, A.I.R. 1963 Guj. 188 at p. 192 : (1963) 4 Guj. L.R. 253.
2. Kadiva Kanti Bhavan Manji *v.* Ismail Mamad, A.I.R. 1955 Sau. 32 at p. 32.
3. Bhagirath *v.* State of Madhya Pradesh, A.I.R. 1959 M.P. 17 at p. 20 : 1958 M.P.L.J. 745 : 1958 J.L.J. 900.
4. (1940) 43 Bom. L.R. 163.
5. Vishnu Krishna Belurkar *v.* State of Maharashtra, (1974) 76 Bom. L.R. 627 at p. 634 : *contra see* Lakhoo *v.* State of M.P., 1985 Cut. L.S. 569.
6. Emperor *v.* Rajani, I.L.R. 49 Cal. 732 : 26 C.W.N. 589 : 35 C.L.J. 356.
7. Naina Koer *v.* Gobardhan, 2 Pat. L.J. 42 : 37 I.C. 424.

corroboration of the *chowkidar's* deposition.[1] The report of a *kanungo* making an enquiry under Sec. 148, Cr. P.C., is admissible under this section in order to corroborate his sworn testimony.[2]

28. Other cases of former statements to corroborate later testimony.—Where the landlord actually did not sign any one of the rent deeds executed in his favour he cannot refer to deeds as corroborative evidence under Sec. 157.[3]

Where a conduct in narrating an event to other witnesses is not *res gestae* and hence inadmissible under Sec. 6 of the Evidence Act, the same is admissible under Sec. 157, Evidence Act when corroborated by the witnesses to whom it was narrated.[4]

Admissibility of the contents of the letter.

The contents of a letter can be used for the purpose of corroborating testimony of its writer in Court, under Sec. 157, Evidence Act. But it cannot be used as substantive evidence.[5]

It is no doubt correct to say that *panchas* or reports made by prosecution witnesses with respect to past conduct of accused may be used to corroborate the fact reported by them in Court in a proceeding under Sec. 107, Cr. P.C.[6] The statement which a witness made to the headman could only be used in the manner provided for in Secs. 145 and 157, Evidence Act.[7] In *Kishorilal Marwari* v. *Adhar Chandra Banerjee*,[8] the mother was examined as a witness. *Held* the statement made by her in the application for guardianship could be used as a corroborative evidence in support of her testimony under Sec. 157, Evidence Act.[9]

The deposition of a witness given at a previous trial when the accused was absconding, was admitted in corroboration of the witness's evidence given at the subsequent trial.[10]

29. Corroboration of witness—Practice.—Generally, before corroborative evidence is admissible, the evidence sought to be corroborated should have been given.[11]

30. Account books may be used under this section.—A witness's account books may be used under this section.[12]

31. *Pyatpaing*, admissibility of, in evidence.—If the headman or surveyor, is called as witness and gives evidence of the terms of the report of transaction from his own memory, then *pyatpaing* is admissible in order to corroborate his tesimony under Sec. 157.[13]

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1. Baldei *v.* Abhey Ram, 12 A.L.J. 945 : 24 I.C. 540.
2. Achambit Das *v.* Sarada Prasad Halder, 12 Cr. L.J. 480 (Cal.) : 12 I.C. 88.
3. Kheman *v.* Chhotu, A.I.R. 1938 Lah. 635 at p. 637 : 40 P.L.R. 968.
4. Chander Kala, Smt. *v.* Ram Krishan, A.I.R. 1985 S.C. 1268 at p. 1270.
5. Balabhadra Misra *v.* Srimati Nirmala Sundari Devi, A.I.R. 1954 Orissa 22 at p. 26 : 19 Cut. L.T. 402.
6. Mahabir Gope *v.* Samrathi Singh, A.I.R. 1940 Pat. 252 at pp. 252-53.
7. Mi Choke *v.* Emperor, A.I.R. 1933 Rang. 119 at p. 119.
8. A.I.R. 1942 Cal. 438 at p. 439 : 199 I.C. 10 : 78 C.L.J. 61.
9. Har Chand *v.* Dewan Singh, A.I.R. 1929 All. 550.
10. Queen-Empress *v.* Ishri Singh, I.L.R. 8 All. 672.
11. 5 C.W.N. xiv.
12. Whitley Stokes, Vol. II, p. 931.
13. 3 L.B.R. 250.

32 Statement in previous deposition.—Where the plaintiffs sought to establish their pedigree by proving *inter alia* that *A* and *B* were brothers, *held* that the statement to that effect, made by one of the plaintiffs in a deposition given long before the controversy in suit arose, was admissible in evidence.[1]

33. Recitals of sale-deeds.—In *Abdul Ali* v. *Harija Bibi*,[2] it was held that the recitals made in the sale-deed had corroborative value and so were clearly admissible in terms of Sec. 157 of the Evidence Act.[3]

The arguments in favour of the admissibility of recitals of boundaries in documents relating to adjacent lands executed between strangers are contained in *Ketabuddin* v. *Nafar Chandra*[4] which was referred to shortly afterwards in *Pramatha Nath Roy* v. *Bejoy Singh Dudhuria*.[5] These arguments show that a recital of this kind may be admissible if the executant is called and deposes to the boundary, to corroborate him under Sec. 157 or if he is dead, under Sec. 32.[6] In *Thyagarajan Chetty* v. *Narayana Thevan*,[7] there was a recital of a boundary in a mortgage deed. Wadsworth, J., held that the recital admissible under Sec. 157, Evidence Act.[8]

Recitals in deeds.

158. What matters may be proved in connection with proved statement relevant under Sec. 32 or 33.—Whenever any statement, relevant under Sec. 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

SYNOPSIS

1. Object of the section ... 4941
2. Scope of the section ... 4942
3. Contradiction of statement made in 1925 in the gift of deed of 1953 ... 4942

1. Object of the section.—The object of the section is to submit the statements of persons who are dead or otherwise unavailable as witness to every possible means of contradiction or corroboration.

The deposition of a witness in a criminal case was admitted after his death in a subsequent civil suit under Sec. 33, *ante*. A witness under examination was then asked what information the deceased witness gave him soon after the occurrence. It was held that the question was admissible to corroborate the deposition of the deceased witness.[9]

Deposition of deceased witness to be corroborated under Sec. 158.

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1. Jadu Nath *v.* Mahendra Nath, 12 C.W.N. 266.
2. A.I.R. 1972 Gauhati 52 at p. 54.
3. Abdul Ali *v.* Harija Bibi, A.I.R. 1972 Gauhati 52 at p. 54.
4. A.I.R. 1927 Cal. 230 : 99 I.C. 907.
5. A.I.R. 1927 Cal. 234 : 99 I.C. 910.
6. Ram Nandan Prasad *v.* Tilakdhari Lal, A.I.R. 1933 Pat. 636 at p. 638. But *see* Ambica Charan Kundu *v.* Kumud Mohun Choudhury, A.I.R. 1948 Cal. 893 at p. 895 : 110 I.C. 521.
7. A.I.R. 1940 Mad. 450.
8. Thyagarajan Chetty *v.* Narayana Thevan, A.I.R. 1940 Mad. 450 at pp. 450, 451 : 192 I.C. 95.
9. Fool Kissory *v.* Nobin Chunder, I.L.R. 23 Cal. 441.

In *Hari Ram v. Emperor*,[1] it was held that the when the statement of a witness previously made is used as evidence under the provisions of Secs. 32 and 33, Evidence Act, then any other statement made by that witness can be used by virtue of Sec. 158, Evidence Act, for the purpose of contradicting that witness.[2]

2. Scope of the section.—This section places a person whose statement has been used as evidence under Sec. 32 in the same category as a witness actually produced in Court for the purpose of contradicting his statement by a previous statement made by him.[3]

In *Amrit Lal* v. *Emperor*,[4] a suggestion was made that a list of property alleged to have been stolen gives to implement and complete the first report may be referred to under Sec. 158 and proved under Sec. 159, Evidence Act.[5]

The provisions of Sec. 162, Cr. P.C., are specific provisions on the admissibility of statements made to the police and control the general provisions contained in Secs. 158 and 159, Evidence Act.[6]

Under Sec. 158, even prior statements of deceased persons can be admitted both for contradiction and corroboration.[7]

3. Contradiction of statement made in 1925 in the gift of deed of 1953.—A gift-deed was executed by *P* in favour of *A* in 1953. It was urged that the statement made in the gift-deed was relevant to contradict the statements made in 1925. *Held* that there was no direct contradiction of the statement made in 1925 in the gift deed of 1953.[8]

159. Refreshing memory.—A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.—Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document :

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

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1. A.I.R. 1926 Lah. 122.
2. Niamat Khan *v.* Emperor, A.I.R. 1930 Lah. 409 at p. 413.
3. Hari Ram *v.* Emperor, A.I.R. 1926 Lah. 122 at pp. 123, 124.
4. A.I.R. 1933 Lah. 987 at p. 990.
5. *See* also Avtar *v.* Emperor, A.I.R. 1931 Oudh 74 ; Emperor *v.* Narain, A.I.R. 1931 Oudh 83.
6. Bhondu *v.* Rex, A.I.R. 1949 All. 364 at pp. 366-67.
7. Sudarsana *v.* Sutharamamma, 1933 M.W.N. 1148.
8. Ramrati Kuer *v.* Dwarika Prasad Singh, A.I.R. 1967 S.C. 1134 at pp. 1139-40 : 1967 A.L.J. 277.

SYNOPSIS

1. Scope of Secs. 159 and 160 : ... 4943
—Any writing ... 4945
—Written reports of medical officers ... 4946
—Reports of post-mortem examination—Evidentiary value ... 4946
—Evidence of dying statement—Not recorded in the presence of the accused ... 4946
—*Jumma-wasil-baki* papers ... 4946
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1. Scope of Secs. 159 and 160.—Under Sec. 159 a witness may, refresh his memory by referring to any writing made by himself at the time of the transaction in question, and under Sec. 160 a witness may also testify to facts mentioned in any such document as is mentioned in Sec. 159.[1]

There is nothing in either of the Sec. 159 or 160 of the Act, limiting their scope to the use of the documents already admissible in evidence.[2]

Section 159 distinguished from Sec. 160

In Secs. 159 and 160 of the Evidence Act a distinction is drawn between the manner in which a witness may refresh his memory by referring to the writing and the testimony which he can give of facts stated in the document.[3] Section 160 of the Evidence Act applies equally when the witness states in so many words that he does not recollect and when the circumstances establish beyond doubt that this is so.[4]

Refreshing memory by reference to a document.

It is open to a witness to refresh his memory by reference to a document provided under Secs. 159 and 160 of the Evidence Act and within the limitations prescribed therein.[5]

Practice of showing to a witness his previous statement.

As a general rule there is nothing wrong in the practice of showing to a witness a statement made by that witness at some time before the witness goes into the witness box to give evidence. The sentence in question which occurs in Archbold's *Criminal Pleading Evidence and Practice*[6] reads as follows, after dealing with the situation in general as to the supply of statements made by a witness to witness :

> "Where the prosecution follows this procedure it is obviously essential that the defence are informed of what has been done as it may be relevant to the weight which can properly be attached to the witness's evidence."

In Court's opinion the wording of that sentence in Archbold[7] is too wide. The words to which exception should be taken are that it is "obviously essential" that the defence are informed of what has been done. The rest of the sentence is perfectly correct and gives the reasoning why the first part of that sentence is so worded. The Court would prefer the substitution for the words "obviously essential" the words "it is desirable". That would deal with the situation where the prosecutor is aware that statements have been seen and the information is then

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1. State *v.* Haris Chandra Kar Mohapatra, A.I.R. 1966 Orissa 189 at p. 190.
2. 16 C.P.L.R. 122 at p. 128 ; Roghuni Singh *v.* Empress, I.L.R. 9 Cal. 455 : 11 C.L.R. 569 ; Empress *v.* Somiruddin, I.L.R. 8 Cal. 211 : 10 C.L.R. 11.
3. *Vide* Mylapore Krishnasami *alias* Krishnasami Sarma *v.* Emperor, I.L.R. 32 Mad. 384.
4. Pratap Singh *v.* Emperor, A.I.R. 1926 Lah. 310 at p. 312 : I.L.R. 7 Lah. 91.
5. Republic of India *v.* G.A.N. Rajan, 1967 Cut. L.T. 239 at p. 243.
6. 38th Edn. (1973) para 488 a.
7. *Ibid.*

passed to those in charge of the defence to consider what steps may be taken by way of testing the weight of the evidence which is being tendered. Equally it covers a situation where the matter was not disclosed beforehand, but emerged during cross-examination.[1]

If the prosecution is aware that statements have been seen by witnesses it will be appropriate to inform the defence. But if, for any reason, this is not done the omission cannot of itself be a ground for acquittal. If the prosecution tell the defence that the witness has been allowed to see his statement the defence can make such use of the information as it thinks prudent, but in any event the defence where such a fact may be material, can ask the witness directly when giving evidence whether the witness has recently seen his statement. Where such information is material, it does not ultimately matter whether it is volunteered by the prosecution or elicited by the defence. If the mere fact that the prosecution had not volunteered the information were a bar to conviction, this would be an artificial and arbitrary rule more appropriate to a game or a sporting contest than to judicial process. The question for the Court is whether, in the event, the trial can be continued without prejudice or risk of injustice to the defendant.[2]

Document to refresh memory.

Where a document is used to refresh a witness's memory, cross- examining counsel may inspect that document in order to check it without making it evidence. Moreover he may cross-examine it without making it evidence, provided that his cross-examination does not go further than the parts which are used for refreshing the memory of the witness.[3] If, however, a party calls for and inspects a document held by the other party, he is bound to put it in evidence if he is required to do so.[4]

Taking down "short-notes" of the speech—If can be used in evidence.

In *Mohansingh Laxmansingh* v. *Bhanwarlal Rajmal Nahata*,[5] Abdul Satar merely said that he had attended the meeting which was addressed by Mohan Singh and took down "short-notes" of his speech. *Held* that having regard to the provisions of Secs. 159 and 160 of the Evidence Act, the notes, cannot be regarded as primary evidence of what Mohan Singh said at the meeting.

Shorthand transcripts can be brought on record by direct evidence.

In the instant case, the High Court held that the contents of shorthand transcripts could be brought on record by direct oral evidence in the manner prescribed by Sec. 160 of the Evidence Act a course the propriety of which has the support of decisions in this Court in *Laxminarayan* v. *Returning Officer*[6] and in *Kanti Prasad Jayshanker* v. *Purshottamdas Ranchhoddas*.[7] The Supreme Court observed that there was no error in the view expressed by the High Court.[8]

Fundamental difference between Secs. 159 and 160.

The fundamental distinction between the two sections is that while under Sec. 159 it is the witness's memory or recollection which is evidence, the document itself not having been tendered in evidence; under Sec. 160, it is the document which is evidence of the facts contained in it. In *Partab Singh* v. *Emperor*,[9] it was

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1. Worley *v.* Bentley, (1976) 2 All. E.R. 449 at pp. 451-452.
2. R. *v.* Westwell, (1976) 2 All. E.R. 812 at pp. 814-15.
3. *See* Gregrov *v.* Taverner, (1833) 6 C. & P. 280.
4. Wharam *v.* Routledge, (1805) 5 Esp. 235 ; Senat *v.* Senat, (1965) 2 All E.R. 504 at p. 512.
5. A.I.R. 1964 M.P. 137 at p. 146 : 1963 M.P.L.J. 498.
6. (1974) 3 S.C.C. 425 : A.I.R. 1974 S.C. 66.
7. (1969) 3 S.C.R. 400 : A.I.R. 1969 S.C. 851.
8. Ziyauddin Burhanuddin Bukhari *v.* Brijmohan Ramdass Mehra, A.I.R. 1975 S.C. 1788 at p. 179
9. I.L.R. 7 Lah. 91 : A.I.R. 1926 Lah. 310.

held that Sec. 160 of the Act applies equally when the witness states in so many words that he has no independent recollection of the precise words used, or when it should stand established beyond doubt that should be so as a matter of natural and necessary conclusion from the surrounding circumstances.[1]

Application of Sec. 160.

Again in *Krishnama Naidu* v. *Emperor*,[2] a Sub-Assistant Surgeon recorded the statement made by the deceased just before his death, which took place in April, 1930, and the former was called upon to give evidence some time in July, 1930. In the Sessions Court he just put in the recorded statement of the deceased which was admitted in evidence. It was held that he could not have been expected to reproduce the words of the deceased, and therefore, he was entitled to put in the document as a correct record of what the deponent had said at the time.

Evidentiary value of recorded statement of the deceased.

Again in *Public Prosecutor* v. *Venkatarama Naidu*,[3] the question arose how the notes of a speech taken by a police officer be admitted in evidence. It was held that it was not necessary that the officer should be made to testify orally after referring to those notes. It was quite enough if he said "I wrote down that speech and this is what I took down" and if the prosecution had done that they would be considered to have proved the words. This case refers to a decision of Lahore High Court in *Om Prakash* v. *Emperor*.[4] It was held therein that instead of deposing orally as to the speech made by the appellant, the police officer had put in the notes made by him, and that there would be no difference between this procedure and the police officer deposing orally after reference to those notes.

Manner of proof of notes of speech taken by police officer.

The same view appears to have been taken in *Emperor* v. *Balram Das*.[5]

According to Sec. 159, it is not necessary that the witness must be sure that what was reduced to writing by him is a correct record. It is enough if on reading it, the true facts are recalled to his memory. But if he does not actually recollect himself what the appellant said; if the words are not recalled to his memory, then the notes may be admitted under Sec. 160, Indian Evidence Act, if he is sure that the facts were correctly recorded in the notes.[6] In *O'Connel's* case,[7] parts of the speech were taken verbatim. They may be used both under Secs. 159 and 160.

Admissibility of notes of speech taken by police officer under Sec. 160.

Any writing.—The word "writing" used in Sec. 159, Evidence Act, includes also printed matter.[8] It is immaterial what the document is whether it be a book of account, letter, bill of particulars of articles furnished, or any other document whatsoever which is efffectual to assist the memory of the witness.[9]

Interpretation of writing used under Sec. 159.

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1. Dharma *v.* State, A.I.R. 1966 Raj. 74 at pp. 80-81 : 1965 R.L.W. 418 : I.L.R. (1965) 15 Raj. 989.
2. A.I.R. 1931 Mad. 430 : 1931 M.W.N. 167 : 33 M.L.W. 348 : I.L.R. 64 Mad. 678 : 60 M.L.J. 404.
3. A.I.R. 1943 Mad. 542.
4. 127 I.C. 209 : A.I.R. 1930 Lah. 867.
5. A.I.R. 1922 Cal. 382 (2) : I.L.R. 49 Cal. 358 : 71 I.C. 685.
6. Mylapore Krishnasami *alias* Krishnasami Sarma *v.* Emperor, I.L.R. 32 Mad. 384 at p. 395.
7. I.L.R. 32 Mad. 384.
8. *See* General Clauses Act, 10 of 1897, Sec. 3, sub-section (58) ; Ram Chandra *v.* Emperor, A.I.R. 1930 Lah. 371 at p. 372 : 120 I.C. 798.
9. *See* cases in Taylor's *Evidence*, Secs. 1406, 1410 Burr, Jones, *Evidence*, Secs. 878, 880, 887 *e.g.* a horoscope; Harbahadur Lal *v.* Chandraj Bahadur, A.I.R. 1918 Oudh 371 : 48 I.C. 400 : 21 O.C. 298 ; 5 O.L.J. 655 ; Banwari Lal *v.* Mahesh, A.I.R. 1918 P.C. 118 : 45 I.A. 284 : I.L.R. 41 All. 63 : 49 I.C. 540 : 23 C.W.N. 577 : 1919 M.W.N. 490 : 6 O.L.J. 161 : 21 O.C. 228 (a memorandum by witness) ; Keyarsosp *v.* Garbad, A.I.R. 1930 Nag. 24 (1) : 120 I.C. 224 ; Maikunda Ram *v.* Ganga Ram, 23 I.C. 893 : 10 N.L.R. 44 ; Gunn., pp. 313-14.

Written reports of medical officers.—Written reports of medical officers are not legal evidence.[1] Medical reports can prove nothing.[2]

Reports of post-mortem examination—Evidentiary value.—The report of a medical man on his post-mortem examination cannot be treated as evidence and no facts can be taken from it.[3] The report can only be used by the doctor under Sec. 159, Evidence Act, for refreshing his memory while under examination.[4]

Evidence of dying statement—Not recorded in the presence of the accused.—The dying statement of a deceased person, if not recorded in the presence of the accused, cannot be admitted in evidence to prove the statement, but the statement may be proved in the ordinary way by one who heard it, and he may have recourse to the writing to refresh his memory, if necessary.[5]

Jumma-wasil-baki papers.—*Jumma-wasil-baki* papers may be used to refresh the memory at the time of giving evidence as to the amount of rent payable.[6]

Admissibility of certain documents.

Collection papers.—Collection papers are no evidence *per se.* The person who has collected rent may merely use them for the purpose of refreshing his memory.[7]

Police diaries.—*Queen-Empress* v. *Mannu.*[8] So far as this section is concerned, it has been unanimously held by the Full Bench that the special diary may be used by the police officer who made it, *and by no witness other than such officer*, for the purpose of refreshing his memory. If so used, the accused person or his agent has a right to see that portion of the diary which has been referred to for the purpose of refreshing the memory, that is to say, the accused person or his agent is entitled to see the particular entry which has been referred to, and so much of the diary as in the opinion of the Court is necessary in that particular matter to the full understanding of the particular entry so used but no more and to cross-examine the police officer thereupon.

Use of police diary for refreshing the memory.

The privilege given to a police diary may extend to the police officer's version or summary of the statements made to him but it does not extend to the statements themselves.[9]

Extension of privilege given to police diary.

If the Court invites the witness to refresh his memory with reference to the writing (police diary) the witness is under an obligation to do so.[10] The law does not entitle the accused to an inspection of anything more than that portion of the police dairy from which the police officer who was examined as a prosecution witness refreshed his memory.[11]

Obligation to refresh memory.

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1. 2 W.R. (Cr.) Letters, p. 14.
2. 6 W.R. (Cr.) Letters, p. 3.
3. Roghuni Singh *v.* Emperor, I.L.R. 9 Cal. 455 : 11 C.L.R. 569 : *see* also 16 C.P.L.R. 122 at p. 128 : 4 C.W.N. 129 ; Mohammad Yusif *v.* Emperor, A.I.R. 1930 Sind. 225 ; Vidyamoti *v.* State, A.I.R. 1953 H.P. 82.
4. Queen-Empress *v.* Jadub Das, I.L.R. 27 Cal. 295 ; Rangappa Goundan *v.* Emperor, A.I.R. 1936 Mad. 426 : 1936 M.W.N. 110 : 43 M.L.W. 305 : 70 M.L.J. 447 : 161 I.C. 663 : I.L.R. 59 Mad. 349 ; Ramaswami, *In re*, A.I.R. 1928 Mad. 336.
5. *In re* Samiruddin, I.L.R. 8 Cal. 211 : 10 C.L.R. 11 ; Nga Mya Da *v.* Emperor, A.I.R. 1936 Rang. 42 at p. 43.
6. Rajanikanth Biswas *v.* Ram Nath Neogy, I.L.R. 10 Cal. 244.
7. *See* Nathu Sheikh *v.* Queen-Empress, I.L.R. 11 Cal. 405 at p. 406.
8. I.L.R. 19 All. 390.
9. *See* Banerji, J., in Queen-Empress *v.* Mannu, I.L.R. 19 All. 390.
10. Harkhu *v.* E., 19 A.L.J. 76.
11. Lachmi Singh *v.* King-Emperor, 23 Cr.L.J. 591 : (Pat.) I.L.R. 2 Pat. 74.

In *Mohiuddin Khan* v. *King-Emperor*,[1] the Sub-Inspector when asked to refresh his memory from the diaries, refused to do so.

Held that the Magistrate should have compelled him to do so.

Police diaries cannot be legally used as substantive evidence.[2]

Special diary, evidentiary value of.—The entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained.[3]

Evidentiary value of dates and other contents of special diary.

Statements of witnesses taken down in writing, such as are referred to in Sec. 162, should not be entered in the special diary. The accused can only see the diary if it is used by the police officer to refresh his memory, or if the court uses it to contradict the police officer.[4]

Special diary not to record statement of witness.

Statement of a person recorded under Sec. 161, Cr. P.C.—The statement of a person recorded under Sec. 161, Cr. P.C., is inadmissible under that section; but it may be used by the police officer who recorded it, for the purpose of refreshing his memory.[5] Statement to police officer reduced to writing, how far can be used as evidence, see *R.* v. *Sitaram Vithal*,[6] *R.* v. *Uttamchand Kapurchand*.[7] In the matter of *Mohomed Ali Hadji* v. *Queen-Empress*,[8] *Sheru Sha* v. *Queen-Empress*,[9] cited under Sec. 155.[10] A statement made by witness to police during investigation cannot be used for the purpose of the witness refreshing his memory in view of the provisions of Sec. 162, Cr. P.C.[11]

Witness not to use his statement for refreshing memory made during investigation.

Panchnama.—A *panchnama* can never be treated as substantive evidence of the facts recorded therein. The *panchnama* is useful only to corroborate or contradict the *panch* witness or to refresh his memory.[12]

2. Statements in the gift-deed.—Statements in the gift-deed would be admissible in view of Sec. 159.[13]

3. Horoscope.—Horoscope can be used to help in proving the date of birth stated in it only under Sec. 159 or Sec. 160 of the Evidence Act.[14] Horoscope can be used both as corroborative or rebutting evidence and for the purpose of refreshing the memory.[15]

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1. A.I.R. 1924 Pat. 829 at p. 830.
2. Queen *v.* Hurdut Surma, 8 W.R. (Cr.) 68.
3. Queen-Empress *v.* Mannu, I.L.R. 19 All. 390.
4. Hafiz Mohammad Sani *v.* Emperor, A.I.R. 1931 Pat. 150 at p. 151.
5. R. *v.* Steward, I.L.R. 31 Cal. 1050.
6. I.L.R. 11 Bom. 657.
7. 11 B.H.C.R. 120.
8. I.L.R. 16 Cal. 612.
9. I.L.R. 20 Cal. 642.
10. *See* also Queen-Empress *v.* Mannu, I.L.R. 19 All. 390.
11. Superintendent and Remembrancer of Legal Affairs, Bengal *v.* K. Zahiruddin, A.I.R. 1946 Cal. 483 at p. 487 ; 223 I.C. 408 ; *see* also Zahiruddin *v.* Emperor, A.I.R. 1947 P.C. 75 : 74 I.A. 80 : 1947 A.L.J. 379 : 1949 A.W.R. (P.C.) 21 : 49 Bom. L.R. 521 : 51 C.W.N. 555.
12. Kadiya Kanbi Bhavan Manji *v.* Ismail Mamad, A.I.R. 1955 Sau. 32 at p. 32 : *In re* Koliseetha Rami Reddi, A.I.R. 1939 Mad. 766; Baloch Pirwali *v.* Emperor, A.I.R. 1933 Sind 220 at p. 222.
13. Ramrati Kuer *v.* Dwarika Prasad Singh, 1967 A.L.J. 277 at p. 282.
14. Shankergir Guru Motigir *v.* Chinnuji, A.I.R. 1923 Nag. 164 at p. 164.
15. Har Bahadur Lal *v.* Chand Raj Bahadur, A.I.R. 1918 Oudh 371 at p. 372.

4. Memoranda kept by a witness.—Memorandum kept by witness can used in evidence not by itself but as corroborating him or refreshing his memory

5. Instance of refreshing memory.—See *Reg.* v. *Uttamchand Kapurchand Emperor* v. *Samiruddin*,[3] *Raghuni Singh* v. *Empress*,[4] *Queen-Empress* v. *Sitar Vithal*.[5]

Madhya Pradesh High Court's view.

In *Mohansingh Laxmansingh* v. *Bhanwarlal Rajmal*,[6] it was held that und Sec. 159 of the Indian Evidence Act the document used to refresh memory is n by itself evidence and that the document can acquire so evidentiary value under Sec. 160 of the Indian Evidence A subject to the conditions mentioned therein. But, in the ca reported in *Sri Aswini Kumar* v. *Union Territory of Tripura*,[7] the prosecution witne refreshed his memory by looking into a certified copy. *Held* that such procedu is not hit by Sec. 159 of the Indian Evidence Act.[8]

Witness to be permitted to refer to account books, etc.

Where a witness has to depose to a large number of transactions there nothing wrong in allowing the witness to refer to the accou books and the documents while answering the questions p to him in his examination.[9]

Witness when to be compelled to refresh memory.

In *Emperor* v. *Kali Charan Chunari*,[10] it has been pointed out that there is authority for saying that a witness can be compelled to refre his memory from any document unless the document is eith in the possession of the party who desires to put it to t witness or is at least such as he can insist on having produced. *In the matter of petition* of *Jhaku Mahton*,[11] it has been observed by Field., J., that "the Sessions Jud was not bound to compel the witness to look at the so-called diary in order refresh his memory; and that it was wholly within his discretion whether should do so or not."

6. By whom document may be written.—The writing may have been ma either by the witness himself, or by others.[12]

Papers or books that may be referred for refreshing.

Thus, a solicitor may refer to his diary,[13] or an ordinary witness to newspaper report read by him when the facts were fresh in his mind,[14] or official shorthand writer to his notes at trial.[15] And workman's time-book may be used to refresh the memory the cashier,[16] or a log-book kept by the mate, and inspect by the captain to refresh the memory of either.[17] S depositions taken before a Magistrate or Coroner may be referred to at the tri

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1. *See* observations at page 47 in Mukundram *v.* Dayaram, (1914) 10 N.L.R. 44.
2. 11 B.H.C.R. 120.
3. I.L.R. 8 Cal. 211 : 10 C.L.R. 11.
4. I.L.R. 9 Cal. 455 : 11 C.L.R. 569.
5. I.L.R. 11 Bom. 657.
6. A.I.R. 1964 M.P. 137.
7. A.I.R. 1969 Tripura 26 at p. 29.
8. *Vide* Bhika *v.* Emperor, A.I.R. 1924 Lah. 605.
9. State of Andhra Pradesh *v.* Cheemalapati Ganeswara Rao, A.I.R. 1963 S.C. 1850 at p. 18
10. I.L.R. 8 Cal. 154 : 10 C.L.R. 51
11. I.L.R. 8 Cal. 793 : 12 C.L.R. 233.
12. R. *v.* Mills, (1962) 3 All E.R. 288 at p. 301.
13. R. *v.* Dexter, 19 Cox. 360 ; R. *v.* Bass, (1953) 1 Q.B. 680.
14. Dyer *v.* Best, 4 H. & C. 189.
15. James *v.* James *ex rel* 21st May, 1919, *per* Roche, J.
16. R. *v.* Langton, 2 Q.B.D. 296.
17. Anderson *v.* Whalley, 3 C. & K. 54; Burrough *v.* Martin, 2 Camp. 112.

either by the witness who signed,[1] or the clerk who wrote them.[2] A person who gives information about records may look at them to refresh his memory,[3] but in general if the witness knew the fact only from his document, record, etc., the original document, record, etc. must be put in the evidence, and properly proved by other means,[4] and a shorthand writer has been allowed to prove a speech from a partial note thereof taken by him.[5]

7. **At the time of the transaction.**—It is essential only that the witness should have read the document at or soon after the transaction to which it relates.[6]

Document to be referred to by witness when to have been written.

The document must have been written either at the time of the transaction or so shortly afterwards that the facts were probably fresh in his memory.[7] A delay of a fortnight may not be fatal;[8] but an interval of several weeks,[9] or six months,[10] has been held to exclude. The documents, however, must not have been written *post litem motam* in any event.[11] "That the paper was not drawn up about the time of the events is not a fault. The collection may be equally refreshed by a recent note as by some contemporaneous record.

"There is adequate authority for the result thus required by principle.[12] Yet the greater number of decisions, and most of the *obiter dicta*, announce as a requirement that the memorandum, used must have been made 'contemporaneously or nearly so' with the events 'at or near the time' with the same varying phrases used in the rule for Past Recollection."[13]

"In order that the past recollection may be one worth trusting, it must have been sufficiently fresh and vivid to be probably, accurate.[14]

Recollection when worth trusting.

"Its own peculiar circumstances must govern each case raising this question. Usually, however, if the witness swears positively, that the notes though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will be allowed to use them, though drawn up a considerable time after the transactions had occurred.[15] If, however, the memoranda were prepared subsequently to the event at the instance of the party calling the witness, or of his solicitor, they can in no case be permitted to be used, since a door might thus be opened to the greatest fraud.[16]

Memoranda prepared at the instance of the party calling witness not permissible evidence.

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1. R. *v.* Williams, 6 Cox, 346; Wood *v.* Cooper, 1 C. & K. 645.
2. R. *v.* Mann, 49 J.P. 743.
3. R. *v.* Bryant and Dickson, (1946) 31 Cr. App. R. 146.
4. Doe *v.* Perkins, (1790) 3 T.R. 749.
5. R. *v.* O'Connell, Arm. & Tr. 165-167; Phipson's *Evidence*, 10th Ed., Sec. 1527 at pp. 586-87.
6. Ramchandra *v.* Emperor, A.I.R. 1930 Lah. 371 at p. 373.
7. Burrough *v.* Martin, 2 Camp. 112.
8. R. *v.* Langton, 2 Q.B.D. 296.
9. R. *v.* Kinloch, 25 How. St. Tr. at pp. 934-37.
10. Jones *v.* Stroud, 2 C. & P. 196.
11. The Dysart, Peerage, 6 App. Cas. 489 497; Phipson's *Evidence*, 10th Ed., Sec. 1528 at p. 587.
12. Neff *v.* Neff, 96 Conn. 273 : 114 Atl. 126 (detective allowed to refresh her memory by reference to the stenographer transcript of notes taken from witness dictation).
13. Wigmore, Vol. III, Sec. 761 at pp. 105-06.
14. *Ibid.*, Sec. 745 at pp. 78-79.
15. R. *v.* Sir A. Gordon Kinloch, (1795) 25 How. St. Tr. 937 (Sc.).
16. Taylor's *Evidence*, 10th Ed., Sec. 1407 at pp. 1013-14.

In *Pannalal Shaw* v. *Nanigopal Biswas*,[1] the doctor when he entered into the witness-box was given a slip of paper by his pleader. After looking at the slip of paper the doctor deposed about the injuries found on the complainant. *Held* that the doctor should not have been allowed to refresh his memory from this slip of paper. There is nothing to show what the slip of paper was and when it was made.

Doctor entering into the witness-box and was supplied by a slip of paper to refresh his memory.

160. Testimony to facts stated in document mentioned in Sec. 159.—A witness may also testify to facts mentioned in any such document as is mentioned in Sec. 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books correctly kept, although he has forgotten the particular transactions entered.

SYNOPSIS

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1. Requirement of Sec. 160.—In the case reported in *Kanti Prasad Jayshankar Yagnik* v. *Purshottamdas Ranchhoddas Patel*,[2] the petitioner sought to prove the speeches by producing members of the Police Force, as witnesses, who had under instructions of Government taken down notes of the speeches and reported them to their officers. The High Court relied on the reports of these members of the Police Force and held that their reports were correctly recorded and fairly represented the speeches made by Shambhu Maharaj. The reports were written by witnesses themselves at the time of the speeches or soon afterwards when the speeches were fresh in their memory. The appeal under Sec. 116-A of the Representation of People Act, 1951, was directed against the judgment and order of the High Court. In this particular case, the witnesses were giving their testimony in Court after a lapse of nearly nine months. It may be implied in this case that the witnesses had no specific recollection of the facts. The requirements of Sec. 160 were satisfied in this case.

It seems that it is not necessary that a witness should specifically state that he has no specific recollection of the facts and that he is sure that the facts were correctly recorded in the document, before the document can be used under Sec. 160. It is enough if it appears from his evidence that these conditions are established.[3]

2. Limits of the rule.—Notes of the impression made on a person's mind by a speech, are inadmissible under this section to prove the words used.[4]

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1. A.I.R. 1949 Cal. 103 : 52 C.W.N. 922.
2. A.I.R. 1969 S.C. 851 at pp. 852, 853, 854 : (1969) S.C.J. 351.
3. Kanti Prasad Jayshanker Yagnik *v.* Purshottam Das Ranchhoddas Patel, A.I.R. 1969 S.C. 851 at p. 853 : (1969) 2 S.C.J. 351 ; Contra *see* Manohar *v.* State, 1983 U.P. Cr.R. 1.
4. Mylapore Krishnaswami *alias* Krishnaswami *v.* Emperor, *per* Sankaran Nair, I.L.R. 32 Mad. 384.

Witness permitted to refer to the entries made by his clerk.

A witness can be allowed to refresh his memory by referring to entries made not by himself but his clerk, though independently of the register the witness had no recollection of the transactions recorded therein.[1]

The meaning of the word 'sure' is that the witness must satisfy the Court with reference to ordinary probabilities, of his right to be sure that the record relied on him is correct.[2]

3. Applications of Secs. 159 and 160.—Section 160 deals with a case of the following kind : "*A*, a grocer, sues *B* for the price of goods sold some time previously, ...The shop-man is called, who says that, ...he has no recollection of the particular transactions, but, they are all contained in a book... if the conditions...as stated in Sec. 159 be satisfied, then under Sec. 160 the witness may look at the book, and if he is prepared to state upon oath that the entries are correct, he may read them out of the book."[3] According to Sec. 159, it is not necessary that the witness must be sure that what was reduced to writing by him is a correct record. If, on reading it, the true facts are recalled to the memory, he can tesify to such facts on oath.[4]

Witness when permitted to look to books.

Substitution of memory under Sec. 160.

4. Witness under obligation to refresh memory.—In *Harkhu* v. *Emperor*,[5] it was held that if a witness suffers from a lapse of memory, which can be remedied by reference to any memorandum prepared by him at the time, and the Court invites him to refresh his memory with reference to the writing, the witness is under an obvious obligation to do so. A similar view was taken in *Mohiuddin Khan* v. *Emperor*,[6] where it was held that the Court in such circumstances should require a witness to refresh his memory when such refreshment seems necessary.[7] In *Empress* v. *Kali Churn Chunari*,[8] since the accused was not entitled to call for the police diaries, it was apparently considered undesirable that an attempt should be made to obtain access to their contents by the indirect means of asking a witness to refresh his memory by reference to them. In *Empress* v. *Jhubboo Mahton*,[9] it was held that, although reference had been made to the police diary, what was really meant was the statements of witness attached thereto and the statement was not necessarily a part of the diary so that the provisions of Sec. 126 (now Sec. 172) would not apply.

Witness to refresh memory when asked by Court.

Witness to refresh memory when necessary.

Police diaries when and how much accessible to the accused.

5. Skilled witnesses.—Skilled witnesses may refresh their memory by referring to professional treatises,[10] tables, calculations, lists of prices, and the like. For instance, an actuary may refer to "the Carlisle Tables" when called upon to give evidence respecting the value of an annuity on joint lives,[11] an architect might, it is presumed, refresh his memory with any price list of generally acknowledged correctness. A

Skilled witness when and what to refer to refreshing memory.

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1. Abdul Salim *v.* K.E., I.L.R. 49 Cal. 573 : 35 C.L.J. 279 : 26 C.W.N. 680.
2. M.S. Yesuvadiyan *v.* P.S.A. Subha Naicker, 52 I.C. 704 (Mad.).
3. Mark, *Evidence*, p. 111.
4. *In re* Mylapore Krishnaswami *alias* A. Krishnaswami Sarma, 5 M.L.T. 393 : 9 Cr.L.J. 456.
5. A.I.R. 1921 All. 86 : 65 I.C. 575.
6. A.I.R. 1924 Pat. 829.
7. *See* also Fatnaya Lal Khan *v.* Emperor, A.I.R. 1942 Lah. 89 at p. 90. But *see* Empress *v.* Kali Churn Chunari, I.L.R. 8 Cal. 154 and Empress *v.* Jhubboo Mahton, I.L.R. 8 Cal. 719.
8. I.L.R. 8 Cal. 154 : 10 C.L.R. 51.
9. I.L.R. 8 Cal. 739 : 12 C.L.R. 233.
10. By Sec. 159 of the Indian Evidence Act, 1872, "an expert may refresh his memory by reference to professional treatises.
11. Rowley *v.* London & N.W. Ry. Co., 1873 L.R. 8 Ex. 221.

physican may strengthen his recollection by referring to books which he considers to be works of authority.[1]

6. **Right to look at document used to refresh memory—Practice.**—The opposite-party has a right to look at any particular writing, before or at the moment when the witness use it to refresh his memory.[2]

Right to inspect note book.

If the defence witness makes a reference to a private note book and practically reads out his deposition *verbatim* from the said book, the prosecution has a right to inspect and use the same for purpose of cross-examination as provided under Sec. 161 of the Evidence Act.[3]

[4]**161. Right of adverse party as to writing used to refresh memory.**—Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

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1. Rules as to refreshing memory discussed.—It is not necessary that the witness, after having seen the writing, should have any *independent or specific recollection* of the facts stated therein. It will be sufficient if he remembers that he has seen the paper before, and is sure that when he saw it, the facts *were correctly recorded therein* (Sec. 160). It has even been held to be sufficient if the witness, having no recollection of the circumstances, or having before seen the paper, can recognize his signature or writing, and so vouch for the accuracy of the memorandum. Where the witness had become *blind* since the writing was made, it was held that it might be read over to him. A writing used to refresh the memory of a witness does not thereby itself become evidence. It is not necessary therefore that writing should be admissible in evidence in order to be used. Section 159 substantially follows the English rule as to *the time when the writing must have been made*, this rule being that a writing can be used to refresh the memory of a witness only where it has been made or its accuracy recognized *at the time of the facts in question or at furthest so recently afterwards as to render it probable that the memory of the witness had not then become defective.* Under Indian, as well as English, law the writing may have been made by *some other person*, provided the witness examined it and knew it to be correct when the facts were fresh in his mind.[5]

What is sufficient for refreshing memory.

Writing used to refresh memory, not evidence.

English rule as to the time of writing referred to.

Writing referred to may be by some other person.

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1. Collier *v.* Simpson, (1831) 5 C. & P. 74 (Tindal, C.J.) ; Taylor's *Evidence*, 10th Ed., Sec. 1422 at p. 1027.
2. *Per* Field, J., in Empress *v.* Jhubboo Mahton, I.L.R. 8 Cal. 739.
3. Republic of India *v.* G.A.N. Rajan, A.I.R. 1967 Orissa 115 at p. 116 : 38 Cut. L.T. 239.
4. As to the application of Sec. 161 to police-diaries, *see* the Code of Criminal Procedure, 1898 (Act 5 of 1898), Sec. 172, *now see* Code of Criminal Procedure, 1973 (Act 2 of 1974), Sec. 172.
5. R. *v.* Williams, 6 Cox. 343 ; Taylor's *Evidence*, Secs. 1267, 1410, 8th Ed.

Use of previous deposition to refresh memory.

When the witness whose deposition is recorded under Sec. 512 (now Sec. 299), Cr. P.C., appears in Court his previous deposition may be read out to him to refresh his memory.[1]

Witness to refer to register kept by *gomastha* for refreshing memory.

When certain bonds had been destroyed by fire, it was held that a register kept by the plaintiff's *gomastha* of the names of the attesting witnesses, might be referred to by a witness for the purpose of refreshing his memory.[2]

Lists of discovery of stolen property can no doubt be used by the person who actually wrote them in order to refresh their memory at the time of giving evidence, but they are not themselves evidence.[3]

Before a witness is allowed to refresh his memory from any writing made by him the requirements of Sec. 159, Evidence Act, should be complied with.[4]

Section 159, Evidence Act, does not require that the writing which is used to refresh his memory should itself be admissible in evidence.[5]

Any writing referred to under the provisions of Sec. 159 or 160, Evidence Act, must be produced and shown to the opposite-party if he requires it. But neither of these sections renders the document itself admissible as evidence. What is admissible under these sections is the memory of the witness as it stands after refreshment. It is permissible for this purpose to make use of documents which are not themselves admissible in evidence.[6] There is a common practice in the State of Punjab of referring to statements in the first information reports, medico-legal reports and so forth as if they were evidence.[7]

Witness when to refer to documents prepared by him.

One fails to see how Sec. 159 can render the notes of the speech inadmisible in evidence.[8]

Witness for refreshing memory to refer to account books refused by Court to be put in evidence.

A witness may be permitted to refresh his memory by reference to account books, althogh the Court refused to allow the books to be put in evidence on the ground that they were not produced within the proper time.[9]

When a witness wants to refresh his memory under Sec. 159, Evidence Act, he is to do so by referring in Court to the document which he had read at or near the time of the transaction.[10]

2. Use of a copy to refresh memory.— "Whether the witness can refresh his memory by reference to a mere copy of his original memorandum, is" says Mr. Taylor, "a question of some difficulty and doubt. In several cases he has been

1. Bhika *v.* E., 76 I.C. 31 (Lah.).
2. Tarak Nath Malik *v.* Jeamat Noshyo, I.L.R. 5 Cal. 353.
3. Hazara Singh *v.* E., 82 I.C. 707 (Lah.).
4. Pannalal Shaw *v.* Nanigopal Biswas, A.I.R. 1949 Cal. 103 : 52 C.W.N. 922.
5. Emperor *v.* Mahadeo Dewoo, A.I.R. 1946 Bom. 189 at p. 191 : 47 Bom. L.R. 992 ; Abdulla *v.* Emperor, A.I.R. 1933 Lah. 716 : I.L.R. 14 Lah. 290.
6. Baloch Pirwali *v.* Emperor, A.I.R. 1933 Sind 200 at p. 222.
7. Mohammad Salabat *v.* Emperor, A.I.R. 1937 Lah. 475 at p. 476 : 39 P.L.R. 290 : 170 I.C. 253, Proper course pointed out.
8. Om Prakash *v.* Emperor, A.I.R. 1932 Lah. 867 at p. 869 : 127 I.C. 209-10 Section 159 explained.
9. Jewan Lal Daga *v.* Milmani Chaudhuri, A.I.R. 1928 P.C. 80 at pp. 81-82 : 26 A.L.J. 124 : 30 Bom. L.R. 305 : 47 C.L.J. 302.
10. Ram Chandra *v.* Emperor, A.I.R. 1930 Lah. 371 at p. 372 : 120 I.C. 798.

allowed to do so, where having looked at the copy, he was enabled to *swear positively to the facts from his own recollection.* Even then it may be questionable whether the copy should be used, so long as the original is in existence and its absence unexplained for there is much weight in the remark[1] of Mr. Justice Patterson, that the rule requiring the production of the best evidence is equally applicable, whether a paper be produced as evidence in itself or be merely used to refresh the memory. The case of *Burton* v. *Plummer*[2] in no way contravenes this rule. There the Court very properly regarded the ledger as an original, and allowed the witness to refresh his memory thereby, without accounting for the absence of the waste-book. So, in *Horne* v. *Mackenzie*,[3] the report seems to have been treated in the light of an original document."[4]

Copy whether usable when the original in evidence.

The refreshing of memory from entries in ledger.

The Indian Act adopts the principle of the English law, in treating the copy as primarily not admissible; though it provides for its reception under the leave of the Court, in the case in which the non-production of the original is sufficiently accounted for.

Rules as to reception of copies according to Indian law.

According to English law, the memory may be refreshed previously to the trial, without the production of the document there, however much its absence might be matter of observation.

Production of instrument of refreshment.

The Indian Act would rather appear to be restrictive to a refreshment in Court; and it goes on to provide that the writing should be produced, and may be seen, by the adverse party.

The practice in England awards to the opposite side a right to the inspection of all that is made use of for the purpose of refreshment; and the opponent is entitled to cross-examine, not only on the particular part referred to, but on the document generally. It would be otherwise, however, were a paper merely put into the hand of the witness to prove handwriting, or did the paper itself fail to produce the required refreshment.

Inspection of, and cross-examination upon it.

It is to be observed that Sec. 160, is silent as to the use of a copy in this particular case.[5]

The Act does not require that the copy shall have been made by the witness himself, or in his presence, or so as to enable him to swear to its accuracy.[6]

Copy referred not necessarily to have been made by witness.

3. Right of opposite-party to see document.— In *Empress* v. *Jhubboo Mahton*,[7] it was held by Field, J., that the opposite-party has a right to look at any particular writing before, or at the moment when the witness uses it to refresh his memory in order to answer a particular question; he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.

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1. Burton *v.* Plummer, 2 Adolphus and Ellis's Rep. 344.
2. 2 Adolphus and Ellis's Rep. 344.
3. 2 Adolphus and Ellis's Rep. 341.
4. Sections 1265, 1266 ; Secs. 1408, 1409 8th Ed.
5. *See* Abdul Salim *v.* King-Emperor, I.L.R. 49 Cal. 573.
6. Whitely Stokes, Vol. II, p. 932 ; *see* also Markby on *Evidence* p. 111.
7. I.L.R. 8 Cal. 739 : 12 C.L.R. 233.

The rule of English law is similar, and the adverse party, by looking at the writing or examining the witness respecting the entries, which he has used to refresh his memory, does not adopt the document as part of his evidence. But it might be otherwise if he were to ask questions as to the other parts of the document.[1]

Adverse party not to look at the documents failing to refresh witness's memory.

The transcribed notes of the speeches were given to the elected candidate on demand and he has cross-examined the witnesses. But counsel says that the notes of speeches are in short-hand which he cannot decipher at all. According to him the notes must have been recorded in the language which can be understood by the adverse party. The Court are unable to appreciate this extreme contention. It means that the notes of a speech recorded in Bengali or Oriya will be inadmissible if the advere party is ignorant of that script and language. Not any uniform rational principle, but the literacy and multi-linguality of the adverse party will determine the admissibility of document. This interpretion of Sec. 161 Evidence Act, is absurd as well as impracticable.[2]

Notes of speech recorded in short hand.

Section 172, Cr. P.C. no doubt confers an absolute right on the Court to inspect all police diaries. It is not possible to hold that the Court can delegate its duties in this matter to the counsel for the defence. The reasons given in *Queen Empress* v. *Mannu*[3] are conclusive on the point. On inspection of the diaries the Court may use them for certain purposes but until the Court has done so the defence are not entitled to inspect those diaries.[4]

Right of Court to inspect police diaries.

4. Grounds upon which the opposite party is permitted to inspect a writing.— The grounds upon which the opposite-party is permitted to inspect a writing, and to refresh the memory of a witness are three-fold:

Opposite-party when to inspect writing referred to by witness.

(*i*) to secure the full benefit of the witness's recollections to the whole of the facts;

(*ii*) to check the use of improper documents; and

(*iii*) to compare his oral testimony with his written statement.[5]

5. Extent of right.— The opposite-party may look at the writing to see what kind of writing it is in order to check the use of improper documents; but it is doubtful whether he is entitled, except for his particular purpose, to question the witness as to other and independent matters contained in the same series of writings.[6]

Opposite-party entitled to look to check improper use of document.

6. Right of cross-examination.— In the case of any document used to refresh, or at all events used in Courts the Indian Act order in general terms that it be produced, and may be seen by the opposite-party ; with a right to cross-examine upon it.[7]

Right of opposite-party to cross-examine in case of witness refreshing memory.

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1. Nemi Chand *v.* Wallace, 10 C.W.N. 107 : 4 C.L.J. 268.
2. Laxminarayan *v.* Returning Officer, A.I.R. 1974 S.C. 66 at p. 80.
3. (1894) 17 P.R. 1894 (Cr.).
4. Emperor *v.* Dharam Vir, A.I.R. 1983 Lah. 498 at p. 500 : 142 I.C. 854 : 34 P.L.R. 541.
5. *Per* Field, J., in Empress *v.* Jhubboo Mahton, I.L.R. 8 Cal. 739 at p. 745.
6. Empress *v.* Jhubboo Mahton, I.L.R. 8 Cal. 739 at p. 745.
7. Goodeve on *Evidence*, pp. 1212-13.

7. **Scotch law.**— Mr. Alison, in his *Practice of the Criminal Law of Scotland*, thus explains the Scotch law on the subject: "The rule is, that notes or memoranda made up by witness at the moment, or recently after the fact, may be looked to in order to refresh memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. With the exception, however, of such memoranda, notes or inventories ...a witness is not permitted to refer to a written paper as containing his deposition. There is one exception, however, properly introduced into this rule, in the case of medical or other scientific reports or certificates, which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath that it is a true report ...In India the rule is slightly different, though similar in principle. When a dead body is sent to the Civil Surgeon in order to the making of a post-mortem examination, a printed form is sent therewith, which the Civil Surgeon fills up on examining the body. This report is not itself evidence;[1] but it is usually placed in the hands of the Civil Surgeon who refreshes his memory from its contents when giving his testimony.[2]

Witness permitted to refer to notes, etc. to refresh memory.

Medical or other scientific reports, etc. how to be refreshed and proved.

Post-mortem examination report how to be refreshed and proved.

162. Production of documents.—A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matter of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.—If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the intepreter disobeys such direction, he shall be held to have committed an offence under Sec. 166 of the Indian Penal Code (45 of 1860).

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1. Scope of the section.— This section refers to official as well as private documents. The position with regard to an official document is that the officer summoned to produce it is bound to produce it in Court. He must raise the objection in Court and the question whether that objection is well-founded is one for

Court not to inspect document referring to matter of State if objected.

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1. Empress *v.* Raghuni Singh, I.L.R. 9 Cal. 455 : 11 C.L.R. 569 : 2 W.R. Cr. Let. 14 : 6 W.R. Cr. Let. 3.
2. *See* also Emperor *v.* Jadub Das, 4 C.W.N. 129 : I.L.R. 27 Cal. 295.

the Court to decide. But for this purpose the Court is not entitled to inspect the document if it refers to matters of State. It must decide the question without such inspection by examining the officer producing it or otherwise.[1]

Section 162 of the Evidence Act enables the Court to inspect the document or take other evidence to determine its admissibility.[2]

Objection to the production or admissibility of evidence.

The first clause of Sec. 162 of the Evidence Act requires that a witness summoned to produce a document must bring it to the Court and then raise an objection against either its production or its admissibility. An objection to the production or admissibility of evidence specified in Sec. 162 of the Evidence Act relates to all claims of privilege provided by the relevant sections of Chapter IX of Part III of the Act. Section 123 is only one of such privilege. So the jurisdiction given to the Court to decide the validity of the objection covers not only the objection raised under Sec. 123 but to all other objections as well.[3] Section 162 makes it obligatory on the witness to produce the documents called upon by the Court and he has no right to determine whether the document shall be produced.[4] The section makes no difference between a private witness called upon to produce private documents and a public officer summoned to produce public record.[5]

Document if summoned to be produced.

Court to decide as to the admissibility and exhibition of document referring to matter of State.

Where a document relates to affairs of States?

It is within the province of the Court to determine whether a certain document sought to be let in evidence relates to affairs of State. It is only when the Court holds that the document is of the kind, the question of permission would arise. It is then left to the head of the department to decide whether he should permit its production or not.[6]

Court to decide objection as to production, etc. of the document.

The first clause of Sec. 162 requires that a witness summoned to produce a document must bring it to the Court and then raise an objection against either its production or its admissibility. It also authorizes the Court, and indeed makes its obligation, to decide the validity of either or both of the said objections.

Matters of State are identical with affairs of State.

The second clause of Sec. 162 in terms refers to the objection as to the admissibility of the document. Admissibility in the context refers both to production and admissibility. It may be added that "matters of State" referred to in the second clause are identical with "affairs of State" mentioned in Sec. 123.[7]

Validity of objection to be decided after the production of document.

As held in *Ganga Ram* v. *Habbib Ullah*,[8] the production of documents protected under Sec. 126, Evidence Act is incumbent under Sec. 126, Evidence Act. The validity of the objection to their production or admissibility has to be decided by the Court after production.[9]

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1. *In re* Mantubhai Mehta, A.I.R. 1945 Bom. 122 at p. 123 : 46 Bom. L.R. 802 : 219 I.C. 290.
2. Lakshmandas Chaganlal Bhatia *v.* State, A.I.R. 1968 Bom. 400 at p. 425 : 696 Bom. L.R. 808.
3. Orient Paper Mills *v.* Union of India, A.I.R. 1979 Cal. 114 at p. 123.
4. Halsbury, Vol. 13, para. 597.
5. Bhalchandra Dattatraya Bubane *v.* Chanbasappa Mallappa Warad, A.I.R. 1939 Bom. 237 at p. 246 : 41 Bom. L.R. 391 : P. Joseph *v.* State, A.I.R. 1953 T.C. 363.
6. Chadalavada Subba Rao *v.* Kasu Brahamananda Reddy, A.I.R. 1967 A.P. 155 at p. 172 : (1966) 2 Andh. W.R. 401.
7. State of Punjab *v.* Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 at p. 503.
8. A.I.R. 1936 All. 212 : 1936 Cr. C. 233 : 159 I.C. 524 : 37 Cr. L.J. 113 : I.L.R. 58 All. 364 : 1935 A.L.J. 1176.
9. Public Prosecutor, Madras *v.* M. S. Menoki, A.I.R. 1939 Mad. 914 : (1939) 2 M.L.J. 634 : 50 L.W. 428 : 1939 M.W.N. 1127.

2. Custody, etc.— A document would be in the custody of a person who held it for another person, the owner thereof; and it might be said to be in the possession of either of such persons. It has been held by the Bombay High Court that a *partner* may be compelled to produce documents belonging to the firm in a suit in which his co-partners are not parties.[1]

Partner to be compelled to produce documents of the firm in suit.

3. English law.— The rule of English law is similar, namely, that when a witness is served a *subponea duces tecum* (summons to produce documents), he is bound to attend with the documents demanded therein, if he has them in his possession and he must leave the question of their actual production to the Judge, who will decide upon the validity of any excuse that may be offered for withholding them.[2]

Witness to produce document summoned.

Foundation of the law behind Secs. 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest.[3]

4. Scheme of Secs. 123, 124 and 162.— Section 124 is really supplementary to Sec. 123. The principle of Sec. 123 is that it is not all records relating to the affairs of State that are privileged, but only those the disclosure of which would result in an injury being caused to public interests. Section 162, Evidence Act, deals with production of documents and gives the power to the Court to inspect the document or to take other evidence to enable it to determine on its admissibility. Under Secs. 123 and 162 the validity of an objection to the production of a document has to be determined by the Court. The only limitation on the power of the Court is that in cases of documents where privilege is claimed under Sec. 123, the Court may not look at those documents but must determine the validity of the claims of privilege on material other than the document itself.[4]

All records referring to the affairs of State not privileged.

Court's power limited in respect of privileged document.

The occasion for claiming privilege under Sec. 123 only arises where it is sought to give any evidence derived from unpublished official records relating to any affairs of State. That is the condition precedent. When this condition precedent is fulfilled and the occasion for claim of privilege arises, it is then for the officer at the head of the department concerned to waive or claim the privilege. Likewise, the condition precedent to give rise to a claim of privilege under Sec. 124 is that the communication had been made to the public officer in official confidence and he is asked to disclose the same. When this condition is fulfilled it is for the public officer to decide whether public interest would suffer by the disclosure. Both the sections are however, silent as to who is to decide whether the condition precedent has been fulfilled. Is it to be left to the *ipse dixit* of the head of the department in one case or the public officer in the other or is it to be decided by the Court? Here the provision of Sec. 162 of the Act comes into play. The first paragraph of this section clearly empowers the Court to decide the

Privilege in respect of document when to be claimed.

Public officer not to be compelled to disclose communication against public interest.

Court how to decide the validity of objection not to produce document.

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1. Jakarla *v.* Gasim, I.L.R. 1 Bom. 496.
2. Taylor, Sec. 1121 ; Sec. 1240, 8 Ed.
3. State of Uttar Pradesh *v.* Raj Narain, A.I.R. 1975 S.C. 865 at p. 875.
4. Lady Dinbai Dinshaw Petit *v.* Dominion of India, A.I.R. 1951 Bom. 72 at p. 80 : 53 Bom. L.R. 229.

validity of the objection. The second paragraph only provides the method or means by which the Court will be able to decide the question, namely, (1) by inspecting the document or (2) by taking other evidence. It is only in case of documents relating to affairs of State that the Court cannot inspect the document. It only means that in cases of such documents one of the methods or means by which the Court is to decide the question is not available to it. The duty of deciding the question is still on the Court under the first paragraph of the section. If necessary, the Court will require the officer to claim the privilege in the manner indicated in the judgment of Lord Blanesburgh in *Henry Greer Robinson* v. *State of South Australia*.[1] It has been held by Holmwood and Sharfuddin, J.J.. in *Harbans Sahai* v. *Emperor*,[2] that statements made by witnesses in the course of a departmental enquiry are not privileged under Sec. 123, 124 or 125 of the Evidence Act. In *Rokunali* v. *Emperor*,[3] Chitty and Smither, JJ., held that an entry in the posting register showing that preventive officers were stationed at a particular place at the time of the appellant's arrest was not privileged under Sec. 123, 124 and 162, Evidence Act. The case in *Harbans Sahai* v. *Emperor*[4] was followed in *Ibrahim Sheriff* v. *Secretary of State*.[5] Again in *Kaliappa* v. *Emperor*,[6] it was held that statements of witnesses recorded by a forest officer in the course of an investigation were not privileged under Sec. 123 or Sec. 124. These sections and the judicial decisions have also been discussed in *Bahiya Saheb* v. *Pandit Ramnath Rampratap*.[7]

Statement of witnesses in departmental enquiry.

Entry in posting register regarding the posting of officer not privileged.

Statements recorded by Forest officer not privileged.

Section 123 of the Evidence Act puts a bar on any witness producing evidence derived from in-published official records relating to any affairs of the State unless permission has been sought from the officer at the head of the department concerned, and discretion is left with that officer to give or withhold such permission, as he thinks fit. This relates to the competency of the witness to depose to such matters. On the other hand, Sec. 162 of the Evidence Act, which is in a different Chapter, relates to the examination of witnesses and puts a clarification that the witness summoned to produce a document shall, if it is in his possession or power, being it to the Court, notwithstanding any objection which there may be to its production or to its admissibility and that the validity of any such objection shall be decided on by the Court.[8]

All the above cases indicate that the ultimate decision as to whether a claim of privilege is well founded or not rests with the Court and the Court jealously guards its powers.[9]

Court to guard jealously its powers.

When a document is directed to be produced, the head of the department can claim privilege under Sec. 123 of the Evidence Act and the Court will have to decide the validity of the objection raised by the head of the department.

Court to investigate into the objection if privilege claimed.

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1. A.I.R. 1931 P.C. 254 : 135 I.C. 625 : 35 C.W.N. 1121 : (1931) A.C. 704 : 100 L.J.P.C. 183 : 145 L.T. 408 : 75 S.J. 458 : 47 T.L.R. 454.
2. 15 I.C. 77 : 13 Cr. L.J. 445 : 16 C.W.N. 431.
3. A.I.R. 1918 Cal. 138 : 45 I.C. 284 : 19 Cr. L.J. 524 : 22 C.W.N. 451.
4. 151 I.C. 77 : 13 Cr. L.J. 445 : 16 C.W.N. 431.
5. A.I.R. 1936 Nag. 25 : 161 I.C. 668.
6. A.I.R. 1937 Mad. 492 : 168 I.C. 867 : 38 Cr. L.J. 619 : (1937) 1 M.L.J. 613.
7. A.I.R. 1938 Nag. 358 : 179 I.C. 865 : I.L.R. (1940) Nag. 280 ; Henry Greer Robinson *v.* State of South Australia, (1931) A.C. 704 relied on.
8. State of Punjab *v.* Tarlok Singh, 1986 (1) S.L.R. 566 at p. 568 (P. & H.).
9. Ijjatali Talukdar *v.* Emperor, A.I.R. 1943 Cal. 539 at pp. 542-44 : I.L.R. (1944) 1 Cal. 410 : 57 C.W.N. 928.

But the jurisdiction of the Court at that stage is limited to the determination of the question whether the documents refer to matters of state. The power of the Court under Sec. 162 of the Evidence Act to inspect the document is also available only when the document does not refer to matters of State.

Court when to inspect document if privilege claimed.

The proper procedure, therefore, will be for the Court to determine from other circumstances without looking into the document and before directing the production of the document if it relates to the matters of State or not.

If it comes to the conclusion that it relates to matters of State from the very nature of the document or other surrounding circumstances, it will neither inspect the record nor can it go into the question as to whether the head of the department has rightly or wrongly withheld permission for its production.

The final authority to determine the question as to whether the documents relate to the affairs of the State is the Court. If the documents are found to relate to affairs of the State, it is for the head of the department to exercise its discretion in the matter and withhold or permit the production of the documents.

Who to determine the document if relates to the affairs of the State.

The claim of privilege can be raised in any manner as the head of the department desires. It is for the Court to determine from the circumstances and from the nature of the documents, as to whether the documents relate to the affairs of the State or not. No particular mode of proof is prescribed in the Act.[1]

Claim of privilege how to be raised.

Under Sec. 162 of the Evidence Act, the Court has power to inspect the document for the purpose of deciding the question of its admissibility or to get it translated if such a course be required. But, the words "unless it refers to matters of State" clearly indicate the documents relating to matters of State cannot even be inspected by the Court for determining the question of its admissibility.[2]

Power of Court to inspect.

5. Validity of objection how to determine.— The validity of any such objection, i.e. *made by the person producing the document*, shall be decided on by the Court.[3]

In the case of a document relating to affairs of State the course of inspecting the document is not open to the Court, but has still the right to take other evidence to satisfy itself that the document does in fact relate to affairs of State.[4]

Satisfaction of the Court as to document relating to the affairs of State.

The section does not contemplate the case of objection made by the opposite-party, which must be determined by the usual rules. In order to decide on the validity of the objection, *the Court may take other evidence to enable it to determine on its admissibility.* The Court may, if is sees fit, *inspect the document unless it refers to matters of State.* This is scarcely in accordance with the rule in England, where it has been decided that when an attorney claiming the privilege of his client objects to produce a document entrusted to him by such client, the Judge ought not to look at the writing to see whether it is a document which may properly be withheld.

Evidence in case of objection as to production of official document.

Attorney whether to claim privilege as to production of document of his client.

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1. S.B. Choudhury *v.* I.P. Changakakati, A.I.R. 1960 Assam 210 at pp. 213, 216.
2. Raj Narain *v.* Smt. Indira Nehru Gandhi, A.I.R. 1974 All. 324 at p. 327.
3. Iqbal Ahmad *v.* State of Bhopal, A.I.R. 1954 Bhopal 9 at p. 11.
4. Governor-General-in-Council *v.* H. Peer Mohd. Khuda Bux, A.I.R. 1950 E.P. 228 at p. 234.

Courts of law have consistently recognized the right of a Court to adjudicate upon the validity of an objection, Viscount Simon in *Duncan* v. *Cammell Laird & Co. Ltd.*,[1] observed :

> "Although an objection validly taken to production on the ground that this would be injurious to the public interest is conclusive, it is important to remember that the decision ruling out such documents is the decision of the Judge."

Viscount Simon went as far as he could in respecting the privilege relating to State documents. In India according to the provisions of Sec. 162, Evidence Act, it is for the Court to adjudicate upon the validity of any objection, taken in respect of any document. In *Robinson* v. *State of South Australia*,[2] an officer of the State claimed privilege in respect of certain documents. Their Lordships of the Privy Council went as far as to say that it was lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege. Viscount Simon in considering this case observed that the Privy Council was mistaken in the view that the Court could inspect the document. He however, did not question that right of the Court to determine upon the validity of the claim for privilege. Indeed, he conceded that the decision ruling out a State document was a decision of the Judge.

The matter was considered in *In re Mantubhai Mehta*,[3] already referred to above and Wadia, J., observed:

> "The Court is not entitled to inspect the document if it refers to matters of State. It must decide the question without such inspection by examining the officer producing it or otherwise."

In *Ijjatali Talukdar* v. *Emperor*,[4] Das J., observed:

> ".. The ultimate decision as to whether a claim of privilege is well founded or not rests with the Court and the Court jealously guards its powers."

That the Court has this power was recognized in *Mohan Singh* v. *Emperor*[5] and indeed in every case where it was held that the document in question was not a document relating to affairs of State.[6]

Under Sec. 162, a witness should not decline to bring documents to Court on the ground of privilege.[7]

What the Court to decide in respect of official documents summoned.

It is for the Court in the first instance to satisfy itself that the documents relate to any affairs of State or that their production will be detrimental to public interest,[8] it was held that departmental enquiry papers are not unpublished documents relating to affairs of the State. In *Weston* v. *Peary Mohan Dass*,[9] the statements made by witnesses in the course of departmental enquiry were produced in the case.

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1. (1942) 1 All E.R. 587 : (1942) A.C. 624.
2. 1931 (A.C.) 704 : 34 M.L.W. 575 : 35 C.W.N. 1121 : 61 M.L.J. 943 : 135 I.C. 625 : A.I.R. 1931 P.C. 254.
3. A.I.R. 1945 Bom. 122 at p. 123 : 46 Bom. L.R. 802 : 46 Cr. L.J. 562.
4. A.I.R. 1943 Cal. 539 : 45 Cr. L.J. 82.
5. A.I.R. 1940 Lah. 217 : 41 Cr. L.J. 667.
6. But *see* Mohan Singh *v.* Emperor, A.I.R. 1940 Lah. 217 : I.M. Lal *v.* Secretary of State, A.I.R. 1944 Lah. 209 ; Khwaja Nazir Ahmad *v.* Emperor, A.I.R. 1944 Lah. 434.
7. Venkata Chella Chettiar *v.* Sampatti, I.L.R. 32 Mad. 62 : 4 M.L.T. 317.
8. *See* Collector of Jaunpur *v.* Jamna Prasas, I.L.R. 44 All. 360 at p. 365 : A.I.R. 1922 All. 37 : 20 A.L.J. 140 ; Harbans Sahai *v.* Emperor, (1912) 16 C.W.N. 431 : 15 I.C. 77 : 13 Cr. L.J. 445.
9. I.L.R. 40 Cal. 898 : 23 I.C. 25.

6. Official documents.— In the case of *Kain* v. *Farrer*,[1] the defendant was the Secretary to the Board of Trade. He made an affidavit *that he had in his official control, custody or possession, as Secretary to the Board of Trade, certain official documents ; and that he objected on the ground of public policy* to state anything further with respect to those documents. It was held that this affidavit was not sufficient. "The common rule", it was said, "as gathered from *Beatson* v. *Skene*, and acted upon in a recent case[2] by Lord Coleridge, is that the Court is entitled to have the pledge and security of the Head Officer of State to give the reason for the non-production of those documents which it is objected to produce, and to demand that he shall come into the witness-box and there say that he is the head of the department and objects to such and such documents being produced, specifying them on the ground of public policy. In the case of *Trolokhanath Biswas and Ram Charn Biswas, In re*,[3] the Magistrate of a district refused to produce a written report made to him by a Magistrate as to the result of an enquiry made by the latter into the cause of a sudden and unnatural death. It was ultimately decided that this report was not a judicial proceeding, and that the District Magistrate was justified in refusing to produce it.

Court what to do when privilege claimed as to official documents.

Report made as to cause of death.

If the document filed by the plaintiff is privileged, the Court cannot call upon the Union of India to admit or deny the same.[4]

7. Translations.— In connection with the subject of the (new Sec. 279) of the translation of documents may be noticed Sec. 361 of the Code of Criminal Procedure.[5]

8. Income-tax papers not exempt from being produced in Court.— Statements made before the Income-tax Officer are not privileged. The Court is empowered under Sec. 162 to inspect them to decide on the validity of any objection to their admissibility in evidence.[6]

Statements before Income-tax Officer not privileged.

9. Repeal of an enactment would not affect the rights and privileges acquired under the enactment.—Sub-section (1) of Sec. 54 of the Indian Income-tax Act, 1922 (XI of 1922) forbids the production of the various documents, statements and returns in Court. Dealing with prohibition contained in the above provisions of law, Shah, J., in *Charu Chandra Kandu* v. *Gurpada Ghosh*,[7] observed:

Verdict of the Supreme Court.

"It is manifest that disclosure of information given to public servants in the course of income-tax proceedings has by a comprehensive provision been prohibited. The income tax authorities are directed by the provision to treat the information disclosed, evidence given, and documents produced as confidential: the Courts are prohibited from requiring any public servant to produce the documents or the records and even to give evidence in respect thereof, and the public servants disclosing the particulars of the evidence, documents or record are penalized... The prohibition imposed against the Court by Sec. 54 is absolute: its operation is not obliterated by any waiver by

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1. 37 L.T. Rep. (N.S.) 469.
2. Swann *v.* Vines, tried at Westminister, November, 1877.
3. I.L.R. 3 Cal. 742.
4. Union of India *v.* Raj Kumar Gujral, A.I.R. 1967 Punj. 387 at p. 388.
5. *See* also Queen *v.* Amirudin, 7 B.L.R. 71.
6. Venkatachella *v.* Sampathu, I.L.R. 32 Mad. 62.
7. A.I.R. 1962 S.C. 1119.

the assessee in whose assessment, the evidence is tendered, document produced or record prepared."

Privilege could not be affected because of the repeal of Sec. 54, of Income-Tax Act of 1922.

As a privilege existed in respect of the production of the documents in question at the time when they were filed before the income tax authorities, in the instant case, the aforesaid privilege could not be affected because of the repeal of Sec. 54 of Act of 1922. The privilege was allowed to continue by Sec. 137 of Act 43 of 1961 and it was only in respect of certain matters enumerated in sub-section (3) of that section that the bar to disclosure was removed. After Sec. 137 too was repealed by Act No. 5 of 1964, Sec. 138, as it exists at present, was enacted.[1]

10. Order XI, rule 19, C.P.C. not repealing Sec. 162, Evidence Act.—Despite the provisions of sub-rule (2) of rule 19 of order XI, C.P.C., the prohibition relating to the inspection of State documents contained in Sec. 162, Evidence Act, holds good.[2]

163. Giving, as evidence, of document called for and produced on notice.—When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

SYNOPSIS

1. Meaning of the section ... 4963
2. Scope of the section ... 4964
3. "Notice to produce" ... 4965

1. Meaning of the section.— "The production of papers upon notice", says Mr. Taylor, "does not make them evidence in the cause *unless the party calling for them inspects them*, so as to become acquainted with their contents ; in which case he is obliged to use them as his evidence, at least if they be in any way material to the issue..."[3]

Party when entitled to give notice to produce.

In *Lawrence* v. *Van Horne*,[4] Radcliffe, J., observed :

"A party ought not to be permitted to ...obtain from his adversary the inspection of any paper or document he may choose to demand. Such a privilege would be liable to abuse."[5]

Where the defendant in response to the plaintiff's petition for discovery produced certain accounts and gave inspection of the same to the plaintiff who did not admit their genuineness or completeness, the defendant is not entitled to exhibit them without proof. This section does not render proof of the document to be exhibited unnecessary or alter the normal incidence of that burden as detailed in other sections of the Act.[6] The documents admitted under this section must not be deemed to be conclusive evidence against the inspecting party, they become evidence for all they are worth.[7]

Defendant not entitled to exhibit documents without proof.

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1. Daulat Ram *v.* Som Nath, (1967) 69 Punj. L.R. (Delhi) 222 at p. 225-27.
2. Governor-General in Council *v.* H. Peer Mohd. Khuda Bux, A.I.R. 1950 E.P. 228 at p. 234.
3. Paragraphs 1614, 1817, 8th Ed.
4. 1 Caines 276.
5. Wigmore's *Evidence*, Vol. VII, p. 558.
6. Raja Gopal *v.* Ramanuja, (1923) M.W.N. 292 : 72 I.C. 459 (Mad.).
7. Ramadhin *v.* Ram Dayal, 57 I.C. 973 (Oudh).

2. Scope of the section.—In *Suresh Chandra Ghose* v. *Emperor*,[1] it was held that an accused person has the right to see the statements recorded by the investigating police and use them for purposes of contradiction.[2]

Right of the accused to statements recorded by investigating officer.

Under this provision a party is bound to give the opponent's documents as evidence in the case if three conditions are fulfilled. *Held* that in the instant case, only one of these conditions has been satisfied. Therefore, the account-books cannot be treated as the plaintiff's evidence in the case.[3]

Conditions to give the opponent's documents as evidence.

The party inspecting the document is bound to give it as evidence only if the party producing the same requires it to do so.[4]

Where a party to a case calls for a document from the other party and inspects the same, under Sec. 163, he takes the risk of making it evidence for both parties.[5] If you call for the books of a party, you make it evidence for the other side, if they think fit to use it.[6] Parke, J., said, "if the plaintiff's counsel call for a paper and look at it, they must read it in evidence if it is at all material to the case; if it does not bear on the case, he need not read it."[7] Notice to produce and inspection of papers does not make them evidence.[8]

Risk to the party calling for a document from opposite-party.

Where a party calls for a document and inspects he is bound to give it as evidence, if the party producing it requires to do so.[9] In *Rajeswari Kuar* v. *Rai Bal Krishna*,[10] the defendant called for plaintiff's books and inspected them but in defence put in certain extracts only and withheld the books must be admitted *in toto*.

Party calling for document when bound to give it as evidence.

See also *Mohammad Khan* v. *Abdul Rehman*[11] and *Krishan Ghule* v. *Puransa*.[12]

In *Government of Bengal* v. *Shanti Ram Mandal*,[13] it was held that Sec. 163, Evidence Act, is applicable to criminal trials as well as to civil actions.

Applicability of section to civil as well as criminal cases.

The procedure was approved in that case that in a criminal trial the accused should call for any previous statement that might be in the possession of Government or a Government officer under Sec. 163, Evidence Act.[14]

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1. A.I.R. 1924 Cal. 542 : 74 I.C. 261 : 24 Cr. L.J. 757.
2. Emperor *v.* Makhan Lal Dutt, A.I.R. 1940 Cal. 167 at p. 168.
3. Liladhar Ratanlal Vyas *v.* Holkarmal Sohanlal, A.I.R. 1959 Bom. 528 at p. 529 : I.L.R. (1960) Bom. 600.
4. Shrinarain *v.* Chunnilal, A.I.R. 1957 Raj. 159 at p. 161 : 1957 R.L.W. 214.
5. Mohammad Khan *v.* Abdul Rehman, 5 Bom. L.R. 380.
6. Wharam *v.* Routledge, 5 Esp. 235 ; Calvert *v.* Flown, 7 C.P. 386 ; *see* Mohammad Khan *v.* Abdul Rehman, 5 Bom. L.R. 380 at p. 385.
7. Wilson *v.* Bowil, 1 Car. p. 10.
8. Sayer *v.* Kitchen , 1 Esp. 210 ; *see* Mohammad Khan *v.* Abdul Rehman, 5 Bom. L.R. 380 at p. 385.
9. Badri Prashad *v.* Shanti Lal Seth, A.I.R. 1941 Lah. 228 at p. 231 : 43 Punj. L.R. 128 : 195 I.C. 275.
10. I.L.R. 9 All. 713 : 14 I.A. 142 : 5 Sar. 80 (P.C.).
11. 5 Bom. L.R. 380.
12. A.I.R. 1928 Nag. 119 : 106 I.C. 305.
13. A.I.R. 1930 Cal. 370 : 127 I.C. 657 : I.L.R. 58 Cal. 96.
14. Nataba Jana *v.* State, A.I.R. 1955 Cal. 138 at pp. 139-40 : 59 C.W.N. 729.

In criminal proceeding document produced to be proved if to be read in evidence.

There is no provision of law whereby a document not duly proved could be read in evidence against the accused simply because it was summoned by the defence. Mere production of a document is, therefore, not sufficient to treat it as evidence unless it is duly proved.[1]

3. "Notice to produce".— Section 163, Evidence Act, mentions inspection of the documents of which notice has been given by a party to produce. Such notice refers to a notice to produce documents as mentioned in O. XI, C.P.C. Such a notice may be given by a party privately to the other party concerned and, if the other party does not produce the documents, an order of the Court for the production of the documents for insepction may also be made.[2]

164. Using, as evidence, of document production of which was refused on notice.—When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration

A sues *B* on an agreement and gives *B* notice to produce it. At the trial *A* calls for the document and *B* refuses to produce it. *A* gives secondary evidence of its contents. *B* seeks to produce the document itself to contradict the secondary evidence given by *A*, or in order to show that the agreement is not stamped. He cannot do so.

SYNOPSIS

1. Principle ... 4965
2. Rule of English law ... 4965
3. Scope ... 4965

1. Principle.— Where an opponent in possession refuses to produce on demand he is afterwards *forbidden* to produce the document in order to contradict the other party's copy or evidence of its contents.[3]

2. Rule of English law.— If a party, after notice, declines to produce a document, he cannot, when his opponent has proved a copy and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness; neither, after such refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination, or to produce and prove it as part of his own case.[4]

Document if refused to produce not to be used in cross-examination.

3. Scope.—Pankridge, J. points out in *Sham Das Kapur v. Emperor* [5] :

Application of Sec. 164 to criminal proceedings.

> "I am by no means convinced that Sec. 164 applies to criminal proceedings."

Section 164 does not give one party, any right at any stage of the case to call upon his opponent to produce the document and use it or not as he sees fit.

The presumption is that the evidence which could be produced and is not would not be favourable to the party who withholds it.[6]

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1. State *v.* Babulal, A.I.R. 1965 Raj. 90 at p. 94 : 1964 R.L.W. 606 : I.L.R. (1965) 15 Raj. 6.
2. Union of India *v.* Firm Vishudh Ghee Vyapar Mandal, A.I.R. 1953 All. 689 at p. 691 : 1953 A.L.J. 306.
3. Yates, J, in Roe *v.* Harvey, (1769) 4 Burr. 2484 at p. 2489 ; Doe *v.* Cockell, (1834) 6 C. & P. 525 at p. 528.
4. Taylor's *Evidence*, 10th Ed., Sec. 1818, p. 1304; *see* O. XI, r. 15 of the Code of Civil Procedure.
5. A.I.R. 1933 Cal. 65 at p. 66 : 36 C.W.N. 1127 : 142 I.C. 57 : I.L.R. 60 Cal. 341.
6. Palamadal Muthusami Aiyer Gopala Aiyar, *In the matter of*, A.I.R. 1935 Sind 196 at pp. 196-97.

165. Judge's power to put questions or order production.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question :

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Secs. 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Sec. 148 or 149 ; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

SYNOPSIS

1. Scope of the section ... 4966
2. Section capable of two interpretations ... 4967
3. English law ... 4968
4. Questions by Judge ... 4968
5. Duty of Sessions Judge in criminal cases ... 4970
6. Statements made to a police officer ... 4971
7. Order for production of any document or thing ... 4971
8. Power of Judge to send for additional witnesses ... 4972
9. Magistrate not to cross-examine accused during police investigation ... 4974
10. Object of accused's examination under Sec. 342 (Sec. 313, new), Cr. P.C. ... 4975
11. Cross-examination of witnesses called by the Court ... 4975
12. Should the Judge in civil cases reject inadmissible evidence, if not objected to by the parties ... 4976
13. Proviso (1) ... 4977
14. Force of precedents in our system of judicial precedents ... 4978
15. Judgements are not binding ... 4979
16. Proviso (2) ... 4979
17. Applicability of the section ... 4979
18. Word "any" in the section confer unbridled power on the trial Court ... 4980

1. Scope of the section.— Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that, in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever. A Judge may ask any question he pleases about any irrelevant fact, if he does so in order to discover or to obtain proper proof of relevant facts.[1]

Judge's power to put intimated question.

Under Sec. 165 of the Evidence Act, the Court can confront the witness with his statement made to the police under Sec. 161, Cr. P.C. In *Raghunandan* v. *State of U.P.*[2], the Supreme Court at page 467 has observed that "It is true that the ban, imposed by Sec. 162, Criminal Procedure Code against the use of a statement of a witness recorded by the police during investigation, appears sweeping and wide. But, at the same time, we find that the powers of the Court, under Sec. 165 of the

1. Queen- Empress *v.* Hari Lakshman, I.L.R. 10 Bom. 185.
2. A.I.R. 1974 S.C. 463 : 1974 Cr. L.J. 453.

Evidence Act, to put any question to a witness, are also couched in very wide terms authorising the Judge "in order to discover or to obtain proper proof of relevant facts" to "ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant". The first proviso to Sec. 165, Evidence Act, enacting that, despite the powers of the Court to put any question to a witness, the judgment must be based upon facts declared by the Act to be relevant, only served to emphasize the width of the power of the Court to question a witness. The second proviso in this section preserves the privileges of witnesses to refuse to answer certain questions and prohibits only questions which would be considered improper under Secs. 148 and 149 of the Evidence Act. Statements of witnesses made to the police during the investigation do not fall under any prohibited category mentioned in Sec. 165, Evidence Act. If Sec. 162, Criminal Procedure Code was meant to be so wide in its sweep as the Trial Court thought it to be, it would make a further inroad upon the powers of the Judge to put question under Sec. 165, Evidence Act. If that was the correct position at least Sec. 162, Criminal Procedure Code would have said so explicitly. Section 165 of the Evidence Act was already there when Sec. 162, Criminal Procedure Code was enacted.[1]

Object of irrelevant questions put by the Judge.

The object of allowing the Judge to ask irrelevant questions under this section is to obtain "indicative evidence" which may lead to the discovery of relevant evidence.[2]

Section 165 of the Evidence Act concerns a situation where a Judge may put questions to a witness for purpose of eliciting information or material that the Court considers necessary and which has not come on record in the course of the evidence led by either of the parties. It would have no application in a situation where the evidence is concluded, where the prosecution has closed its case, where the judgment has commenced and where it appears to the Court at that point of time that the prosecution has failed on a material aspect. Thus, it was held that the prosecution cannot be allowed to reopen the evidence to fill in a lacuna when it has been closed and the case is under judgement.[3]

In the instant case, the High Court seems to have been under the impression that the Court had ample powers to direct production of any document under Sec. 165 of the Indian Evidence Act. In doing so with due deference the High Court overlooked that the Representation of the People Act was a special Act and provisions of the Evidence Act or the Code of Civil Procedure would only apply where they are not excluded.[4]

There is not only Sec. 165 of the Evidence Act which enables the Court to put any question it likes to a witness, but there are also the provisions of Order XVI, Rule 14, C.P.C.[5]

2. Section capable of two interpretations.— It may mean that the Judge may introduce into the case, without any restrictions except those stated in the second proviso, any irregular evidence he pleases.[6] The other possible construction of the section is that it only empowers the Judge to ask irregular questions in order to discover or obtain proper, that is regularly admissible, evidence.[7]

Judge to modify law or add to existing law.

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1. Relied on in State of Rajasthan *v.* Bhera, 1997 Cr. L.J. 1237 at pp. 1245, 1246 (Raj.).
2. K.L. Krishna Ayyar *v.* T. Balakrishna Iyer, A.I.R. 1934 Mad. 199 (2) at pp. 201-2 : 66 M.L.J. 498 : 39 M.L.W. 179 : 148 I.C. 79 : I.L.R. 57 Mad. 635.
3. Omprakash Shankarlal Sharma *v.* State of Maharashtra, 1993 (1) Bom. C.R. 599 at p. 602 : 1993 Cr. L.J. 3175 (Bom.).
4. Hari Ram *v.* Hira Singh, A.I.R. 1984 S.C. 396 at pp. 397, 398.
5. Pratap Singh *v.* Rajinder Singh, A.I.R. 1975 S.C. 1045 at p. 1052.
6. Markby on *Evidence*, p. 114.
7. *Ibid* at p. 115.

Power of Judge to recall witness.

3. English law.— In England, the Judge may recall a witness at any stage of a trial and put such legal questions to him as the exigencies of justice require. And in a criminal case, after the witnesses are examined on the prisoner's behalf, if the Judge calls and examines a witness for the prosecution, the prisoner's counsel has a right to cross-examine again.[1]

Power of Judge to ask witness any question.

4. Questions by Judge.— This section enables a Judge to ask the witness any question, in any manner, the answer to which in his opinion would aid in the discovery of truth. But the parties have no right to cross-examine any witness except with the permission of the Court.[2] If the prosecution omits to bring out a material fact or the cross-examining counsel brings a witness to a state in which he cannot make his meaning clear. It is precisely for use on such occasion that the Judge's powers under Sec. 165, Evidence Act, are intended.[3]

Section 162, Cr.P.C., does not impair power of the Court under Sec. 165, Evidence Act.

The language of Sec. 162, Cr. P.C., though wide, is not explicit or specific enough to extend the prohibition to the use of the wide and special powers of the Court to question a witness, expressly and explicitly given by Sec. 165 of the Indian Evidence Act in order to secure the ends of justice. Section 162, Cr. P.C., does not impair the special powers of the Court under Sec. 165, Indian Evidence Act. Consequently, the Trial Court could and should have itself made use of the statement by the Jailal during the course of the investigation.[4]

Power of Magistrate under Sec. 165.

The Magistrate has unlimited power under Sec. 165 of the Evidence Act to put any question to a witness or to order him to produce documents. This is invariably done to do justice in the case he can put questions to the witness as may be necessary, either *suo motu* or on the suggestion of a party so that complete material may come on the record and it be possible for him to pronounce a proper judgment.[5]

Judge's duty to discover truth.

The right of a Judge to put questions to witnesses is given to him by Sec. 165, Evidence Act. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or wilfully avoided. But while theoretically the powers of the Judges are limitless and unfettered, certain principles have come to be recognized which he must follow as to the manner in which he exercises the power. It need hardly be pointed out that he must not take side, but he must not also "descend into the arena" and forsake the judicial claim for the zeal of a combatant.

Under Section 165 of the Evidence Act, in order to discover or to obtain proper proof of the relevant facts, the Judges have been *inter alia* empowered to order the production of any documents. This section is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and enquire into every fact whatever. Similar powers have been vested in the Courts under various provisions of the Civil Procedure Code.[6]

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1. Whitley Stokes, Vol. II, p. 833 ; R. *v.* Watson, 6 C. & P. 653 and Taylor's *Evidence*, Sec. 1477.
2. *In re* Mukhesh Ramachandra Reddy, A.I.R. 1958 A.P. 165 at p. 167 : I.L.R. (1957) A.P. 742 : (1958) 1 Andh. W.R. 9 : 1957 Andh. L.T. 709.
3. Sunil Chandra Roy *v.* State, A.I.R. 1954 Cal. 305 at p. 319 : 576 C.W.N. 962.
4. Raghunandan *v.* State of Uttar Pradesh, A.I.R. 1974 S.C. 463 at pp. 467, 468.
5. Giriraj Singh *v.* State, A.I.R. 1965 All. 131 at p. 135 : 1964 A.L.J. 335 : 1964 A.W.R. (H.C.). 213.
6. **Assistant Commissioner and Land Acquisition Officer, Puttar, Dakshina Kannada *v.* Karmin *alias* Lucy Pudthedo, 1999 (6) Kant. L.J. 417 at p. 429.**

Proper time for Judge when to put questions to witnesses.

Again, although the law allows the Judge to put any question at any time, the time generally considered proper for an extended examination is when the lawyers for the parties have finished their questions or at least when the lawyer examining the witness at the time, is passing on to a new subject. The Judge may always intervene, in the course of examination by counsel to put a question in a clearer form or to have an obscure answer clarified or to prevent a witness being unfairly misled, but if he does more and stops counsel again and again to put a long series of his own questions, he makes an effective examination or cross-examination impossible and diverts the trial from its natural course.

Principles laid down for Judge to ask questions, etc.

These principles will be found stated in the leading authority *Yuill* v. *Yuill*.[1] There is an early Calcutta decision in *Noor Bux Kazi* v. *Emperor*,[2] and a decision of the Bombay High Court in *Yusuf H. Abbas* v. *Bhagwandas P. Nangpal*.[3] There are two decisions in England which have not been reported any legal journal and which concerned the same learned Judge who had been concerned in the earlier case of *Yuill* v. *Yuill*.[4] One of them is *Harris* v. *Harris* reported in *The Times* of the 9th April, 1952. Being given in a newspaper report, they are in the form of an indirect narration :

Judge how far to question witnesses.

"The duty of the Judge to keep complete control of the proceedings before him was an essential part of the administraton of justice in all our Courts. He had a duty of intervene by way of questions or otherwise at any time that he deemed it necessary so to do. He might wish to make obscurities in the evidence clear and intelligible, he might wish to probe a little further into matters that he deemed important and in a score of ways his interventions might be both desirable and beneficial. But it was safe to say that all his interventions must be governed by the supreme duty to see that a fair trial was enjoyed by the parties. His interventions must be interventions and not a complete usurpation of the functions of counsel."

Judge's power to put unlimited questions.

There is no limit to the questions which the Judge may put and if he considers that he has not yet got to the bottom of the matter or that the witness has not yet made his full meaning clear, there is no reason why he should not go on with the examination, whatever the number of the questions required to achieve the purpose of eliciting the truth.[5]

In a striking passage Lord Greene, Master of the Rolls, in *Yuill* v. *Yuill*,[6] observed as follows (page 20) :

Disadvantage to Judge when he himself cross-examines witness.

"A Judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming just appreciation than a Judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."

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1. (1945) 1 All. E.R. 183.
2. I.L.R. 6 Cal. 279.
3. A.I.R. 1949 Bom. 346 : 51 Bom. L.R. 523.
4. (1945) 1 All E.R. 183.
5. Sunil Chandra Roy *v.* State, A.I.R. 1954 Cal. 305 at pp. 317-18.
6. (1945) 1 All. E.R. 183.

A Judge who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out; is not fulfilling his duty.[1]

Magistrate not to look on as passive agents in examination of witness.

Magistrates are not to look on as passive agents where cases are being tried by them. They have the power and the duty to question witnesses themselves in order to elicit revelant matters.[2]

No convincing reason had been given by both the Courts below in the instant case for rejecting the evidence of P.W. 1, when she has specifically stated that summons had not been received by her. Her evidence had not been properly put to test for disbelieving the same. In the instant case, it is a gross failure to exercise the jurisdiction vested with the Trial Court, in that the Trial Court has failed to make use of the porvisions under Sec. 165 of the Evidence Act and further enlighten itself, irrespective of the fact whether evidence was made available by either side or not, in order to get at the truth with respect to the entire aroma that had been created due to the existence of a signature which is alleged to be not the petitioner's signature. Therefore the petition was allowed and the order refusing the prayer for setting aside the *ex parte* decree was set aside.[3]

Power of Sessions Judge under Sec. 298, Cr.P.C.

5. Duty of Sessions Judge in criminal cases.— The above section applies to both civil and criminal proceedings. In criminal proceedings, however, still greater power is given to a Sessions Judge by Sec. 298 of the Code of Criminal Procedure.[4]

It is the duty of the Judge to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties.[5]

It may be stated that witnesses are not to be examined on behalf of the Court to assist the prosecution in filling in the blanks. They are to be examined in the interests of justice.

Judge may put as many questions as he likes relying on the provisions of Sec. 165 of the Evidence Act.

If the Judge is of the opinion that the case has not been properly dealt with he can put as many questions as he likes, relying on the provisions of Sec. 165 of the Evidence Act, in order to discover truth, but, by and large, he should leave it to the parties to examine their witnesses. As far as possible, witnesses called by the Court to testify should be called before the case for the defence has been closed but not after the case of the defence is closed.[6]

Sessions Judge like jury, to confine attention to evidence legally before him.

Sessions Judge, in dealing with the evidence properly given before him, is bound to confine his attention solely to such evidence.[7] It is improper for a Court to receive any information of any kind other than such as comes before it in the way which the law recognizes in the form of legal evidence.[8]

The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an

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1. Emperor *v.* Ram Singh, A.I.R. 1948 Lah. 24 at p. 27 : 49 P.L.R. 42.
2. Mandharia Alana Umar *v.* Kutch Government, A.I.R. 1950 Kutch 59 at p. 60.
3. Santhamani *v.* S.N. Somasundaram, (1983) 1 M.L.J.R. 73 at pp. 78, 79.
4. There is no corresponding provision in the Cr. P.C., 1973.
5. Abbas Peada *v.* Queen-Empress, I.L.R. 25 Cal. 736.
6. Ibrahim Husen *v.* State, A.I.R. 1969 Goa 68 at p. 72.
7. Queen-Empress *v.* Judub Das, I.L.R. 27 Cal. 295 : 4 C.W.N. 129.
8. 6 Bom. L.R. 789.

umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. With wide powers the Court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must of course, not assume the role of a prosecutor in putting questions. The functions of the counsel, particularly those of the public prosecutor, are not to be usurped by the judge by descending into the arena, as it were. Any questions put by the judge must be so as not to frighten, coerce, confuse or intimidate the witnesses.[1]

6. Statements made to a police officer.— The power conferred on the Judge under Sec. 165, Evidence Act, cannot be exercised for the purpose of introducing evidence in contravention of the law.[2]

Judge not to contravene law under Sec. 165.

There is nothing in Sec.162, Cr. P.C., which prevents a Judge from looking into the police diaries *suo motu* and himself using the statement of a person examined by the police recorded therein for the purpose of contradicting such person when he gives evidence in favour of the State as a prosecution witness. The Judge may do this or he may make over the recorded statement to the lawyer for the accused so that he may use it for this purpose.[3] Under Sec. 165, Evidence Act, no doubt the Judge may call for the record of the statement of witnesses made by the police officer, during investigation, but he is not bound to do so.[4]

Judge's power to call for the record of the statement made to police officers in investigation.

The Court should not allow itself to be influenced in the least by what is stated in the police diary. It may be pointed out that the only legitimate purpose for which the diary may be used would be to assist the Court by suggesting means of further elucidating material points which need clearing up.[5]

The Trial Judge has the police diary in front of him and should use his greater experience to cross-examine the witnesses. When he says that the defence lawyer is incompetent.[6]

In rare cases, a Court which has a case diary in its possession, at the request of the defending counsel, would be perfectly justified in putting a question to a police officer to elicit what an accused told him, in exercise of powers under section 165 Evidence Act.[7]

Court justified to put question to police officer when the diary in its possession.

7. Order for production of any document or thing.— Section 165 of the Evidence Act gives power to the Court to require production of any document or thing if it consider necessary the production of that document or thing.[8] The

Judge empowered under Sec. 165 to order document to be produced.

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1. Ram Chander *v.* State of Haryana, 1981 Cr. L.J. 609 at pp. 609, 610.
2. Kerramat Mandal *v.* King-Emperor, A.I.R. 1926 Cal. 147 at p. 148.
3. Emperor *v.* Lal Mia, A.I.R. 1943 Cal. 521 at pp. 526-27 : 47 C.W.N. 336 : 209 I.C. 206.
4. Natabar Jana *v.* State, A.I.R. 1955 Cal. 138 at p. 139 : 59 C.W.N. 729.
5. Dikson Mali *v.* Emperor, A.I.R. 1942 Pat. 90 at p. 94 ; Dal Singh *v.* Emperor, A.I.R. 1917 P.C. 25.
6. Darpan Potdarin *v.* Emperor, A.I.R. 1938 Pat. 153 at p. 158.
7. *In re* Molagan *alias* Same Goundan A.I.R. 1953 Mad. 179 at p. 182 : I.L.R. (1953) Mad. 284 : (1952) 2 M.L.J. 186 : 1952 M.W.N. 608.
8. Ghurey Lal *v.* State, A.I.R. 1965 All. 206 at p. 207 : (1963) A.W.R. (H.C.) 612 : 1963 A.L.J. 930.

Judge may himself, order the production of any document where Order XIII, rules 1 and 2, or Sec. 151 of the Civil Procedure Code do not serve his purpose.[1] Before the appointment of a receiver the Court cannot compel the defendant to produce accounts, which are not connected with the suit.[2] As to the production of any material thing, see second proviso to Sec. 60.

Banker's book—Import of.

A Banker's book in ordinary language would not be called a book. A book is a word which is used in many contexts. But there is no doubt at all that actual microfilming transactions and actual cheques do come within the definition of "bankers" in Sec. 9 of the Banker's Books Evidence Act, 1879.[3]

It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money, as for instance when the customer has got the money by fraud, or other wrong doing, and paid it into his account at the bank. The plaintiff who has been defrauded has a right in equity to follow the money. Owing to his fraud, the customer is disentitled from relying on the confidential relationship between him and the bank.[4]

8. Power of Judge to send for additional witnesses.—Section 540 (new Sec. 311) of the Criminal Procedure Code gives a power to the Court to summon a material witness or to examine a person present in Court or to recall a witness already examined. It confers a wide discretion on the Court to act as the exigencies of justice require. Another aspect of this power and complementary to it is to be found in Sec. 165 of the Indian Evidence Act.

Scope of Sec. 311, Cr.P.C.

These two sections between them confer jurisdiction on the Judge to act in aid of justice.

The power of the Court which is to be exercised to reach a just decision is exercisable at any time.[5]

It is now firmly established that if the Court feels that certain evidence is available or can reasonably be made available and the same would be essential to a just decision of the case, whether in favour of the prosecution or the defence, the Court is not merely to fold its hands and to bang the prosecution or to hand the defence simply because they or any of them did not take reasonable steps to bring such evidence on record. Neutrality, if it means, as it does, impartiality, is surely the first thing for a judicial decision. But neutrality, if it also means, as it does, non-action, then such neutrality in such circumstances as aforesaid, would amount to a failure to exercise a jurisdiction vested in a Court under Sec. 540, Cr, P.C.[6] read with Sec. 165, Evidence Act, which two sections complementing each other, vest a Judge with the widest possible jurisdiction to take all steps to bring on record all such evidence as it would think to be essential for a just decision.[7]

Indeed as stated by Avory, J., in *Rex* v. *Harris*[8] :

> "The cases of *Reg.* v. *Chapman*[9] and *Reg.* v. *Holden*[10] establish the proposition that the presiding Judge at a criminal trial has the right to call a

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1. Shankar Lal *v.* Mahbub Shah, A.I.R. 1923 Oudh 59 at p. 60.
2. K.L. Krishna Ayyar *v.* T. Balkrishna Iyer, A.I.R. 1934 Mad. 199 (2) at p. 200 : 66 M.L.J. 498.
3. Banker *v.* Wilson, (1980) 1 All E.R. 81 at p. 83 (Q.B.D.).
4. Bankers Trust Co. *v.* Shapira, (1980) 3 All. E.R. 353 at p. 357 (C.A.).
5. Jamatraj Kewalji Govani *v.* State of Maharashra, A.I.R. 1968 S.C. 178 at pp. 180-82.
6. Now Sec. 311 Cr. P.C., 1973.
7. State of Sikkim *v.* Premba Sherpa, 1981 Cr. L.J. 856 at p. 865.
8. (1927) 2 K.B. 587 at p. 594.
9. (1838) 8 C. & P. 558.
10. (1838) 8 C. & P. 606.

witness not called by either the prosecution or the defence, if in his opinion this course is necessary in the interests of justice."

When the Judge to summon as Court witness.

When one party cites a witness and does not examine him, it is perfectly open to the Trial Court to put him in the witness box, as a court-witness and see if he is possessed of knowledge which after being tested by cross-examination by both sides would be materially helpful to decide any issue.[1]

In the present case the applicant/accused, inspite of engaging advocate of his choice and after depositions of all the seven prosecution witnesses were recorded, vide this application, is taking frivolous contentions for recalling of all the prosecution witnesses. It appears that the advocate appointed by the applicant, probably did not effectively bring out certain material on record, which in the opinion of the applicant was necessary, to weaken the prosecution case. The intention of the applicant was therefore, to appoint another advocate to effectively carry out this job and therefore, this application for recalling of all the prosecution witnesses was made. This certainly is not permissible. Therefore, the lower Court by its reasoned order, rightly rejected that application which certainly was not a *bona fide* application.[2]

The Magistrate can, at any time of the proceeding till the judgment is delivered, gather further evidence in the case. The Court has got vast powers to this effect under Sec. 311, Cr.P.C. and Sec. 165 of the Indian Evidence Act.[3]

Where required materials for coming to the conclusion regarding the liability for the accident were not placed before the Tribunal by either side, the Tribunal is obliged to find out from the evidence available or to get at the evidence as provided under Sec. 165 of the Evidence Act.[4]

Power of the Court under Order XVI, rule 14, Cr.P.C.

Under O. XVI, rule 14, if the Court at the time thinks it necessary to examine any person other than a party to the suit and not named as a witness by a party to the suit, the Court may of its own motion cause such person to be summoned as a witness to give evidence or to produce any document in his possession.

Power of Court to examine a witness at the instance of the prosecution or defence.

Although the Court can examine a witness at the instance of the prosecution or defence, still when the prosecution asks the Court to examine him because it could not examine him, though it had intended to do so, that should be no ground for the Court to exercise its discretion under Sec. 540, new Sec. 311, Cr. P.C.[5]

It is beyond competence of the Court to virtually oblige a party to examine any particular witness.[6]

Rules to be observed by Magistrate while examining court-witness.

The only rules, which the Magistrate must bear in mind when examining court-witnesses are (1) that the prosecution and the accused are both equally entitled to cross-examine a court-witness, and (2) that if the evidence of a court-witness is prejudicial to the accused, opportunity to rebut the evidence so given to the accused.[7]

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1. Sheik Dada Sahib *v.* Jammu Latchanna, A.I.R. 1954 Mad. 80 at p. 80 : (1952) 2 M.L.J. 290 : 1952 M.W.N. 604 (1).
2. **Popatlal Jethabhai Shah *v.* State of Maharashtra, 2001 (5) Bom. C.R. 672 at p. 674 (Bom.).**
3. Ekambaram *v.* Sundaramurthy, 1988 L.W. (Cr.) 127 at p. 130 (Mad.).
4. P. Rajeswari *v.* Hotel Imperial, A.I.R. 1989 Mad. 34 at p. 35.
5. *In re* K.V.R.S. Mani, A.I.R. 1951 Mad. 707 at pp. 709, 710 : I.L.R. (1951) Mad. 986.
6. Municipal Corporation of Greater Bombay *v.* Lal Pancham, A.I.R. 1965 S.C. 1008 at p. 1014 : 67 Bom. L.R. 782 : (1966) 1 S.C.J. 49.
7. Rangaswami Naicker *v.* Muruga Naicken, A.I.R. 1954 Mad. 169 at p. 170 : (1952) 2 M.L.J. 497 : 1952 M.W.N. 750.

In the case of *Nur Baksh Kazi* v. *Empress*,[1] it was pointed out that it is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions. That a Judge in criminal trial has power to call such witnesses that he condsiders necessary in the interests of justice has never been disputed.[2]

Court when to examine witness.

Judge's power to recall witness in criminal trial.

Our Codes of Civil and Criminal Procedure recognize the power of a Judge to summon and examine any witness he thinks necessary. The common law of England also recognizes the power of a Judge in civil action to call as a witness any person that the Judge thinks necessary. Lord Esher, M.R., in *Coulson* v. *Disborough*,[3] observed as follows :

Power of Judge to summon or examine any witness in criminal or civil proceedings.

> "If there be a person whom neither party to an action chooses to call as a witness, and the Judge thinks that the person is able to elucidate the truth, the Judge, in my opinion is himself entitled to call him."

Judge when to recall a witness.

Professor, Wigmore in his *Treatise on the Anglo-American System of Evidence*, Vol. IX (3rd Ed.) at page 268, has commented on the view expressed by the Court of Appeal in *In re Enoch and Zaretzky Bock & Co.*,[4] as follows:

> "It is deeply regrettable to have to note that the English Court of Appeal in a modern case changed its view, holding now that in civil case the Judge may not call a witness."[5]

At page 268 Prof. Wigmore concludes his discussion by stating—

> "that a Trial Judge may call a witness not called by the parties or may consult any source of information on topics subject to judicial notice, or may put additional questions to a witness called by the parties, or may *ex mero motu* exclude inadmissible evidence, or may take a view of a place or thing."

On the question of the inherent power of the Court to summon and to question witnesses, Prof. Wigmore at page 267 observes "that the general judicial power itself, expressly allotted in every State constitution, implies inherently a power to investigate as auxiliary to the power to decide; and the power to investigate implies necessarily a power to summon and to question witnesses."

See also Jones on *Evidence*, 5th Ed., Vol. 4, pp. 1641-42.

A Court of justice, within the sphere of its jurisdiction has inherent power to compel the attendence of witness in proceedings before it and the giving of testimony concerning relevant facts within their knowlege.

Court's inherent power to compel attendance of witness.

The court has no power to summon the parties to give evidence in misfeasance proceedings.[6]

9. Magistrate not to cross-examine accused during police investigation.— During police investigation, the examination of an accused by a Magistrate by way of cross-examination is improper.[7]

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1. I.L.R. 6 Cal. 279 : 7 C.L.R. 385.
2. *Vide* Halsbury's *Laws of England*, Vol. 10 (3rd Ed.), p. 423.
3. (1894) 2 Q.B. 316.
4. (1910) 1 K.B. 327.
5. *In re* Enoch and Zaretzky Bock & Co. (1910) 1 K.B. 327 at p. 332, approved in Rex. *v.* Harris, (1927) 2 K.B. 587.
6. P.A. Tendolkar *v.* Official Liquidator, A.I.R. 1964 Mys. 75 at pp. 79-80.
7. 5 C.W.N. 864.

10. Object of accused's examination under Sec. 342 (Sec. 313, new) Cr.P.C.—Section 342 (new Sec. 313), Cr. P.C., only empowers a Court to examine an accused person to explain evidence already recorded.[1]

11. Cross-examination of witnesses called by the Court.—In a case of *Tarini Charan Chaudhri* v. *Saroda Sundari Dasi*,[2] and *Empress* v. *Girish Chandra Talukdar*,[3] it was decided that when a party to the suit or a witness is summoned by the Court, such witness is liable to be cross-examined by the parties.[4] A Magistrate was held to be wrong in refusing to allow the attorney, who appeared for the complainant, to cross-examine a witness summoned and examined by himself under Sec. 165.[5] The provisions of Sec. 165 of the Evidence Act apply rather to particular questions put to a witness already before the Court than to the whole examination of witness called by the Court. See *R.* v. *Sakharam Mukundjia*.[6]

Party or witness summoned by the Court is liable to be cross-examined.

The parties have no right to cross-examine any witness except with the permission of the Court. Ordinarily the Judge would give the requisite permission if the answers given are adverse to the party who seeks the said permission.[7] Ordinarily, the principles of natural justice would demand that the discretion should be exercised in a manner that may not result in injustice. If the answers given in reply to the question in examination by the Court under Sec. 165, Evidence Act, may or may not tend to adversely affect a party to the proceedings such a party may not be refused permission to cross-examine in exercise of the discretion.[8]

Parties not entitled to cross-examine witness without Court's permission.

If the answers given by the witness in such examination are adverse to a party then it is desirable that such party should be given a chance to cross-examine that witness. In the present case, in cross-examination by the accused, the witness had stated that he had made the statement before the committing Magistrate at the instance of his mother-in-law and that in fact he had not seen anything. It appears that in view of that statement the accused did not further cross-examine the witness about the incident. However, after the close of the cross-examination by the accused, the Court put the following question to the said witness:

> "In your statement before the committing Magistrate referred to above, you have stated that on the day of Baisakhi Sunita Rani had come to your house and accused Sarbjit *alias* Jit Lal came to your house in the evening time and had given beatings to Sunita Rani and taken to his house. You have also stated that you had correctly stated before the Magistrate but in your cross-examination you have stated that you made statement before the Magistrate on the asking of your mother-in-law. Please let us know if this fact that Sunita had come to your house and was given beating by the accused Sarbjit in your presence was also got recorded by you on the asking of your mother-in-law Bimla Devi."

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1. 5 C.W.N. 864.
2. 3 B.L.R. (A.C.) 158.
3. I.L.R. 5 Cal. 614.
4. Empress *v.* Girish Chandra Talukdar, I.L.R. 5 Cal. 614 at p. 615.
5. Gopal Lall Seal *v.* Manick Lall Seal, I.L.R. 24 Cal. 288 at p. 299.
6. 11 Bom. H.C. Rep. 166.
7. *In re* Mukesh Rama Chandra, A.I.R. 1958 A.P. 165 at p. 167 : I.L.R. (1957) A.P. 742 : (1958) Andh. W.R. 9 : 1957 Andh. L.T. 709.
8. Dwarka Dass *v.* State, 1979 Cr. L.J. 550 at p. 554 (J. & K.); *see* also Haw Ram *v.* Hira Singh, A.I.R. 1984 S.C. 39.

The witness gave the following answer:

"This incident of beating given by the accused to Sunita Rani actually took place in my house in my presence and this fact was stated by me correctly of my own before the committing Magistrate because it had actually happened."

In view of the above reply, it was a fit case where the Trial Court should have exercised its discretion in favour of the accused as the above reply is very much adverse to him. The accused had not cross-examined the witness about that incident in view of the replies given by him during his cross-examination.[1]

Witness not to answer incriminating questions put by Judge.

A witness is not bound under this section to answer questions put to him by a Judge with a view to criminal proceedings being taken against the witness.[2]

There is nothing in this section debarring or disqualifying a party to a proceeding from cross-examining any witness summoned by the Court.[3] All that Sec. 165 says is that a party to a proceeding should not be allowed to cross-examine a witness, upon an answer given by him to a question put by the Court, without the permission of such Court.[4] It is the right of every litigant unless he gives up the same to be afforded an opportunity of cross-examining the witness whose testimony may be used against him at the trial. On the party of reasoning therefore, a witness called by the Court also is liable to be cross-examined by the parties to the proceedings, if they desire to do so. The provisions of Sec. 165, Evidence Act, do not apply to the witness summoned and examined by the Courts.[5] Where the defence declined to examine a witness called by them and the Court thereupon examined him as a Court witness but refused to allow the accused to cross-examine him, *held* that the accused should have been given an opportunity to cross-examine.[6]

12. Should the Judge in civil cases reject inadmissible evidence, if not objected to by the parties.—Under the old law it was indicated on more than one occasion that the Courts had an active duty to perform in respect of the admission and rejection of evidence, and this wholly irrespective of objections emanating or rather falling to emanate from the parties or their pleaders. The Calcutta High Court laid down the following rule on one point connected with the subject: "It will be the duty of the Judge to ascertain, by a few questions put to each witness at the proper time, whether he is speaking of matters within his own knowledge, or merely of those which he has heard from others; and if the former what are his means of knowledge."[7] In the case of *Queen* v. *Pitamber Sirdar*,[8] Markby, J., said : "The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court." This no doubt was a crimimal case, but the general direction above first quoted was addressed to all Courts, civil and criminal. Having regard to the language of Secs. 165, 64, 60 and 5 and of other portions of the Act, it would appear that it was the intention of the Legislature

Judge's power to ascertain from witness the source of witness's knowledge.

1. Sarbjit Singh *v.* State of Punjab, 1983 Cr. L.R. 15 at pp. 16-17.
2. Queen-Empress *v.* Hari Lakshman, I.L.R. 10 Bom. 185.
3. Gopal Lal Seal *v.* Manick Lal Seal, I.L.R. 24 Cal. 288.
4. *Ibid.*, at p. 290 : 3 B.L.C. (A.C.) 145 at p. 158 ; and Empress *v.* Girish Chandra Talukdar, I.L.R. 5 Cal. 614.
5. Dwarka Dass *v.* State, 1979 Cr. L.J 550 at p. 554 (J.K.).
6. Mohendra Nath *v.* Queen-Empress, I.L.R. 29 Cal. 387.
7. Circular No. 31 (Civil Side,) dated the 13th Ocotober, 1863.
8. 7 W.R. (Cr.) 25.

that a Civil Court should, irrespective of objections made by parties, compel observance of the provisions of the law.

13. Proviso (1).— It would be intolerable that the Court should decide right upon suspicions unsupported by testimony.[1] Consent of the parties cannot take the place of declaration of the Evidence Act.[2]

Consent of parties not to take the place of the Act.

As observed by the Privy Council in *Maharaj Sri Chandra Nandy* v. *Rakhalanda*,[3] there must be a specific provision in the Evidence Act before facts can be treated as relevant and facts must also be proved as laid down in the Evidence Act. It is only those facts which are declared to be relevant and duly proved, which can be the basis of a judgement as provided by Sec. 165 of the Evidence Act.[4]

Judgment of the Court must be based on relevant facts duly proved.

Even if the evidence upon the record is in itself insufficient, a Judge may properly decide the case upon the evidence, if the defendant consents to its being taken as sufficient.[5]

Judge may by defendant's consent decide on insufficient evidence.

While arriving at a conclusion the Judge should exclude from his consideration the result of the confidential inquiry.[6]

Before a Judge is justified in commenting adversely upon a witness's evidence, he must establish the particular fact warranting such criticism by proper evidence in Court and not by reference to documents which are not properly on the record.[7]

Adversary comment on evidence.

The omission to object to the admission of irrelevant evidence cannot possibly make it relevant.[8] In *A.B. Miller* v. *Madho Das*,[9] their Lordships of the Privy Council held that an erroneous omission to object to the admission of tesimony did not make it available as a ground of judgment.

Omissions to object to adolescent evidence.

The undernoted cases[10] are sufficient authority for justifying a Judge in using his knowledge about the character of the parties. On the other hand, it has been laid down by their Lordships in *Harpurshad* v. *Sheo Dyal*,[11] that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts.[12]

Judge to use the knowledge of the character of parties.

It is not improper for a Magistrate who has special knowledge of the circumstances forming the background to a particular case to draw on that special knowledge in interpretation of the evidence which he has heard. He is not there

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1. Smt. Mohun Bibi *v.* Sarad Chand, 2 C.W.N. 17 at p. 27.
2. Ponnuswami Pillai *v.* Singaram Pillai, A.I.R. 1919 Mad. 848 (2) at p. 849 ; but *see* Sri Rajah Prakaserayanim Garu *v.* Venkata Rao, I.L.R. 38 Mad. 160.
3. A.I.R. 1941 P.C. 16.
4. Miyana Hasan Abdullah *v.* State of Gujarat, A.I.R. 1962 Guj. 214 at p. 216.
5. Sheetal Pershad Mitter *v.* Junmejoy Mullick, 12 W.R. 244 at p. 245.
6. Baldeo Singh *v.* Sheoraj Kueri, A.I.R. 1920 Pat. 116 at p. 117.
7. Amar Nath *v.* King-Emperor, A.I.R. 1925 Lah. 187 at p. 188.
8. Nanak Chand *v.* Mian Mohammad Shahbaz Khan, A.I.R. 1936 Lah. 114 at p. 115.
9. I.L.R. 19 All. 76 : 23 I.A. 106.
10. Bomundass Mookerjee *v.* Mst. Tarine, (1857-59) 7 M.I.A. 169 ; Mohammad Buksh Khan *v.* Hossain Bibi, I.L.R. 15 Cal. 684.
11. (1877) 26 W.R. 55 : 3 I.A. 259 (P.C.).
12. San Hla Baw *v.* Mi Hhorow Nissa, A.I.R. 1918 L.B. 66 at p. 67.

to give evidence to himself, still more is he not there to give evidence to other justices; but he can employ his basic knowledge in considering, weighing up and assessing the evidence given before the Court beyond doubt.[1]

14. Force of precedents in our system of judicial precedents.—It would be useful to refer to the observation made by Venkataram Aiyar, J., in *Jaisri Sahu* v. *Rajdewan Dubey*,[2] and the cases referred to therein.

Effect of the precedent.

The effect of a precedent of the Gujarat High Court fell to be considered indirectly in this case. Before Raju J., it was urged for the first time in the course of this litigation that in the absence of the sanction of the Charity Commissioner the Court sale was invalid. Counsel for the auction-purchaser contended that this question was not raised before District Court and that Court cannot be said to have acted illegally or with material irregularity in not deciding the question. Counsel for the auction-purchaser relied upon two decisions in support of that proposition; *Pinjare Karimbhai* v. *Shukla Hariprasad*[3] and *Haridas* v. *Ratensey*.[4] He urged that under the Bombay Reorganization Act, 1960, the jurisdiction of the Bombay High Court which originally extended over the territory now forming part of the State of Gujarat, ceased when a new High Court was set up in the State of Gujarat, but it was held by a Full Bench of the High Court of Gujarat in *State of Gujarat* v. *Gordhandas*,[5] that the decision of the Bombay High Court will be regarded as binding since the Gujarat High Court had inherited the jurisdiction, power and authority in respect of the territory of Gujarat. When pressed with the observations made in the two cases cited at the Bar, Raju. J., found an easy way out. He observed that the judgment of the Full Bench of the Gujarat High Court had "no existence in law" for in absence of a provision in the Constitution and the Charter Act of 1861, a Judge of a High Court had no power to refer a case to a Full Bench for determination of a question of law arising before him.

Verdict of the Supreme Court.

The judgment of the Full Bench of the Gujarat High Court was binding upon Raju, J. If the learned Judge was of the view that the decision of Bhagwati, J., in *Pinjare Karimbhai's*[6] case, and of Macleod, C.J., in *Haridas's* case,[7] did not lay down the correct law or rule of practice, it was open to him to recommend to the Chief Justice that the question be considered by a large Bench. Judicial decorum, propriety and discipline required that he should not ignore it. Gajendragadkar, C.J., observed in *Bhagwan* v. *Ram Chand* [8] :

> "....That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety."

Whether a precedent of a Court of co-ordinate authority is binding.

In considering whether a precedent of a Court of co-ordinate authority is binding, reference to Sec. 165 of the Evidence Act is irrelevant. Undoubtedly, every judgment must be based upon facts declared by the Evidence Act to be relevant and duly proved. But when a Judge in deciding a case, follows a precedent, he only regards himself bound by the principle underlying the judgment and not by the facts of the case.

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1. Witherall *v.* Harisson, (1976) 1 All E. 241 at p. 244.
2. (1962) 2 S.C.R. 558 at pp. 567-69 : A.I.R. 1962 S.C. 83 at pp. 87-88.
3. (1962) 3 Guj. L.R. 529.
4. 23 Bom. L.R. 802 : A.I.R. 1922 Bom. 259.
5. 3 Guj. L.R. 269 : A.I.R. 1962 Guj. 128 (F.B.).
6. (1962) 3 Guj. L.T. 529.
7. 23 Bom. L.R. 802 : A.I.R. 1922 Bom. 149 (2).
8. A.I.R. 1965 S.C. 1767.

It is true that every Judge of a High Court before he enters upon his office takes an oath of office but there is nothing in the oath of office which warrants a Judge in ignoring the rule relating to the binding nature of the precedents which is uniformly followed.[1]

15. Judgments are not binding.— A judgment of a High Court is not binding on the other Judges of the same Court or upon Judges of any other High Court. It is open to a High Court Judge to agree with the judgment of another, but if he does not agree, he must follow his own judgment.[2]

Binding nature of judgments of High Court discussed.

Sitting as a Single Judge, Sir Beaumont, C.J., said that he was not bound by the judgment of Division Court of the Bombay High Court in *Punjashet Lal* v. *Moti Ram Badhu*,[3] and Sir John Beaumont observed thus:

> ".....I am not bound by the reasoning on which another decision is based....."[4]

Halsbury (3rd Ed., Vol. 22, para. 1689) observes that a Judge of first instance will usually follow the decision of another Judge of first instance unless he is convinced that that judgment was wrong. Halsbury observes that that is not a rule of law but is the practice.

When judgment of Judge binding on another Judge.

For a High Court Judge, to treat a judgment of a High Court as binding on him and to decide a case in accordance with such judgment would contravene the provisions of Art. 219 of the Constitution. He may accept the view of another High Court Judge or of another Bench of High Court Judges but the conclusion must be based on his own judgment. Except when there is judgment of the Supreme Court declaring the law to be applied, High Court Judges must use their own judgment even if they consider various decisions before forming their judgment.[5]

Binding nature of the judgment of Supreme Court discussed.

If a Judge or Judges of a Bench comes to a certain conclusion because the weight of authority is in favour of that conclusion, that would be contrary to the provisions of Sec. 165 of the Evidence Act and Art. 219 of the Constitution, and to the oath taken by the Judges under the Government of India Act.[6]

16. Proviso (2).— A Magistrate exceeds his duty by addressing a witness thus" "Recollect, or else, I will send you into custody."[7]

Magistrate's duty exceeded.

But where the question is asked with a view to criminal proceedings being taken against the witness, he is not legally bound to answer it.[8]

17. Applicability of the section.— The proof of a previous conviction may be adduced provided the previous conviction is relevant under the Evidence Act.[9] This section does not jusify a Court examining a witness without notice to the parties or their

Previous conviction of the accused when to be proved.

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1. Tribhovandas Purshottamdas Thakkar *v.* Ratilal Motilal Patel, A.I.R. 1968 S.C. 372 at pp. 376-77 : 70 Bom. L.R 73.
2. State *v.* Ramprakash P. Puri, A.I.R. 1964 Guj. 223 at p. 226.
3. I.L.R. 50 Bom. 192.
4. *See* Mahakori Bai *v.* Bhikabhai Sankalchand, A.I.R. 1935 Bom. 28.
5. State *v.* Ramprakash P. Puri, A.I.R. 1964 Guj. 223 at pp. 226, 229.
6. Madhusudan Dahyabhai *v.* Manilal Harilal, A.I.R. 1963 Guj. 291 at p. 295.
7. Queen-Empress *v.* Ishri Singh, I.L.R. 8 All. 672 at p. 675.
8. Queen-Empress *v.* Hari Lakshman, I.L.R. 10 Bom. 185 at p. 186.
9. E. *v.* Ismail Alibhai, I.L.R. 39 Bom. 326.

pleaders. If the Court bases its decision on the evidence of such a witness; it acts with material irregularity in the exercise of its jurisdiction.[1] In a suit under Sec. 77, Registration Act, the parties filed the evidence adduced before the registering authorities as evidence in the case by mutual consent on which the Court based its judgment entirely. *Held* that the stringent provisions of this section rendered the judgment invalid and that it must be set aside.[2]

Witness not to be examined without notice to parties.

18. Word "any" in the section confer unbridled power on the trial Court.—Section 165 of the Evidence Act confers vast and unrestricted powers on the trial Court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislature intent to confer unbridled power on the trial Court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transagress beyond the contours of powers of the Court. This is clear from the words "relevant or irrelevant" in Sec. 165. Neither of the parties has any right to raise objection to any such question.[3]

166. Power of jury or assessors to put questions.—In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

SYNOPSIS

1. Scope ... 4980
2. Question by jury or assessor ... 4980
3. View of the spot by jury or assessors ... 4981

1. Scope.— Section 166 has no application to a case where the murder and robbery were parts of the same transaction and the accused was in possession of the jewels, a possession which he has not explained some hours later. That section cannot apply to shift the onus of proof in a criminal prosecution, at any stage of the prosecution.[4]

Can accused be guilty if the chain of circumstantial evidence is incomplete ?

2. Question by jury or assessor.— These questions should be put through or by leave of the Judge.[5] Magistrate, trying a criminal case, may themselves inspect the locality, if the evidence be conflicting, or if the guilt or innocence of the party depends on local peculiarities of situation.[6]

The law (Sec. 309 of the Code of Criminal Procedure, 1898) gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary.[7]

Judge's discretion under Sec. 309.

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1. Peary Lal Das *v.* Peary Lal Dawan, 19 C.W.N. 903.
2. Ponusamy Pillai *v.* Singaram Pillai, I.L.R. 41 Mad. 731. But *see* Jainab Bibi *v.* Hyder Ally, I.L.R. 43 Mad. 609 (F.B.), where it was held that the benefit of Sec. 33 *ante* may be waived and notes under Sec. 33.
3. State of Rajasthan *v.* Ani, A.I.R. 1997 S.C. 1023 at p. 1025 ; 1997 Cr. L.J. 1529 (S.C.) : (1997) 6 S.C.C. 162 : 1997 S.C.C. (Cr.) 851 : 1997 (1) Crimes 146.
4. *In re* Thangaswami, A.I.R. 1963 Mad. 476 at pp. 479, 480. N.B. Trial by jury or with assessment view abandoned Cr. P.C. 1973.
5. King-Emperor *v.* Tirumal Reddi, I.L.R. 24 Mad. 523 at p. 543. An assessor may also like jury be allowed to put question through the Court to witness under examination.
6. *In the matter of* Lalji, I.L.R. 19 All. 302 at pp. 303-4.
7. Nazimuddin *v.* Emperor, I.L.R. 40 Cal. 163 at p. 163 : 13 Cr. L.J. 447 : 15 I.C. 641.

3. View of the spot by jury or assessors.—It is often desirable that the jury should have an opportunity of *viewing the spot* in controversy[1] since the knowledge, derived by these means is far more satisfactory than any obtainable by the mere examination of maps or plans.[2]

The assessors can view the scene of alleged offence.[3]

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1. For an early instance of this being ordered, *see* Mossam *v.* Ivy, (1684) 10 How. St. Tr. 562 at p. 631.
2. Taylor's *Evidence,* 10th Ed., Sec. 558 at p. 398.
3. Queen *v.* Chutterdharee Singh, 5 W.R. 59 at p. 60 (Cr.).

CHAPTER XI

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

167. No new trial for improper admission or rejection of evidence.—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

SYNOPSIS

1. Principle of the section ... 4982
2. Rule of English law ... 4983
3. English and Indian law ... 4983
4. Evidence rejected ... 4984
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7. Appraisal of evidence ... 4986
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20. Evidence admitted at an improper stage of case ... 4994
21. Improper rejection of evidence ... 4995
22. Review and new trial ... 4995
23. Scope of the power of the High Court in exercise of revisional jurisdiction against an order of acquittal ... 4995
24. Some other cases ... 4996

1. Principle of the section.— It is the rule of the Judicial committee to do substantial justice between the parties and to see if there is sufficient evidence on the whole record to justify the conclusion to which the Court below has arrived.[1] If the evidence, after omitting that portion of it which should not have been admitted, is sufficient to sustain the verdict, the conviction will be upheld.[2] Though evidence be improperly received, yet where the case appears clear against the prisoner without the evidence, improperly admitted it would be no reason to stay the execution.[3]

Duty of Appellate Court to see sufficiency of evidence on record.

Where there is sufficient evidence to justify a decision, arrived at by the Court below, independently of the evidence objected to as being improperly received, such admission would be no ground for ordering a new trial.[4] Where evidence such as hearsay, is improperly admitted, the question for the the Judicial Committee is whether rejecting that evidence, enough remains to support the finding.[5] Where

Not a ground for new trial.

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1. 13 M.I.A. 77 at p. 83 : 12 W.R. (P.C.) 32.
2. 6 B.H.C. (Cr. Cas.) 47.
3. R. *v.* Oldroyd, R. & R. 83 ; also R. *v.* Tinkler, East P.C. 354 ; *see* 9 B.H.C. 372.
4. I.L.R. 28 Bom. 129 at p. 152 ; *see* also I.L.R. 10 All. 207 : 6 B.L.R. 495 : 15 W.R. (P.C.) 8 : 9 B.L.R. 371 : 14 M.I.A. 86 : 16 W.R. (P.C.) 11 : 20 W.R. 384 : 20 W.R. 458 : 10 B.H.C. 497 : 11 B.H.C. 90 at p. 97 : I.L.R. 19 Bom. 749 at p. 761 : I.L.R. 7 Cal. 293 : I.L.R. 8 Cal. 739 : 12 C.L.R. 233 : I.L.R. 21 Cal. 955 and 6 M.I.A. 232.
5. 6 B.L.R. (P.C.) 495 ; *see* also 7 B.L.R. (Ap.) 4 and 7 B.L.R. (Ap.) 14.

evidence of a doubtful admissibility has been received, the Judicial Committee will not allow any objection to prevail as to its admissibility.[1] Where the remaining evidence (after rejecting that improperly admitted) was not of such a character that a conviction might reasonably be based upon it. The High Court set aside the conviction and sentence,[2] for a case where, a conviction was set aside on the ground of improper admission of evidence and misdirection.[3] Where the High Court formed the opinion that the evidence could not, in any proper view of the case, support a conviction, it would not alter or reverse the order of acquittal.[4] Where inadmissible evidence is let in with other evidence, legally admissible, and where the former is of material character, it would be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former.[5]

Duty of Court in case of inadmissible evidence on record

2. Rule of English law.— This is verbatim Sec. 57 of the old Act II of 1855; and the rule has been adopted from the practice of the Courts in England. "Where evidence," says Mr. Lush, "has been offered by one party at the trial, and has been improperly rejected or admitted by the Judge after hearing the objections of the opposite-party, a new trial, as a general rule, may be claimed on the ground that, in so rejecting or admitting the evidence the Judge did not rule according to law."[6] In *R.* v. *Grant*,[7] it was laid down that it is only where the evidence in question is deemed by the Court to have been admissible *for the purpose for which it was tendered at the trial*, that its rejection forms a sufficient ground for a new trial; and that a new trial will not be granted in order that evidence may be given for a purpose other than that for which it was offered, for in such case the fault lay with the party and not with the Judge.[8]

English law.

Court when to order for new trial.

The purpose of new trial.

3. English and Indian law.— In England, in civil cases, the rules as to admissibility may, at the trial be relaxed by the consent of the parties. Under the Indian law, there is no such power.[9]

Section 167 to apply to civil or criminal proceedings.

(*a*) Section 167 applies to civil as well as to criminal cases.[10]

(*b*) The words "in any case" in Sec. 167 are wide to include criminal trials by jury.[11]

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1. 13 M.I.A. 519 : 15 W.R. (P.C.).
2. Imparatrix *v.* Pandharinath, I.L.R. 6 Bom. 34 at p. 37.
3. *See* Queen-Empress *v.* O'Hara, I.L.R. 17 Cal. 642.
4. I.L.R. 26 Mad. 1 at p. 15, approving I.L.R. 14 Bom. 115, commenting on Wafadar Khan *v.* Queen-Empress, I.L.R. 21 Cal. 955 and Ali Fakir *v.* Queen-Empress, I.L.R. 25 Cal. 230 and following 5 W.R. (Cr.). 80.
5. I.L.R. 27 Bom. 626 at p. 633 : 5 Bom. L.R. 599 at p. 603.
6. Stephen Lush's *Common Law Practice*, 2nd Ed., p. 481, quoting Anderson, B., in Hughes *v.* Hughes, 15 Meeson and Welsby's Rep. 701 ; *see* also the other cases there cited.
7. Barnewell and Adolphus Rep. 1081.
8. *See* Wright *v.* Doed, Tatham, 7 Adolphus and Ellis's Rep. 330 Compare 13 & 14 Vict., cap. 36, Sec. 45, which lays down a similar rule for Scotland.
9. Whitley Stokes, Vol. II, p. 833.
10. Queen *v.* Hurribole Chunder Ghose, I.L.R. 1 Cal. 207 at p. 217 ; R. *v.* Navroji Dadabhai, 9 B.H.C.R. 358 at p. 375.
11. Queen-Empress *v.* Ram Chandra Govind, I.L.R. 19 Bom. 749 at p. 762 ; Wafadar Khan *v.* Queen-Empress, I.L.R. 21 Cal. 955 (diss.) ; Sovlimiya Miyabhai *v.* Empress, A.I.R. 1944 Bom. 338 at p. 343.

(*c*) That Sec. 167 applies to criminal and civil cases is satisfactorily established by Sec. 1 and by Sec. 3.[1]

(*d*) And it is so applicable, whether or not the trial has been had before a jury.[2]

The provision contained in Sec. 167, Evidence Act, 1872, applies to all judicial proceedings in or before any Court.[3]

4. Evidence rejected.— Section 167 of the Indian Evidence Act enacts that the improper rejection of evidence shall not be a ground of itself for a new trial or reversal of any decision if it shall appear to the Court that if the rejected evidence has been received it ought not to have varied the decision.[4] The question under Sec. 167 is whether the evidence rejected "ought not to have varied the decision."[5]

5. Conclusion of the High Court resting on inadmissible evidence.—The High Court refused to rely on the testimony adduced in support of appellants, claim as regard the value of the orchard. The conclusion of the High Court, relied on the inadmissible evidence. *Held*: the valuation was subsequently enhanced by the High Court by relying on inadmissible evidence. The Government had not appealed against that decision. Therefore the decision of the High Court in that regard stood.[6]

6. Application of the principle in criminal cases.— The principle of this section was applied upon appeal in *Imperatrix* v. *Pandharinath*,[7] to a case tried by a Sessions Judge sitting with a jury. The High Court, after excluding the evidence improperly admitted, found that the remaining evidence was not of such a character that a conviction might reasonably be based upon it; and accordingly the conviction and sentences were reversed. In *Queen-Empress* v. *O'Hara*,[8] the Judge read to the jury certain statements made by two witnesses which had not been admitted in evidence. It was held that this was an error calculated to prejudice the prisoner and after a consideration of the remaining evidence, the conviction was set aside. In the case of *Queen* v. *Hurribole Chunder Ghose*,[9] certain evidence, which had been improperly admitted, was rejected, and upon the evidence that remained the conviction was upheld. In *Imperatix* v. *Pitambar Jina*,[10] it was held that the High Court had power to determine whether the rejection of evidence held to have been improperly admitted should have the effect of varying the result of the trial so that the conviction should be reversed.[11] In *Uma Kant Bakshi* v. *Ganga Narain Chaudhri*,[12] the copy of a deposition of a witness was improperly admitted in evidence. But there being other evidence sufficient to jusify the decision, this was not held to be ground of itself for a new

Court when to set aside conviction if evidence besides inadmissible is not sufficient.

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1. R. *v.* Pitamber Jina, I.L.R. 2 Bom. 61 at pp. 65-66.
2. Imperatrix *v.* Pitamber Jina, I.L.R. 2 Bom. 61 at p. 65.
3. Abdul Rahim *v.* Emperor, A.I.R. 1946 P.C. 82 at p. 84 : 73 I.A. 77 : 1947 A.W.R. (P.C.) 3 : 48 Bom. L.R. 473 : 50 C.W.N. 692.
4. Sri Gangadhar Mohanti *v.* Sir Priyanath Das, 29 Cut. L.T. 357 at pp. 362-63.
5. Narain *v.* State of Punjab, A.I.R. 1959 S.C. 484 at p. 487 : 1959 S.C.J. 447 : (1959) 1 S.C.R. Sup. 724 : 1959. A.W.R. 292 : 1959 M.W.N. 17.
6. Chaturbhuj Pande *v.* Collector, Raigarh, A.I.R. 1969 S.C. 255 at pp. 256-57 : 1969 All. L.J. 159.
7. I.L.R. 6 Bom. 34.
8. I.L.R. 17 Cal. 642.
9. I.L.R. 1 Cal. 207.
10. I.L.R. 2 Bom. 61.
11. *See* also Regina *v.* Navroji Dadabhai, 9 B.H.C.R. 358.
12. 20 W.R. 384.

trial. In *Queen-Empress* v. *Nand Ram*,[1] copies of depositions given at a previous trial were read out to the witnesses who were then cross-examined by the prisoners. It was held that the irregularity was cured by this section. In *Empress* v. *Jhubbo Mahton*,[2] irregularities were held not to be objections which would justify an interference with the verdict.

Appellate Court has power in the event of admission of inadmissible evidence either to convict or acquit the accused according as the evidence is or is not sufficient for conviction, a new trial may be ordered as in the case of *Reg* v. *Ramaswami Mudaliar*.[3] That every breach of Sec. 162, Cr.P.C., will not vitiate a trial was very emphatically pointed out by Sir George Rankin in the case of *Sajjad Mirza* v. *Emperor*.[4] Chotzner, J., in the case of *Harendra Nath Shah* v. *Emperor*,[5] has pointed out that reception of evidence inadmissible owing to the provisions of Sec. 162, Cr.P.C. is not necessarily fatal. In the case of *Nitai Koley* v. *Emperor*,[6] Henderson and Khundkar, JJ., have taken the same view that it must always be a question whether prejudice has been caused in such cases, and if not, whether the materials left are sufficient within the meaning of Sec. 167, Evidence Act.[7] The presumption of the innocence of the accused still persists and the Court of Appeal has to satisfy itself that the judgment of the Magistrate is right.[8] A duty is, as was held in *Fidoi Hussein* v. *Emperor*,[9] imposed on an Appellate Court to examine the evidence for the defence and to come to a decision thereon even if the counsel for the appellant has practically ignored it during his arguments. In *Kanchan Malik* v. *Emperor*,[10] a Division Bench ruled that in an appeal from a conviction it is for the Appellate Court to be satisfied affirmatively that the prosecution case is substantially true, and that the guilt of the appellant has been established beyond all reasonable doubt.[11] If real injury were done by the prosecution or the Court to an accused person the absence of objection by counsel for the accused would not excuse it.[12] For the ends of justice, the High Court should send the matter back to the Magistrate to determine the guilt or otherwise of the accused after eliminating the evidence of the complainant which he has wrongly admitted.[13]

Prejudice to accused main ground for new trial.

Presumption of the innocence of the accused still to persist.

Appellate Court to satisfy as to substantial truthfulness of the case.

Appellate Court when to send the matter back to Magistrate.

Where a piece of evidence (entry in general diary) which might not have been brought on the record, is used as corroborative evidence. The judgment is not vitiated.[14]

Judgment not vitiated by the evidence of entry in general diary not admissible.

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1. I.L.R. 9 All. 609.
2. I.L.R. 8 Cal. 739 : 12 C.L.R. 233.
3. (1869) 6 B.H.C.R. Cr. 47 ; Ramchanda Shankarshet Urvane *v.* Emperor, A.I.R. 1933 Bom. 153 at p. 156 : 35 Bom. L.R. 174.
4. 45 C.L.J 129 : A.I.R. 1927 Cal. 372 : 28 Cr. L.J. 446.
5. 40 C.L.J. 313 : A.I.R. 1925 Cal. 161 : 26 Cr. L.J. 307.
6. I.L.R. (1939) 1 Cal. 337.
7. Surendra Dina *v.* Emeperor, A.I.R. 1949 Cal. 514 at p. 518 : I.L.R. (1945) 2 Cal. 513 : 231 I.C. 471.
8. Abdul Gani Bandukchi *v.* Emperor, A.I.R. 1943 Cal. 465 at p. 467 : I.L.R. (1943) 1 Cal. 423 : 47 C.W.N. 332.
9. I.L.R. 40 Cal. 376 : 20 I.C. 403.
10. A.I.R. 1915 Cal. 187 : I.L.R. 42 Cal. 374 : 26 I.C. 134.
11. Mohammad Hussain *v.* Emperor, A.I.R. 1945 Nag. 116 at pp. 116-17 : I.L.R. (1945) Nag. 441 : 1945 N.L.J. 87.
12. Inayat Khan *v.* Emperor, A.I.R. 1936 P.C. 199 at p. 201 : 40 C.W.N. 1101.
13. Sudhindra Nath *v.* State, A.I.R. 1953 Cal. 339 at p. 341 : 56 C.W.N. 835.
14. Kali Das Mukherji *v.* Emperor, A.I.R. 1948 Cal. 16 at p. 18 : 229 I.C. 276.

Admission of inadmissible evidence not to be disregarded in every case.

It is clear from the language of Sec. 167 that it is not in every case that the admission of inadmissible evidence will be disregarded on the ground that it appears to the Appellate Court that independently of the evidence improperly admitted there was sufficient evidence to justify the decision.[1] The prosecution, though it had cited as a witness, dropped him. *Held* that this was not a case in which evidence could be said to have been rejected within Sec. 167 of the Evidence Act.[2]

7. Appraisal of evidence.— Appraisal of evidence is not permissible in proceedings under Art. 266 of the Constitution.[3]

8. An appeal from verdict of jury[4].— In *Wafadar Khan* v. *Queen Empress,*[5] following the decision in *Makin* v. *Attorney General for New South Wales,*[6] it was held by the Calcutta High Court that an accused in a trial by a jury is entitled to the verdict of the jury on questions of fact, and where a verdict is vitiated owing to misdirection by the Judge, the Appeal Court has no option but to set aside the verdict and direct a retrial. This view was affirmed in *Ali Fakir* v. *Queen-Empress,*[7] and in *Biru Mandal* v. *Queen-Empress,*[8] but was dissented from in *Taju Paramanik* v. *Queen-Empress,*[9] which followed the course adopted in *Queen-Empress* v. *O'Hara,*[10] *R.* v. *Navroji Dadabhai,*[11] and *Queen-Empress* v. *Hurribole Chunder Ghose,*[12] citied above, holding that the law nowhere lays down that when the verdict of the jury is set aside the Court must necessarily direct a new trial.[13] In *Sadhu Sheikh* v. *E.,*[14] which was a case of misdirection by the Judge, Maclean, C.J., observed : "I entertain, personally, a strong opinion that when a case has been tried before a jury and the conviction has been set aside on the ground of misdirection, the accused is entitled to have his case re-tried before a jury." In *Sheikh Hazir* v. *E.,*[15] Stephen and Carnduff, JJ. held that they had no wish to dissent from the general principle as enuniciated by Maclean, C.J., in *Sadhu Sheikh* v. *E.,*[16] and ordered a re-trial. In *Ramesh Chunder Das* v. *King-Empress,*[17] it was held that if in the opinion of the Appellate Court, there is sufficient legal evidence to justify the decision, then the improper admission of other evidence is not to be ground of itself for interference jury trial is omitted in Cr. P.C. 1973. But when the trial is by jury. The Appellate Court should not confirm the convictions or regard the legal

Appellate Court to set aside conviction when verdict is vitiated owing to misdirection.

Re-trial when in case of inadmissible evidence on record.

Duty of Appellate Court in case of decision by jury on inadmissible evidence.

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1. C.G. Lloyd *v.* Emperor, A.I.R. 1933 Cal. 136 at p. 138 : 142 I.C. 274.
2. Narain *v.* State of Punjab, A.I.R. 1959 S.C. 484 at p. 487 : 1959 M.W.N. 17.
3. Babu Nandan *v.* Board of Revenue, A.I.R. 1972 All. 406 at p. 408.
4. Jury trial has been omitted in Cr.P.C., 1973.
5. I.L.R. 21 Cal. 955.
6. (1890) A.C. 57 ; *see* also Emperor *v.* Ikramuddin, A.I.R. 1917 All. 173.
7. I.L.R. 25 Cal. 230.
8. I.L.R. 25 Cal. 561.
9. I.L.R. 25 Cal. 711.
10. I.L.R. 17 Cal. 642.
11. 9 B.H.C.R. 358.
12. I.L.R. 1 Cal. 207.
13. *See* also Jaminuddi *v.* E., I.L.R. 29 Cal. 782 : 6 C.W.N. 553.
14. 4 C.W.N 576.
15. 14 C.W.N. 493 : 11 C.L.J. 301.
16. 4 C.W.N. 576.
17. I.L.R. 46 Cal. 895 : 39 C.L.J. 513 : 23 C.W.N. 661.

evidence as sufficient to justify the decision, unless it is satisfied that the verdict of the jury would have been the same, if no evidence had been wrongly admitted. The same principles should be applied to the wrongful admission of evidence as to misdirection of law. Directing a retrial is a matter of the Court's discretion. In *Harrendra* v. *E.*,[1] it has been held that in the case of reception of inadmissible evidence, the Court of Appeal has to see whether the reception has in fact occasioned a failure of justice; and secondly, whether if it is excluded, there is sufficient evidence to justify the verdict.

Power of High Court in case of inadmissible evidence on record.

The Bombay High Court did not follow *Wafadar Khan* v. *Queen-Empress*,[2] and held that when part of the evidence, which has been allowed to go to the jury, is found to be irrelevant and inadmissible, it is open to the High Court in appeal, either to uphold the verdict upon the remaining evidence on the record under Sec. 167, Evidence Act, or to quash the verdict and order a retrial.[3]

High Court when to maintain conviction in case of inadmissible evidence on record.

In *Abdul Rahim* v. *Emperor*,[4] it was laid down by the Privy Council that where inadmissible evidence has been admitted in a criminal case tried with a jury, the High Court on appeal may maintain a conviction provided that the admissible evidence remaining was, in the opinion of the Court, sufficient clearly to establish the guilt of the accused.

Supreme Court view in case of inadmissible evidence on record or misdirection to jury.

This decision was followed by the Supreme Court in *Mushtaq Husain* v. *State of Bombay*,[5] and the Court held that where a jury has been misdirected and has based its verdict on assumptions and conjectures, the Supreme Court may order a re-trial or remit the case to the High Court to it may examine the merits of the case and decide for itself whether there has been a failure of justice in the case.

The verdict of jury when to be set aside.

The Supreme Court came to the conclusion, that unless it was established in a case that there has been a serious misdirection by the Judge in charging the jury which had occasioned a failure of justice and had misled the jury in giving its verdict, the verdict of the jury could not be set aside.

Appeal Court to substitute its verdict for that of jury.

What has therefore got to be done in cases where inadmissible evidence has been admitted and has been incorporated in the learned Judge's charge to the jury is to exclude the inadmissible evidence from the record and consider whether the balance of evidence remaining thereafter is sufficient to maintain the conviction.[6] In *Abdul Rahim* v. *Emperor*,[7] the Privy Council came to the conclusion that the ratio of cases beginning with *Elahee Buksh, In re*,[8] and ending with *Arnold Monteath Mathews* v. *Emperor*,[9] was correct. The Court of Appeal is entitled to substitute its own verdict for the verdict of the jury if on examining the record for

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1. 40 C.L.J. 313.
2. I.L.R. 21 Cal. 955.
3. *See* Queen-Empress *v.* Ramchandra Govind Harshe, I.L.R. 19 Bom. 749.
4. A.I.R. 1946 P.C. 82 : 73 I.A. 77 : 1947 A.W.R. (P.C.) 3 : 48 Bom. L.R. 473 : 50 C.W.N. 692.
5. A.I.R. 1953 S.C. 282 : 55 Bom. L.R. 529 : 1953 S.C.A. 1014 : 1953 S.C.J. 338 : 1953 S.C.R. 809 : 1953 A.W.R. Sup. 72.
6. Ramkishan Mithanalal Sharma *v.* State of Bombay, A.I.R. 1955 S.C. 104 at pp. 120-21 : 1955 S.C.A. 410 : 1955 S.C.J. 129 : 1955 1 S.C.R. 903 : 1955 A.W.R. Sup. 41.
7. A.I.R. 1946 P.C. 82 : 73 I.A. 77 : 1947 A.W.R. (P.C.) 3 : 48 Bom. L.R. 473.
8. 5 Suth. W.R. (Cr.) 80.
9. A.I.R. 1940 Lah. 87.

itself it comes to the conclusion that the verdict to the jury was erroneous or that there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.[1]

9. Misdirection.[2]— Where a verdict of the jury is vitiated by the Judge's misdirection the Appeal Court must set aside the verdict and order a re-trial.[3]

Misdirection of jury—Effect.

The power of the Court is not limited to directing a new trial, but it can deal with the case in any of the ways provided in Sec. 423, (New Sec. 386) Cr. P.C.[4] Where a case has been tried before a jury and the conviction has been set aside on the ground of misdirection, the accused is entitled to have his case re-tried before a jury.[5]

Ways of rectifying misdirection.

Right of the accused of new trial.

If the Appellate Court should go into the facts in such a case it would be substituting the decision of the Appellate Court for the verdict of the jury.[6] The language used by the Privy Council in *Makin's* case does not apply to the Codes of India.[7]

Whether Appellate Court can consider facts in cases of misdirection.

The power of setting aside convictions and ordering new trials for any error or defect in the summing up will be exercised by the High Court only when it is satisfied that the accused person has been prejudiced by the error or defect or that a failure of justice has been occasioned thereby.[8] Before the High Court can interfere with the verdict of a jury it must be satisfied that the verdict is erroneous that the error was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it was laid down by the Judge.[9]

When misdirection will be interfered with.

Where material evidence which ought not to be admitted is admitted there is a misdirection of law when the Judge tells the jury that it is evidence on which they can, if they think proper, convict the accused.[10]

Insurance of misdirection.

10. Review by the High Court under the Letters Patent.—Under Cls. 25 and 26 of the Letters Patent, the High Court is not competent to order a re-trial, but should finally decide the matter on review. The Full Bench is competent to investigate whether independently of the evidence erroneously admitted there was sufficient evidence to justify the verdict of the jury.[11] It has been the practice of

High Court's power under Letters Patent.

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1. Ramkishan Mithanlal Sharma *v.* State of Bombay, A.I.R. 1955 S.C. 104 at p. 121 : 1955 S.C.A. 410 : 1955 S.C.J. 129 : (1955) 1 S.C.R. 903 : 1955 A.W.R. Sup. 41.
2. Jury trial has been omitted in Cr. P.C., 1973.
3. Wafadar Khan *v.* Queen-Empress, I.L.R. 21 Cal. 955 at p. 978 ; Makin *v.* Attorney-General of New South Wales, L.R. (1894) A.C. 57 ; *see* also Subramania Ayyar *v.* King-Emperor, I.L.R. 25 Mad. 61 at pp. 76-77 (P.C.).
4. Taju Pramanik *v.* Queen-Empress, 2 C.W.N. 369 : I.L.R. 25 Cal. 711; Wafadar Khan *v.* Queen-Empress, I.L.R. 21 Cal. 955 (diss.)
5. 4 C.W.N. 576 ; *see* also Ali Fakir *v.* Queen-Empress, 25 Cal. 230 at pp. 232-33.
6. Wafadar Khan *v.* Queen-Empress, I.L.R. 21 Cal. 955 at p. 978 ; but *see* Taju Pramanik *v.* Queen-Empress, I.L.R. 25 Cal. 711 ; the Indian Cases of 5 B.H.C. (Cr.). 85 ; 6 B.H.C. 47 (Cr.); 9 B.H.C. 358 (Cr.) ; 10 B.H.C. 497 (Cr.).
7. Queen-Empress *v.* Ramachandra Govind Harshe, I.L.R. 19 Bom. 749 at p. 763.
8. Elahee Buksh, *In re*, 5 W.R. (Cr.). 80.
9. Emperor *v.* Waman Shivram Damle, 5 Bom. L.R. 599 at p. 602 : I.L.R. 27 Bom. 626.
10. *Ibid.*
11. E. *v.* Panchu, I.L.R. 47 Cal. 671 (F.B.) : 24 C.W.N. 501 : 31 C.L.J. 402.

the Court to consider the whole case on the evidence and to pass such sentences as shall seem right.[1] Provisions of Sec. 167 of the Evidence Act apply to cases heard by the High Court in exercise of its power of revision under Cl. 26 of the Letters Patent.[2]

Application of Sec. 167 to revisional powers of High Court.

When certain inadmissible evidence, to the admission of which no objection was taken has been admitted or there has been a misdirection to the jury on a question of fact. Such admission or misdirection cannot be regarded as a decision on a point of law by the Trial Judge within the meaning of Cl. 26 Letters Patent.[3]

11. Application of the principle in civil cases—First appeals.—In the case of *Mohar Singh* v. *Ghariba*,[4] the following observations were made by the Privy Council: "It is the duty of their Lordships, who are judges of the facts, in such a case as this, to consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees.[5] The Court sitting in first appeal should throw aside the evidence which ought not to have been admitted and then consider whether there still remains sufficient evidence to support the decree. The decree can be supported upon relevant evidence only; and if, after all that is irrelevant has been thrown aside, there does not remain enough that is relevant to support it, the decision must be reversed. The party who is thus defeated may say that if he had known that the evidence given would have been insufficient for the purpose, he could have produced other evidence that would have been sufficient. The answer to this objection is to be found in the observations of their Lordships of the Privy Council in the case of *Nitresar Singh* v. *Nand Lall*.[6]

Appellate Court when to interfere with the decision of Lower Court.

An Appellate Court will not interfere with the decision of a subordinate Court even where a doucment is wrongly admitted, unless it is satisfied that the improper admission has resulted in a wrong decision on the merits.[7]

12. Finding warranted by other evidence.— If the finding recorded by the Lower Appellate Court can be warranted by the other evidence on the record, the finding cannot be set aside merely because it chose to rely also upon one piece of inadmissible evidence.[8]

13. Admission of additional evidence by Appellate Court.— The High Court declined to set aside a decision on the ground that the decision of the Court below was justified by sufficient evidence, independently, of the evidence improperly admitted.[9] Where the Lower Appellate Court, without recording clearly its reasons for doing so, sent for documents which had not been put in evidence before the first Court, the High Court remanded the case for

Appellate Court when to receive or not additional evidence.

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1. E. *v.* Fateh Chand, I.L.R. 44 Cal. 477 : 24 C.L.J. 400 : 21 C.W.N. 33 (F.B.).
2. E. *v.* Patrick Mcquire, 4 C.W.N. 433 (F.B.) ; *see* also Queen-Empress *v.* O'Hara, I.L.R. 17 Cal. 642 ; Queen-Empress *v.* Hurribole Chunder Ghose, I.L.R. 1 Cal. 207 ; Imperatrix *v.* Pitamber Jina, I.L.R. 2 Bom. 61 ; Reg. *v.* Navroji Dadabhai, 9 B.H.C.R. 358 ; E. *v.* Narayan Raghunath, I.L.R. 32 Bom. 111 (F.B.).
3. Emperor *v.* M. Ramanuja Ayyangar, A.I.R. 1935 Mad. 486 at pp. 498, 500.
4. 6 D.L.R. 495 : 15 W.R. (P.C.) 8.
5. *See* also Lalla Bansidar *v.* Government of Bengal, 9 B.L.R. 371 : 14 M.I.A. 86 : 16 W.R. (P.C.) 11 ; and Bommarauze *v.* Rangaswami Muddi, 6 M.I.A. 232 ; K. Sankar A. Chenna Basappa *v.* K. Monappa, A.I.R. 1925 Mad. 245.
6. 8 M.I.A. 199 : 1 W.R. (P.C.) 51.
7. Peddibothla *v.* Bezwada, (1914) M.W.N. 864 ; Kutupa Sankara *v.* Killi, 82 I.C. 283 (Mad.).
8. Sukh Ram *v.* Ram Swarup, 1969 A.W.R. 12 at p. 13.
9. Maharajah Juggut Indur Bunwaree *v.* Bhubo Tarinee Dossee, 14 W.R. 19 : 5 B.L.R. App. 54.

re-trial—excluding from the evidence on the record the evidence which had been received in the appeal stage.[1] The High Court declined, on appeal, to receive evidence which was available at the trial below, when the prisoner deliberately elected not to give evidence.[2]

If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence the additional evidence so brought on the record will have to be ignored. Under Order XLI, rule 27, it is the Appellate Court that must require the evidence to enable it to pronounce judgment. *Vide Kissowji Issur* v. *G.I.P Railway,*[3] and *Parsotim* v. *Lal Mohan.*[4] The true test, therefore, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideratiion the additional evidence sought to be adduced. A finding reached on the basis of additional evidence which ought not to have been admitted cannot be accepted as conclusive in second appeal.[5]

In *Sawan Ram* v. *Nachittar Singh,*[6] it is clearly laid down that additional evidence can be allowed by the Appellate Court only when Court requires it in order to be able to decide the case and not because party requires it.

14. Second appeals.— In *Umesh Chandra Chatterji* v. *Chandi Charan Rai Chaudhari,*[7] an opinion was expressed that the only cases which could properly be disposed of without a remand are those in which, independently of the evidence improperly admitted, the Lower Court has apparently arrived at its conclusion upon other grounds. When the judgment and decree of the Lower Appellate Court are vitiated by the admission of inadmissible evidence, they must be set aside and the case sent back to that Court in order that it may dispose of the appeal before it after excluding the improper evidence from its consideration.[8] Where a finding of fact proceeds to any extent upon a piece of inadmissible evidence it is not competent to the High Court in second appeal to consider whether apart from such evidence the finding of the Lower Appellate Court could be maintained since in second appeal the High Court is not in a position to weigh the evidence.[9] When the finding of the Lower Appellate Court on the existence of usage was mainly based on irrelevant matters, the case was remanded for re-trial.[10]

Disposal of appeal without remand.

In second appeal if the High Court finds the Lower Appellate Court has based its judgment partially upon a piece of evidence which was not admissible it cannot, by that reason alone, reverse that finding or remand the case if it can come to the conclusion that there was sufficient evidence on the record to justify the finding. There may be cases in which this conclusion cannot be arrived at unless the whole of the evidence be gone into, and in that case it will be for the Court to decide whether

What to be done when evidence wrongly admitted.

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1. Nowab Khan *v.* Rughoonath Doss, 20 W.R. 474.
2. Queen *v.* Madhub Chunder Giri Mohunt, 21 W.R. (Cr.). 13.
3. 34 I.A. 115 : I.L.R. 31 Bom. 381 (P.C.).
4. 58 I.A. 254 : A.I.R. 1931 P.C. 143.
5. Arjan Singh *v.* Kartar Singh, A.I.R. 1951 S.C. 193 at pp. 195-96 : 1951 S.C.J. 274 : 1951 S.C.R. 258 : 1951 A.W.R. 437 : 64 L.W. 537.
6. A.I.R. 1952 Pepsu 63 at p. 64.
7. I.L.R. 7 Cal. 293.
8. Ramani Prasad *v.* Mahanth Adaiya, I.L.R. 31 Cal. 380.
9. Mst. Sumitry Kuer *v.* Ram Khair Chowbey, A.I.R. 1921 Pat. 17.
10. Palakdhari Rai *v.* Manners, I.L.R. 23 Cal. 179.

that evidence should be gone into in the High Court or the case should be remanded for a fresh hearing of the appeal to the Lower Appellate Court.[1]

Where an Appelllate Court ignores the reat body of evidence on record and places reliance on what can be shown either to be no evidence at all, or which points almost exclusively the other way the High Court would be justified in considering such proceedings as errors of law.[2] When a Court of fact acts on material, partly relevant and partly irrelevant, its finding is vitiated because of the use of inadmissible material and thereby an issue of law arises.[3]

Issue of law to arise on account of the use of inadmissible material.

In *Abdul Shakur* v. *Kotwaleshar Prasad*,[4] it was held that it will be open to the High Court in second appeal itself to determine an issue of fact if it finds that it has been wrongly determined by reason of any illegality.

It is not all previous statements made by a witness that can be relied as corroborative evidence.[5]

When the Courts below have relied almost entirely on inadmissible evidence it is quite open to the High Court to upset the decision in second appeal.[6]

When there was other evidence in the case which supported the finding of fact arrived at by the two Courts below the fact that reliance was placed on inadmissible evidence is no ground for interference in second appeal.[7]

It may be observed that when one takes away a piece of evidence of importance in the defence, one cannot accept the findings of the Courts below on the rest of the evidence for the defence, findings which may have been coloured by inferences from these two documents.[8]

In *Ram Wiattan Sukal* v. *Nandu*,[9] their Lordships of the Privy Council, observed that if there is evidence to be considered the decision of the second Court, however unsatisfactory it might be, if examined, must stand final. This authority has for many years been considered by the Allahabad High Court to mean that so long as there is legal evidence on the record in support of the finding of fact recorded by the Lower Appellate Court the finding would be binding in second appeal.[10]

Finding binding in second appeal if legal evidence on record to support the finding.

If there was sufficient evidence upon which the Judge could come to the conclusion, he is precluded from remanding the case for rehearing.[11]

Judge not to remand if evidence sufficient.

The point as to non-registration of certain documents and their inadmissibility being a question of law can be raised in second appeal.[12]

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1. Soney Lal Jha *v.* Darbdeo Narain Singh, A.I.R. 1935 Pat. 167 at p. 173.
2. Mst. Roop Narainee Kooer *v.* Ressal Tewaree, 24 W.R. 119.
3. Dhiraj Lal Girdharilal *v.* Commissioner of Income-tax, Bombay, A.I.R. 1955 S.C. 271 at p. 273.
4. A.I.R. 1958 All. 54 at p. 63.
5. Komirineni Rosayya *v.* Munnamgi Rosayya, A.I.R. 1947 Mad. 345 at p. 346 : 1947 M.W.N. 345 : (1947) 1 M.L.J. 60.
6. Harihar Prasad Singh *v.* Mst. Janak Dulari Quer, A.I.R. 1941 Pat. 118 at p. 128.
7. Pardip Singh *v.* Ambika Singh, A.I.R. 1948 Pat. 185 at pp. 185, 186.
8. Alapati Narasimham *v.* Ailoori Babu Rao, A.I.R. 1939 Mad. 40 at p. 42.
9. I.L.R. 19 Cal. 249 : 19 I.A. 1 (P.C.).
10. *See* also Mohammad Ali *v.* Labh Singh, A.I.R. 1937 Lah. 26 at p. 27 ; Paran Munda *v.* Santosh Mahta, A.I.R. 1942 Pat. 372 at p. 374.
11. Hari Ahir *v.* Sri Sanghat Chacha, A.I.R. 1934 Pat. 617 (2) at p. 619.
12. Pardip Singh *v.* Ambika Singh, A.I.R. 1938 Pat. 185 at p. 185.

15. Leave to appeal to Supreme Court in criminal cases.—Before the present Constitution came into force Crown could not allow appeals to Privy Council in criminal cases such appeal being confined to civil cases only.[1] Though the Crown had the prerogative to admit an appeal from a criminal case it was not exercised but under very exceptional circumstances.[2] For a case where leave to appeal from a conviction to Privy Council was refused, see *Bal Gangadhar Tilak* v. *Queen-Empress*[3] and *Subrahmania Ayyar* v. *King Emperor*.[4]

In the case of *Nika Ram* v. *State of Himachal Pradesh*,[5] conviction was based on the other evidence as well as upon the confession recorded by a second Class Magistrate not specially empowered. The accused went up in appeal to the Supreme Court by special leave.

It was held that the other material on the record proved the guilt of the accused.

Supreme Court may grant leave to appeal under Art. 136.

Article 134 (1) (*c*) of the Constitution however gives a right of appeal to the Supreme Court in criminal matters. Under Art. 136, the Supreme Court may in its discretion grant a special leave to appeal. How the discretion conferred upon the Supreme Court will be exercised in criminal cases was indicated in the decision of that Court in *Pritam Singh* v. *State*.[6]

Supreme Court when to grant leave to appeal in criminal cases.

It was laid down in *Pritam Singh's*[7] case that, generally speaking Supreme Court will not grant special leave to appeal in criminal cases unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a view of the decision appealed against. It was further observed that the power under Art. 136 should be exercised sparingly and in exceptional cases only. It was held by a Bench of Bombay High Court in *In re Bal Gangadhar Tilak*,[8] that before granting a certificate for leave to appeal the High Court must be satisfied that there is a reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

Power under Art. 136 is to be exercised sparingly and in exceptional cases only. The Privy Council have tried to lay down from time to time certain principles for granting special leave in criminal cases.[9]

High Court when to grant certificate of fitness to appeal.

The High Court has been authorized to grant a certificate of fitness to appeal to the Supreme Court in any case that it might consider appropriate. As was observed by Kaul, C.J., in *State* v. *R.B. Rajkumarsingh*,[10] it would not be proper for any Judge to attempt to define in a few clear-cut categories in what cases or classes of cases a certificate of fitness should be granted but a certificate should

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1. 3 M.I.A. 468 (no appeal to Queen in felony).
2. *In re* Joykisson Mookerji, 1 W.R. (P.C.) 13 : 9 M.I.A. 168.
3. I.L.R. 22 Bom. 528 at p. 532 *contra*.
4. I.L.R. 25 Mad. 61 : 4 C.W.N. ccxii (P.C.).
5. A.I.R. 1972 S.C. 2077 at p. 2081.
6. A.I.R. 1950 S.C. 169 : 1950 S.C.R. 453 : 1950 M.W.N. 605.
7. *Ibid*.
8. I.L.R. 33 Bom. 221.
9. Pritam Singh *v.* State, A.I.R. 1950 S.C. 169 at p. 171 : 1950 M.W.N. 605.
10. A.I.R. 1953 M.B. 35.

not be granted unless there is something exceptional or special in the case calling for a review of the decision of the High Court by the Supreme Court [1]

An assumption of jurisdiction which is not warranted by the clear words of Arts. 134, 135 or 136 will be tantamount to making legislation by the Supreme Court which it is never its function to do.[2]

16. No appeal to Privy Council if Court below discredits witnesses.—The Privy Council would not disturb a judgment of a Court in India upon a question of the credibility of witnesses, unless it was manifestly clear that the Court below was wrong in the conclusion drawn from such evidence.[3]

Privy Council whether could disturb judgment on credibility of witnesses.

17. Court's discretion and power.—There is no warrant for absolute proposition of law that disregard of the Commissioner's report, made after local investigation, under the provisions of Order XXVI, rules 9 and 10 of the Code of Civil Procedure constitutes an error or defect in the procedure within the meaning of Cl. (*c*) of Sec. 100 of the Code; or that such disregard affects "the merits of the case" within the said Sec. 100, as to justify interference in the Second Appeal. The acceptance or rejection of the Commissioner's report is entirely within the Court's competence. It has full discretion in the matter but the said discretion is to be exercised properly and not capriciously. The report of the Commissioner is in no way binding on the Court. A party to the suit is entitled to have the report, for what it is worth, considered by the Court, before it reaches its conclusion. Though the Court has full power and discretion to arrive at its own conclusions even at variance with the report, it would not be altogether a bad practice to allow the Commissioner to explain his report and then to reject it, if necessary, *in toto*. The expression "may examine the Commissioner" in sub-rule (2) of rule 10 of Order XXVI of the Code of Civil Procedure emphasizes the Court's discretion and power.[4]

18. Relevant fact improperly proved.—But there is another class of cases, namely, where secondary evidence of the contents of a document has been admitted without the absence of the original having been accounted for. The rule in England is that, unless the opposite-party objected to this evidence at the time that it was offered, he cannot object afterwards; and in accordance with this rule, it has been held more than once by the Calcutta High Court, that it is not competent to an Appellate Court sitting in regular appeal to reject the copy of a document, to the admission of which by the Lower Court no objection was made by any of the parties, although the original was not produced or its non-production not accounted for.

Secondary evidence of document if not objected whether admissible.

Where a copy of a copy was admitted in evidence in a Court of first instance without objection being taken to its admission, it has been held under this Act by the Bombay High Court that it is not within the province of the Appellate Court to raise or admit an objection to it in appeal.[5] The same rule has been laid down by the Calcutta High Court in *Akbar Ali* v. *Bhya Lal Jha*.[6]

Admissibility of secondary evidence if not objected.

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1. Krishnakant Vyas *v.* State, A.I.R. 1953 M.B. 206 at p. 207.
2. Janardhan Reddy *v.* State, A.I.R. 1951 S.C. 124 at p. 127 : 1951 S.C.J. 98 : 1950 S.C.R. 940 : 64 L.W. 378 : 1951 M.W.N. 709.
3. Musaddi Mohammad *v.* Mohammad Khan, 6 M.I.A. 27 ; Knapp. 269.
4. Bibhuti Bhusan Banka *v.* Sadhan Chandra Sheet, 68 C.W.N. 1043 at pp. 1047-48.
5. Chimnaji Govind Godbole *v.* Dinkar Dhondev Godbole, I.L.R. 11 Bom. 320.
6. I.L.R. 6 Cal. 666 : 7 C.L.R. 497 ; *see* also notes under Sec. 5 *ante*.

19. Unstamped or insufficiently stamped documents.—Where documents required by law to be stamped were received by a Court of first instance without a stamp or sufficient stamp, it was held that it was not competent to an Appellate Court to reject them,[1] or on this account to reverse the decision of the Lower Court.[2] These cases proceeded on the ground that the error of receiving a document insufficiently stamped or without a stamp did not affect the merits of the case or the jurisdiction of the Court,[3] although it might affect the Government revenue. But see *Tatai Abom* v. *Gagai Gura Chawa*[4] in which, however, the document had been objected to in the Court of first instance; and the remarks of Couch, C.J., in *Ankur Chandra Rai Chaudhri* v. *Madhab Chandra Ghosh*.[5]

Appellate Court whether competent to reject unstamped, etc. documents received by Lower Court.

20. Evidence admitted at an improper stage of case.—Evidence cannot be said to have been improperly admitted merely because it was admitted at an improper stage of the case, unless indeed the other party has been prejudiced by this course.[6] Where copies of documents are admitted and read in the Court of first instance without objection, no objection to their admissibility can afterwards be taken in a Court of Appeal.[7] If an Appellate Court receive additional evidence without recording the reasons for the admission thereof evidence so received is to be regarded as improperly admitted.[8]

Evidence admitted at improper stage whether improperly admitted.

The judgment of an Appellate Court is also to be set aside where no reason has been accorded for the admission of the additional evidence.[9] For such admission opposite-party must be given notice or opportunity to adduce rebutting evidence.[10] As regards this power of the Appellate Court, see *Indrajit* v. *Amar Singh*[11] explaining their Lordships own decisions in *Kessowji Issur* v. *G.I.P. Ry*[12] and *Sreeman* v. *Gopal*.[13] An erroneous omission to object to admission of evidence (which according to law is not relevant evidence) does not make it relevant evidence.[14]

Judgment of Appellate Court when to be set aside on the ground of admission of additional evidence.

Court to disregard irrelevant evidence.

As observed by their Lordships of the Supreme Court in *Dharijlal* v. *Income-tax Commissioner, Bombay*,[15] when a Court of fact acts on material, partly relevant and partly irrelevant, its finding is vitiated because of the use of inadmissible material and thereby an issue of law arises.[16]

Supreme Court's view as to the arising of issue of law in case of admission of evidence partly relevant or irrelevant.

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1. Lalji Singh *v.* Akram Ser, 3 B.L.R. 235 (unstamped recepits).
2. Mark Ridded Currie *v.* Mutu Ramen Chetty, 3 B.L.R. 130 ; Afzalunissa *v.* Tej Ban, I.L.R. 1 All. 725.
3. Haran Chandra Bhuri *v.* Rasik Chandra Neogi, 20 W.R. 63.
4. 3 B.L.R. App. 30.
5. 21 W.R. 1.
6. Doed Nicholl *v.* Bower, 16 Adolphus and Ellis Rep. 805 ; Tota Ram *v.* Rikmoni Ballab, 13 M.I.A. 83.
7. Akbar Ali *v.* Bhyea Lal Jha, I.L.R. 6 Cal. 666 at p. 670.
8. Jagdindra Banwari Gobind *v.* Bhabatarini Dasi, 5 B.L.R. App. 54.
9. Gajadhar *v.* Mst. Lohia, 24 C.L.J 457 ; but *see* Gopal *v.* Jhakri, I.L.R. 12 Cal. 37.
10. Ramjan *v.* Nabi Bux, 80 I.C. 830 (Punj.) ; Hansraj *v.* Sham Sundar, 63 I.C. 425 (All.); Kebal *v.* Rojoni, 39 C.L.J. 261.
11. 50 I.A. 183 : I.L.R. 2 Pat. 676.
12. 34 I.A. 115 : I.L.R. 31 Bom. 386.
13. 11 M.I.A. 28 : 7 W.R. 10.
14. A.B. Miller *v.* Babu Madho Das, I.L.R. 19 All. 76 at p. 92 (P.C.).
15. A.I.R. 1955 S.C. 271.
16. Kalappa Shidelappa Uppar *v.* Bhima Govind Uppar, A.I.R. 1961 Mys. 160 at p. 164.

21. Improper rejection of evidence.—*Palvinder Kaur* v. *State of Punjab*[1] clearly rules that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. A confession that contains self-exculpatory matters cannot amount to a confession.[2]

The way of admission of confession

Turning now to the case in which evidence properly receivable has been offered and improperly rejected, the rule here is that the improper rejection is not of itself to be a ground for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, if the rejected evidence had been received, it ought not to have varied the decision. If the Appellate Court is of opinion that the rejected evidence, if received, ought to have varied the decision it would be proper to proceed in the manner provided for by Sec. 568 of the Code of Civil Procedure.[3]

Effect of improper rejection of properly receivable evidence.

The improper rejection of evidence affecting the decision of the case on the merits, is an error of law which may be set aside in special appeal.[4] The exclusion of evidence in the Lower Court is not sufficient ground for removing a decree of that Court, unless the Appellate Court comes to the conclusion that the evidence refused, if it had been received, would have varied the decision.[5] The Code of Civil Procedure provides in Order XLI, rules 27(1) (*a*), 28 and 29, the method to be followed in a case of improper rejection of evidence.[6]

Improper rejection of evidence when error of law.

22. Review and new trial.— With regard to a new trial it is to be observed that the Code of Civil Procedure does not provide for a new trial in civil cases. Sections 623 to 630 (now Sec. 114) and Order XLVII, rules 1 to 8 of this Code provide for a review of judgment, the terms "review" and "re-hearing" are borrowed from the practice of the Courts of Chancery in England.[7] A new trial is provided for by Sec. 37 of Act XV of 1882, applicable to the Presidency-towns. Under the Provincial Small Cause Courts Act, IX of 1887, a review of judgment can be applied for, but not a new trial. In criminal cases an Appellate Court may, if it see fit, order the appellant to be re-tried [Sec. 423 (now Sec. 886) of the Code of Criminal Procedure]. The High Court, in the exercise of its power of revision, may exercise any of the powers conferred on a Court of Appeal, including the power of ordering a new trial (Sec. 439, Sec. 401 new).

In Civil Procedure Code no provision for trial.

Meaning of re-hearing.

New trial under Sec. 37 of the Act XV of 1882.

Re-hearing of suit of Small Cause Court by High Court.

23. Scope of the power of the High Court in exercise of revisional jurisdiction against an order of acquittal.—A revision was directed against an order of acquittal passed by the Sessions Judge in appeal. Nothing substantial was brought to the notice which would vary the decision of Sessions Judge.

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1. 1952 S.C.J. 545 : A.I.R. 1952 S.C. 354.
2. Smt. Jasoda Haldar *v.* Sailendra Nath Samanta, A.I.R. 1957 Cal. 372 at p. 374 : 61 C.W.N. 483.
3. As an instance where additional evidence was received in a divorce case, *see* Morgan *v.* Morgan, I.L.R. 4 All. 306.
4. Hurro Chunder *v.* Govind Chunder, 17 W.R. 455 ; *see* also Mohim Chunder *v.* Kali Tara, 11 C.W.N. 1028.
5. De Souza *v.* Pestonji, I.L.R. 8 Bom. 408.
6. Raja Jyot Kumar *v.* Jadu Nath Bose, 34 C.L.J. 160.
7. On the subject of reviews the following cases may be usefully referred to : Amrao Thakur *v.* Gokal Mandal, 8 B.L.R. App. 34 ; *In the matter of the petition of* Chintamani Pal , 6 B.L.R. 126 (F.B.); *In the matter of the petition of* Jadunath Mukherji, 6 B.L.R. 333.

Held that the High Court had no jurisdiction to interfere with the order of acquittal.[1]

The scope of power of the High Court in exercise of revisional jurisdiction against an order of acquittal has been stated in *Padasa* v. *Kusa*.[2]

24. Some other cases.—In the case of *Tota Rani* v. *Rukmani Balab*,[3] their Lordships of the Privy Council said that they had not been in the habit of determining appeals upon the mere fact that certain evidence may have been improperly admitted.

Rule of substantial justice laid down by Privy Council.

The High Courts, upon the hearing of second or special appeals[4] have remanded cases for reconsideration and a fresh decision by the Lower Appellate Court—where important evidence had not been carefully considered by such Court[5]—where the judgment of the Lower Appellate Court was based on part of the evidence only[6]—where the importance of a particular piece of evidence had been much underrated[7]—Where witnesses were discredited for general reasons not affecting the credit of any individual deponents[8]—where the Judge of the Lower Appelllate Court had not recorded his judgment in the manner required by law[9]—where the Lower Appellate Court had otherwise dealt with the evidence in an improper manner,[10] where a fact had been found by the Lower Court upon evidence, part of which was inadmissible[11]—where the judgment showed on the fact of it want of due consideration of the evidence and the introduction of extraneous matter[12]—where the judgment of the Lower Court mis-stated the most important facts[13]—where relevant evidence was considered to be no safe guide, and treated as worthless without being disbelieved.[14] It was held to be an error in law when the Lower Court found on no evidence or on what was not legal evidence[15]—when secondary evidnece was improperly admitted in the place of primary[16]—when the Lower Court dealt improperly with presumption of law[17]—or with presumptions of fact.[18]

Hearing of special appeals or second appeals by High Court.

Cases on evaluation of evidence by the Court.

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1. Dondapani Samanta Rai *v.* Duryodhan Pradhan, A.I.R. 1968 Orissa 167 at p. 169.
2. 32 Cut. L.T. 1053.
3. 13 M.I.A. 83.
4. *See* Sec. 372 of the old and Sec. 584 of the Code of 1882 (now Sec. 100 of the Code of 1908).
5. Digambari Dasi *v.* Kissen Dhar Nandi, 1 Jur. N.S. 35.
6. Shandhaban Mohant *v.* Sarat Chandra Rai, 23 W.R. 16 ; Abdul Rahman *v.* Sofy Mikhayest Saheba, 24 W.R. 293.
7. Sarasati Dasi *v.* Ambika Nand Biswas, 24 W.R. 192.
8. Sheo Parshan Panday *v.* Burn Panday, 24 W.R. 251.
9. Tatur Khawas *v.* Jagannath Persad, 7 B.L.R. App. 14 and *see* Kristo Gobind Kar *v.* Ganga Prasad Sarma, 23 W.R. 266.
10. Rup Narain Kuwar *v.* Resasal Tewari, 24 W.R. 119 ; Chand Mani Dasi *v.* Abhai Charan Mal 24 W.R. 289 ; Amiran *v.* Cherag Ali, 24 W.R. 343 ; Ramdas Saha *v.* Manmahini Dasi, 7 B.L.R. App. 4; Basti Sahu *v.* Jeo Narain Singh, 24 W.R. 338 ; Hansa Koer *v.* Sheo Gobind Raut, 24 W.R. 431 ; Guni Biswas *v.* Srigopal Pal Chaudhri, 8 W.R. 395.
11. Gurudas De *v.* Sambhunath Chakravarti, 3 B.L.R. 258.
12. Surjo Kanth Achariya *v.* Khudi Narain Manna, 22 W.R. 9.
13. Purna Chandra Chatarji *v.* Chandra Kumar Rai, 24 W.R. 171.
14. Haro Prasad Rai *v.* Umatara Debi, I.L.R. 7 Cal. 263 : 8 C.L.R. 449.
15. Ram Sudhan Sirkar *v.* Kistobag Bag, Marsh. Rep. 322.
16. Chandra Kant Ghosh *v.* Saudamani Debi, 9 W.R. 517.
17. Sumamayi *v.* Luchimpal Dugar, 9 W.R. 338.
18. Nilatachi *v.* Verikatachala Madali, 1 Mad. H.C. Rep. 139 ; *see* also the following cases : Gopal Khuddi Rao *v.* Deoki Nandan, 9 N.W.P. Rep. 172 ; Shiv Sahai Singh *v.* Narsingh Lal, 22 W.R. 352 ; Tara Prasano Mazumdar *v.* Bissonath Sirkar, 23 W.R. 144; Himatali Khadim *v.* Nimatullah Khadim, 23 W.R. 250.

In second appeal finding of Lower Courts whether to be interfered with.

The Privy Council have, however, in recent cases repeatedly pointed out that in second appeal the finding of the Lower Courts cannot be interfered with, however erroneous they may appear to be, unless there be an error or defect in procedure.[1] The cases of *Fattehma Begum* v. *Mohamed Ausar*[2] and *Nivath Singh* v. *Bhikki Singh*[3] in which the contrary was held, have been expressly overruled. But a finding without evidence to support it is a good ground for second appeal.[4]

Principle of concurrent findings not to apply if there is no evidence.

The principle of concurrent findings of fact does not apply to a case of no evidence.[5] The High Court on second appeal will reverse the judgment of the lower Appellate Court based on evidence not on record.[6] Where the Lower Appellate Court left out of account an important portion of the evidence relied upon by plaintiff, *held* that this was ground of second appeal.[7]

In a case where the evidence excluded is the main evidence in support of a party's case, it would be necessary to send the appeal to be heard afresh.[8]

THE SCHEDULE.—[***Enactments repealed.***] *Repealed by the Repealing Act, 1938 (1 of 1938), Sec. 2 and Sch.*

(End of Vol. 5 *i.e.* Commentary)

1. Ananga Manjari Chaudhurani *v.* Tripura Sundari Chaudhurani, I.L.R. 14 Cal. 740 : L.R. 14 I.A. 101 : Pratab Chandra Ghosh *v.* Mehendra Nath Pulkhait, I.L.R. 17 Cal. 291 : L.R. 16 I.A. 233 ; Durga Chaudhurani *v.* Jowahir Singh, I.L.R. 18 Cal. 23 : L.R. 17 I.A. 122 ; Ram Ratan Sukal *v.* Nandu, I.L.R. 19 Cal. 249 : L.R. 119 I.A. 1 and Ram Gopal *v.* Shams Khatun, I.L.R. 20 Cal. 93.
2. I.L.R. 9 Cal. 309.
3. I.L.R. 7 All. 649.
4. Hemanto Kumari Debi *v.* Brajendra Kisore Rai Chanduri, I.L.R. 17 Cal. 875 : L.R. 17 I.A. 65.
5. Harendra Lal Roy Chowdhuri *v.* Srimati Hari Dasi Devi, I.L.R. 41 Cal. 972 (P.C.) : 18 C.W.N. 817 : 19 C.L.J. 484.
6. Moni Lal *v.* Uma Charan, 19 C.L.J. 541.
7. Hassan Kuli Khan *v.* Nakchedi, I.L.R. 33 Cal. 200 ; Appakalga *v.* Mallu, I.L.R. 16 Bom. 477.
8. Channo Mahto *v.* Jang Bahadur Singh, A.I.R. 1957 Pat. 293 at p. 298.

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